

TRACKAGE RIGHTS AGREEMENT --- PENINSULA MAIN LINE AND SANTA CLARA/LICK LINE

This AGREEMENT dated as of December 20, 1991, is by and between the PENINSULA CORRIDOR JOINT POWERS BOARD, a joint powers agency created under California law, (hereinafter referred to as "Owner") and SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation, (hereinafter referred to as "User");

RECITALS:

A. Owner and User have entered into a Purchase, Sale and Option Agreement dated as of November 22, 1991 ("Sale Agreement") providing, in part, for the purchase by Owner from User of certain properties in San Francisco, San Mateo and Santa Clara Counties, California including the Peninsula Main Line and the Santa Clara/Lick Line (both as defined in Section 1 hereof and as more fully described in Exhibit A hereto);

B. Pursuant to the Sale Agreement, Owner acquired the Peninsula Main Line and the Santa Clara/Lick Line for the purpose, in part, of providing Commuter Service (as defined in Section 1 hereof) and for any purpose other than those reserved exclusively to User in the Sale Agreement and User retained for itself and its successors and assigns a perpetual and exclusive easement (as set forth in the deeds and assignments conveying said properties) in and trackage rights over such properties acquired by Owner for User's present and future Freight Service and Intercity Passenger Service (both as defined in Section 1 hereof).

C. Owner and User desire to set forth the terms of the reservation by User of the trackage rights retained for User's exclusive present and future Freight Service and Intercity Passenger Service on the Peninsula Main Line and the Santa Clara/Lick Line.

D. Owner and User also desire to set forth the terms of Owner's Bridge Trackage Rights over User's Cahill/Lick Line for Gilroy Commuter Service (all as defined in Section 1 hereof).

NOW THEREFORE, it is mutually agreed by and between the parties hereto as follows:

Section 1. DEFINITIONS

The following capitalized terms are used in this Agreement with the following meanings:

1.1 "AAR" shall mean the Association of American Railroads.

1.2 "Bridge Trackage Rights" shall mean exclusive Gilroy Commuter Service trackage rights for Gilroy Commuter Service Trains only over User's Cahill/Lick Line, over which segment there shall be no intermediate Gilroy Commuter Service station stops; however, Owner's Trains may enter or leave the segment at any point. These Bridge Trackage Rights are to be used only in conjunction with the trackage rights granted (pursuant to the Lick/Gilroy Trackage Rights Agreement) by User to Owner from Lick (at or near Milepost 51.4) to Gilroy (at or near milepost 80.7), for Trains in Gilroy Commuter Service.

1.3 "Cahill Yard" shall mean the yard in front of the San Jose passenger station at San Jose, California, as more fully described in Exhibit A hereto.

1.4 "Changes and/or Additions" shall mean any capitalized improvements including, without limitation, the additions, betterments, construction, reconstruction, modifications and renewals thereof and additional facilities, regardless of book treatment as an expense or capital item, but excluding capitalized maintenance provided for in Section 9.

1.5 "Commuter Service" shall mean the operation by Owner (or an Operator for Owner) of Trains that provide commute passenger service on the Joint Facilities (excluding User's Cahill/Lick Line) between San Francisco (at or near Milepost 0.147) and Lick (at or near Milepost 51.4), California in San Francisco, San Mateo and Santa Clara Counties, and frequently characterized by reduced fare, multiple-ride and monthly commutation tickets. Commuter Service as so defined shall not include Intercity Passenger Service. The term "Commuter Service" shall also include Owner's Trains and Equipment operated for the purpose of Equipment review, schedule checks, personnel training, Changes and/or Additions and maintenance of way activities.

1.6 "Customary Additives" shall mean elements of cost added to billings of either party to the other that generally are calculated as a percentage of direct labor costs and are intended to compensate for, without limitation, paid holidays, vacation and personal leave days, health and welfare benefits, payroll taxes and administrative and supervisory expenses that include direct and general overhead, inclusive of a customary one percent (1%) additive for special administrative costs related to billing

preparation, and are subject to periodic changes depending upon industry practices and the provisions of Section 11.3. As an example of such additives, Exhibit B sets forth 1990 amounts as represented by SPT to JPB.

1.7 "Designated Freight Trackage" shall mean Trackage which is part of the Joint Facilities (excluding User's Cahill/Lick Line), which is located on real property owned by Owner (as described on Exhibit A hereto), which is used now or in the future solely for Freight or Intercity Passenger Service and which shall be maintained at the sole cost and expense of User (unless the parties have agreed in writing to use also by the Owner, in which case sharing of maintenance costs shall be as agreed to in writing by the parties notwithstanding the provisions of Section 9.1 hereof) including, without limitation, (i) the present yard Trackage at South San Francisco, (ii) the proposed gauntlet Track Structure between Milepost 3.18 and Milepost 5.26, (iii) storage Track Structure (for two tracks) between Bayshore at Milepost 4.9 and Brisbane at Milepost 7.1, and (iv) upon the approval of Owner (which shall not be unreasonably withheld), such additional Freight Service support Trackage and other facilities to meet User's Freight Service needs.

1.8 "Effective Date" shall have the meaning set forth in Section 11.12.

1.9 "Equipment" shall mean locomotives, cars, cabooses, hi-rail vehicles, other vehicles, and machinery which are capable of being operated on Joint Facilities.

1.10 "Exclusive Commute Trackage" shall mean that part of the Joint Facilities, excluding User's Cahill/Lick Line, (which is described by the designated line symbols on Exhibit A), including yard or other side Trackage used solely by Owner, and including but not limited to the double main Trackage from Santa Clara Junction to Cahill Yard, the passenger Trackage at Cahill Yard, the magnetic westerly main Trackage from Cahill Yard to Auzerais Street at Milepost 47.5 and all new Trackage which Owner may construct between Auzerais Street and Lick at Milepost 51.4, which Owner shall maintain at its sole cost and expense (unless the parties have agreed in writing to use also by User, in which case sharing of maintenance costs shall be as agreed to in writing by the parties notwithstanding the provisions of Section 9.1 hereof).

1.11 "Fiscal Year" shall mean the period beginning July 1 of any calendar year and ending June 30 of the following calendar year.

1.12 "Freight Service" shall mean User's railroad operations contemplated hereunder in furtherance of transporting freight commodities of all types and description in Trains whether loaded

or empty, including personnel training, and the use of all Equipment and Non-Revenue Equipment for such operations.

1.13 "Gilroy Commuter Service" shall have the meaning set forth in Section 1.13 of the Lick/Gilroy Trackage Rights Agreement.

1.14 "ICC" shall mean the Interstate Commerce Commission.

1.15 "Intercity Passenger Service" shall mean intercity railroad passenger service (other than Commuter Service) provided by NRPC or any other Operator with whom User contracts to provide Intercity Passenger Service over the Joint Facilities in accordance with this Agreement.

1.16 "Joint Facilities" shall mean the Peninsula Main Line and the Santa Clara/Lick Line, Designated Freight Trackage, Exclusive Commute Trackage, and only that portion of the New Coast Main consisting of User's Cahill/Lick Line, and all Changes and/or Additions thereto now or in the future.

1.17 "Lick/Gilroy Trackage Rights Agreement" shall mean that agreement between User and Owner dated as of the date hereof which grants Owner trackage rights over the rail lines of User from milepost 51.4 at or near Lick to milepost 80.7 at or near Gilroy.

1.18 "Materials Additives" shall mean elements of cost customarily charged by railroads to one another and which are to be added to any and all materials cost billings of either party to the other and that generally are calculated as a percentage of direct costs, are intended to compensate for store, purchasing and handling expenses, sales or use taxes, foreign line freight, and on-line freight and are subject to periodic changes depending upon industry practices and the provisions of Section 11.3. As an example of such additives, Exhibit B sets forth 1989 amounts as represented by SPT to JPB.

1.19 "New Coast Main" shall mean Track Structure of (i) the No. 1 Track, (ii) User's Cahill/Lick Line, and (iii) all Track Structure located on property of Owner magnetic east of the Track Structure described in (i) and (ii) above, all as more fully described in Exhibit A hereto.

1.20 "Non-Revenue Equipment" shall mean Equipment which is maintenance of way equipment and freight cars that are either empty or loaded only with maintenance of way equipment or material and equipment transported for the internal use of either party including, without limitation, rails, ties, ballast, and other track materials, and signal and bridge materials and supplies.

1.21 "No. 1 Track" shall mean the existing yard Track Structure designated as User's "No. 1 Track" on the easterly side of the double main Track Structure between Milepost 44.0 at or near

Santa Clara Junction and the southern end of Cahill Yard at or near Milepost 47.1.

1.22 "NRPC" shall mean the National Railroad Passenger Corporation, or Amtrak, in all circumstances other than in a capacity as Operator for Owner.

1.23 "NRPC Agreement" shall mean the Agreement between NRPC and User dated April 16, 1971, as amended from time to time.

1.24 "Operator" shall mean the person, firm, corporation or other legal entity utilized by Owner or User to conduct, on its behalf and for its account, operations on the Joint Facilities in accordance with this Agreement.

1.25 "Peninsula Main Line" shall mean the Trackage and the right-of-way and real estate underlying said Trackage between Milepost 0.147 at or near 4th and Townsend Streets in San Francisco County, California and Milepost 44.0 at or near Santa Clara Junction in Santa Clara County, California, all as more fully described in the Sale Agreement and in Exhibit A hereto.

1.26 "Sale Agreement" shall have the meaning set forth in Paragraph A of the recitals to this Agreement.

1.27 "Santa Clara/Lick Line" shall mean the Trackage and the right-of-way and real estate underlying said Trackage between Milepost 44.0 at or near Santa Clara Junction and Milepost 51.4 at or near Lick, all in Santa Clara County (including the fee ownership, easements (but excluding User's easements)), and franchises of the real estate and right-of-way underlying the Trackage) but excluding the New Coast Main, all as more fully described in the Sale Agreement and in Exhibit A hereto.

1.28 "Service(s)" shall mean Commuter Service, Freight Service and Intercity Passenger Service collectively or any of them individually, as applicable.

1.29 "SFGTF" shall have the meaning set forth in Section 9.2 and Exhibit D or as it may be amended by written agreement of the parties.

1.30 "Track Structure" shall mean rail and fastenings, switches and frogs complete, ties, ballast, and signals.

1.31 "Trackage" shall mean Track Structure and all appurtenances thereto, including without limitation, bumpers, roadbed, embankment, bridges, trestles, tunnels, culverts or any other structures or things necessary for support of and entering into construction thereof, and, if any portion thereof is located in a thoroughfare, the term shall include pavement, crossing planks and other similar materials or facilities used in lieu of pavement

or other street surfacing material at vehicular crossings of tracks, culverts, drainage facilities, crossing warning devices, and any and all work required by lawful authority in connection with construction, renewal, maintenance and operation of said Track Structure and all appurtenances thereof and Changes and/or Additions thereto now or in the future.

1.32 "Train(s)" shall mean a locomotive unit, or more than one such unit, coupled, with or without cars or caboose.

1.33 "User's Cahill/Lick Line" shall mean the existing single main Track Structure between Cahill Yard at or near Milepost 47.1 and Lick at or near Milepost 51.4.

Section 2. RIGHTS OF OWNER AND USER

2.1 **User's Reservation:** Subject to the terms of this Agreement, User reserves the perpetual and exclusive right to conduct Freight and Intercity Passenger Service over the Joint Facilities (excluding User's Cahill/Lick Line which User retains ownership of, and excluding Exclusive Commute Trackage except to the extent provided in Sections 1.10 and 2.4 hereof). Owner confirms User's reservation of said right in the Sale Agreement.

2.2 **Authority:** Owner represents that it has the right and authority to confirm User's reservation of perpetual and exclusive trackage rights (which rights do not include Exclusive Commute Trackage except as provided in Sections 1.10 and 2.4 hereof) over the Joint Facilities (excluding User's Cahill/Lick Line) as contemplated herein without the concurrence or approval of any other person or entity, except for regulatory approvals or exemptions contemplated by Section 8.1 hereof.

2.3 **Ownership:**

(a) Owner shall own all of the Peninsula Main Line and the Santa Clara/Lick Line, including Designated Freight Trackage, existing at the date of execution of this Agreement.

(b) User shall own the New Coast Main, but Owner shall own the real property underlying the New Coast Main.

(c) Owner shall own those Changes and/or Additions and capitalized maintenance to the New Coast Main made at its sole cost and expense. User shall own such Changes and/or Additions and capitalized maintenance to the New Coast Main made at its sole cost and expense. Owner and User shall jointly own such Changes and/or Additions and capitalized maintenance to the New Coast Main made at their shared cost and expense in the same proportion as the respective shares of the cost and expense bears to the total cost

and expense. Owner shall not remove any Changes and/or Additions or capitalized maintenance items to the New Coast Main without the written consent of User as long as User holds itself out to provide Freight or Intercity Passenger Service over the applicable portion of the New Coast Main or such Services have not been abandoned; provided, however, in the event that Owner has permanently ceased to provide Commuter Service over all or substantially all of the Santa Clara/Lick Line, User shall pay Owner for the unamortized value of such Changes and/or Additions made by Owner on the New Coast Main. At the time that User no longer holds itself out to provide Freight and Intercity Passenger Service and such Services have been abandoned, Changes and/or Additions or capitalized maintenance items shall be returned to Owner to the extent of Owner's interest in such Changes and/or Additions and capitalized maintenance items.

(d) Owner shall own all Changes and/or Additions to the Joint Facilities (other than User's Cahill/Lick Line) and all capitalized maintenance provided for in Section 9 hereof.

2.4 User's Rights: For the purpose of conducting Freight and Intercity Passenger Service, User has the perpetual right of access to and from and use of the Joint Facilities, except for the Exclusive Commute Trackage unless otherwise agreed to in writing by the parties. User shall also have perpetual rights, subject to the terms of this Agreement including the restrictions concerning the Exclusive Commute Trackage, solely to serve all existing and future industries, team or house tracks or branches located on or served off any existing or future turnouts or leads from or to the Joint Facilities or No. 1 Track. User shall have use of the Exclusive Commute Trackage for the sole purpose of obtaining necessary access to provide Freight Service to existing or future industries and branch lines served from the Joint Facilities or No. 1 Track. User's rights of use under this section, for the purposes specified in this section, shall be exclusive, and no other person or entity shall be entitled to or be granted any rights to such use for such purposes.

2.5 Owner's Rights: Subject to the limitations otherwise set forth in the Sale Agreement and in this Agreement, Owner (or any Operator designated by Owner) shall have the right to use existing and future Joint Facilities (excluding User's Cahill/Lick Line) for any purpose other than rail Freight and Intercity Passenger Service.

2.6 Freight Trackage: Except as may be otherwise agreed in writing by the parties, User retains the exclusive and perpetual ownership of and right to use and control the New Coast Main and User retains the exclusive and perpetual right to use and control the Designated Freight Trackage; however, User may allow Owner to use such portions of the South San Francisco Yard and other Designated Freight Trackage as User decides, from time to time, are

not needed by User to support its operations. User shall not unreasonably withhold, condition, or delay its permission for such use; provided, however, that during such use, User's operations shall have priority over Owner's use. In such case, maintenance and capital expenses will be apportioned on a basis agreed by the parties in writing notwithstanding the provisions of Sections 9.1 and 10.2 hereof.

2.7 Intercity Passenger Service Agreement: Intercity Passenger Service on the Joint Facilities (except for User's Cahill/Lick Line) shall be subject to the following provisions:

(a) Owner shall permit User to allow NRPC Intercity Passenger Service Trains to be operated over the Joint Facilities (except for User's Cahill/Lick Line) in accordance with the terms of the NRPC Agreement in effect as of the date of this Agreement with the understanding that any change subsequent to the date of this Agreement in Intercity Passenger Service, including but not limited to the number or schedule of Trains, shall be subject to Owner's consent under Section 2.7(b) hereof.

(b) User may amend its present or any subsequent NRPC Agreement and enter into any new agreements and amendments thereto with NRPC or with any other party for the provision of Intercity Passenger Service over the Joint Facilities (except User's Cahill/Lick Line) with the consent of Owner, which shall not be unreasonably withheld, subject to the provisions of Section 4.3 when Owner dispatches and controls the operations and provided that costs due to any such Intercity Passenger Service agreement, or amendment thereto or to Intercity Passenger Service operations pursuant thereto over the Joint Facilities (except for User's Cahill/Lick Line) and costs of changes necessitated by such agreements affecting line capacity, yard capacity, or the signal system shall be borne by User. The parties agree to negotiate in good faith with regard to any additional parties that may be engaged or User proposes to have engaged in Intercity Passenger Service.

(c) Notwithstanding the provisions of Section 2.7(b) above, no Intercity Passenger Service Trains shall operate on Exclusive Commute Trackage without a written agreement between Owner and User.

2.8 Operator: Either party may use an Operator or Operators to provide applicable Services pursuant to this Agreement.

2.9 Owner's Bridge Trackage Rights: User shall grant to Owner exclusive Bridge Trackage Rights, as defined in Section 1.2, over User's Cahill/Lick Line. User shall not enter into any agreement with or permit any additional Operator of Freight or Intercity Passenger Service Trains on User's Cahill/Lick Line which would materially impair or interfere with Owner's rights or use

pursuant to Section 4.5 hereof or under the Lick/Gilroy Trackage Rights Agreement. Upon completion of Owner's construction of its Trackage on the Joint Facilities between Auzerais Street at or near milepost 47.5 and Lick at or near milepost 51.4 and the commencement of Gilroy Commuter Service operations thereover, the Bridge Trackage Rights shall continue in effect only if User is granted access to and use of such newly constructed Owner's Trackage upon terms and conditions substantially similar to Owner's rights under the Bridge Trackage Rights and only so long as such access and use are made available to User (whether or not used by User).

2.10 Physical Clearances: Owner represents that the Joint Facilities (excluding User's Cahill/Lick Line) shall continue to have not less than existing clearances (as shown in User's records attached as Exhibit E) for the operation of Freight and Intercity Passenger Service. If User's Trains or Equipment require additional clearance, Owner agrees to provide said additional clearance in a timely manner at User's sole cost provided that such additional clearance would not materially impair or interfere with the usefulness or utility of the Joint Facilities (excluding User's Cahill/Lick Line) to Owner or Owner's operation or use of such Joint Facilities (excluding User's Cahill/Lick Line) or frustrate the purposes of this Agreement. In the event any work to be performed by Owner on the Joint Facilities (excluding User's Cahill/Lick Line) may affect the horizontal and vertical line clearances, Owner shall notify User and Owner shall cooperate with User to provide any such additional horizontal and vertical line clearances needed by User, provided that such additional clearances would not materially impair or interfere with the usefulness or utility of the Joint Facilities (excluding User's Cahill/Lick Line) to Owner or Owner's operation or use of such Joint Facilities (excluding User's Cahill/Lick Line) or frustrate the purposes of this Agreement and User shall pay the incremental costs required for such additional clearance requirements.

2.11 Retention of Rights for Changes and/or Additions: User retains the perpetual and exclusive right, for Freight and Intercity Passenger Service, to construct or reconstruct, with the consent of Owner (which shall not be unreasonably withheld, conditioned or delayed) Changes and/or Additions to the Joint Facilities (excluding User's Cahill/Lick Line and Exclusive Commute Trackage) consisting of railroad and railroad-related facilities necessary for and related to User's Freight and Intercity Passenger Service operations. Failure to reach agreement as to cost sharing for Changes and/or Additions subject to Section 10.3 shall constitute a reasonable basis for refusal of consent. Owner's consent will be given if such construction, reconstruction, or use shall not unreasonably interfere with Owner's existing or planned Commuter Service or with Owner's other planned or existing use of such portion of the Joint Facilities (excluding User's Cahill/Lick Line) and if the provisions of Section 8.3 are not otherwise

invoked by Owner. Changes and/or Additions consisting of Track Structure crossing other Track Structure at grade shall be treated as any other Changes and/or Additions under this Section; provided, however, that such Changes and/or Additions consisting of at grade crossings which do not result in a decrease in average Train speeds over the applicable Trackage shall not, absent other construction or reconstruction, be considered an unreasonable interference with Owner's use or planned use of the Joint Facilities (excluding User's Cahill/Lick Line). Notwithstanding the above, User may construct Changes and/or Additions which Owner has advised may unreasonably interfere with its planned use of the Joint Facilities (excluding User's Cahill/Lick Line), at User's sole risk. Such risk shall include the costs of removal of such newly constructed Changes and/or Additions at the time of actual use by Owner. User also retains the perpetual right to use, construct, reconstruct, or reimburse Owner for the construction or reconstruction of Changes and/or Additions to User's Cahill/Lick Line without the consent of Owner as long as the provisions of Section 9.3 would not be violated. All other Changes and/or Additions to User's Cahill/Lick Line shall be subject to Section 10.6 hereof. User also retains the perpetual and exclusive right to use, construct or reconstruct Changes and/or Additions to the New Coast Main (excluding User's Cahill/Lick Line) without the consent of Owner, except to the extent any such Trackage may be subject to Section 10.6 hereof. User retains the perpetual and exclusive right to use all such Changes and/or Additions to the Joint Facilities referred to in this Section 2.11 for Freight and Intercity Passenger Service, subject to Owner's rights of use thereof in accordance with the terms of this Agreement.

2.12 Emergencies and Detours: Either party may, at its sole discretion, allow the other party to use the Trackage of said first party in the Joint Facilities or No. 1 Track in emergency and detour situations. Any such use shall be subject to the prior written consent and upon the terms and conditions of the party granting such use.

2.13 Interim Operation Detour: Notwithstanding the provisions of Section 2.12, unless the parties otherwise agree in writing, during the period from the Effective Date until Owner completes the Changes and/or Additions to No. 1 Track pursuant to Section 10.1(a) and (b) hereof, Owner grants its consent to allow User to use Owner's tracks consisting of Exclusive Commute Trackage between Santa Clara Jct. at or near Milepost 44.0 and the magnetic south end of Cahill Yard at or near Milepost 47.45. Such use shall be subject to the terms and conditions of this Agreement in the same manner and to the same extent as if User were operating over the Peninsula Main Line; provided, however, that, in lieu of Section 4.3, Owner shall establish reasonable terms and conditions for dispatching User's Trains in conjunction with Owner's Trains which shall minimize delays to both Owner's and User's operations; and further provided that notwithstanding the provisions of Section

9.2, the costs of ordinary and capitalized maintenance of the Trackage over which User will operate pursuant to this Section 2.13 for the first two years after the Effective Date shall be solely the responsibility of Owner and, thereafter, such costs shall be apportioned between the parties in accordance with Section 9.2(a) hereof.

2.14 Authority and Enforceability: Each party hereto respectively represents and warrants that it has the full power and authority to enter into this Agreement and to carry out the obligations contemplated hereby. Upon execution and delivery, this Agreement, including but not limited to the indemnification terms of Section 6 hereof, are enforceable against such party in accordance with its terms (except to the extent such enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium, or similar laws relating to creditor's rights generally and the availability of equitable remedies may be limited by equitable principles of general applicability).

2.15 Retirement Limitations: Subject to Section 8.3 hereof, neither Owner nor User shall make any retirement, withdrawal, elimination or disposal of any part of the Joint Facilities without the prior written consent of the other party which shall not be unreasonably withheld. The affected party will grant its consent under this Section if such retirement, withdrawal, elimination or disposal would not materially impair the usefulness of the Joint Facilities to such party or frustrate the purposes of this Agreement.

2.16 Taxes: Owner shall be responsible for all taxes assessed against it (or its Operators or other entities acting on its behalf or for its account), if any, as owner of the real and personal property which are part of the Joint Facilities (excluding User's Cahill/Lick Line) and of the real property underlying the New Coast Main and as holder of the Bridge Trackage Rights; provided, however, that User shall be responsible for any possessory interest tax assessed against it (or its Operators or other entities acting on its behalf or for its account), if any, as holder of the easement retained by User hereunder and under the Sale Agreement and as owner of the Track Structure and personal property which are part of the New Coast Main. Nothing contained in this Agreement shall be construed to make Owner liable to taxing authorities for any taxes which Owner, as a public entity, would not otherwise be liable; provided, however, that, for purposes of this Agreement, Owner shall indemnify User for all taxes assessed against any Operator for Owner or any other entity acting on Owner's behalf.

2.17 Non-Use of Designated Freight Trackage: In the event that all or any portion of the Designated Freight Trackage has not been used by User after the Effective Date for any continuous period of at least thirty-six (36) months, Owner may, during the

period of continuous non-use in excess of thirty-six (36) months, request in writing that User make application for and diligently pursue all necessary approvals or other actions to remove such unused Trackage, if such approvals or other actions are necessary, and if Owner so requests, (upon receipt of any necessary authority) to remove at its cost any and all such Trackage and Equipment and property of User thereon. Within ninety (90) days of such request, User shall make application for such approvals or other actions or, if no approvals or other actions are necessary, shall commence, at its cost, removal of such Trackage, Equipment and property and shall diligently progress completion of such removal. If approvals or applications are necessary, User shall commence removal of such Trackage, Equipment and property within ninety (90) days after receipt of such authorization and shall diligently progress completion of such removal. User shall not progress the above actions if it demonstrates justification for such non-use, which justification shall be provided to Owner in writing within ninety (90) days of the written request of Owner referred to above. Within ninety (90) days of receipt by Owner of such written justification, Owner shall notify User in writing as to whether it concurs in or disputes such justification. If Owner disputes such justification, the dispute shall be resolved by arbitration in accordance with Section 7 of this Agreement. If, however, such non-use continues so that such Trackage has not been used by User for a continuous period of five (5) years, then User, promptly upon notice from Owner shall apply for and diligently prosecute all governmental approvals or other actions necessary, if any, to remove said Trackage and (after receipt of such approvals or other actions), shall promptly at its cost remove said Trackage and Equipment and property of User thereon, if requested by Owner.

Section 3. ASSIGNMENT

This Agreement shall be binding upon and inure to the benefit of the parties hereto, their respective successors and assigns, provided, however, that:

(a) The rights and obligations of Owner hereunder may be assigned or sold in whole or in part without User's consent only to (i) Owner's successor agency; (ii) any one or more of Owner's member agencies or counties; (iii) the Peninsula Rail Transit District; (iv) the State of California Department of Transportation; or (v) an existing or to be formed public, quasi-public or nonprofit entity formed or authorized to own Owner's interest in the Joint Facilities (excluding User's Cahill/Lick Line), but only if such successors or assigns have the legal power and authority to undertake all of the rights and obligations of Owner hereunder including, but not limited to, the obligation to indemnify User pursuant to Section 6 hereof;

(b) User may assign or sell all or any part of its trackage rights hereunder without the consent of Owner only to: (i) any successor or affiliate of User, (ii) any other Class I railroad, or (iii) in connection with its trackage rights over the Santa Clara/Lick Line, to any Operator who is financially responsible and has a management team with a demonstrated record of reliable and safe railroad maintenance and operating experience; provided that such successors or assigns have the legal power and authority to undertake all of the rights and obligations of User hereunder including, but not limited to, the obligation to indemnify Owner pursuant to Section 6 hereof.

(c) User may assign or sell all or any part of its trackage rights hereunder to any person with the consent of Owner (which consent shall not be unreasonably withheld, conditioned or delayed) to any person and, in connection with its trackage rights over properties other than the Santa Clara/Lick Line, to any Operator who is financially responsible and has a management team with a demonstrated record of reliable and safe railroad maintenance and operating experience; provided that such party has the legal power and authority to undertake all of the rights and obligations of User hereunder including, but not limited to, the obligation to indemnify Owner pursuant to Section 6 hereof.

(d) Within ten (10) days after any assignment, the assignee shall execute and deliver to Owner and User a written instrument assuming all of the assignor's obligations hereunder, and an opinion of such assignee's counsel stating that such assignee is entitled to perform all of the assignor's obligations hereunder.

Section 4. OPERATIONS

4.1 Management and Control: Subject to Sections 4.2, 4.3, and 4.14 below, the management and operation (including dispatching) of the Joint Facilities (except for User's Cahill/Lick Line) shall be under the exclusive direction and control of Owner. User, at its sole cost and election may monitor dispatching operations over the Joint Facilities (excluding User's Cahill/Lick Line) on a reasonable basis. Owner, at its sole cost and election, may monitor dispatching operations over User's Cahill/Lick Line on a reasonable basis.

4.2 Optional User Dispatching: At Owner's option, User may continue to dispatch the Joint Facilities (excluding User's Cahill/Lick Line) in a manner that minimizes conflicts and is consistent with dispatching conditions existing prior to the Sale Agreement until Owner obtains dispatching capability; but, in no event later than December 31, 1993. Owner may, at its sole option, assume control and dispatching of the Joint Facilities (excluding User's Cahill/Lick Line) prior to December 31, 1993 by providing

thirty (30) days advance notice to User. Owner shall pay User a monthly rate of Eleven Thousand Five Hundred Dollars (\$11,500) for each full month or pro rata for partial months that User provides such dispatching services. Such monthly payment shall be made not later than 45 days following the end of the month in which dispatching services were provided.

4.3 User's Operating Windows: Owner will provide User the ability to operate Freight Service on the Peninsula Main Line whenever there exists a period of at least thirty (30) minutes headway between passenger Trains including Owner's Commuter Service and/or User's Intercity Passenger Service. During the hours between 10 A.M. and 3 P.M., at least one thirty (30) minute headway "window" on each of the northbound and southbound main tracks of the Peninsula Main Line will be provided in Owner's scheduling for Trains in Freight Service that are capable of operating at Commuter Service Train speeds and will operate at such speeds when directed by Owner. Between midnight and 5 A.M., at least one main track of the Peninsula Main Line shall always be in service for Freight and Intercity Passenger Service, and User will be provided during that time an adequate number of thirty (30) minute headway windows for User to serve its Freight Service customers. Owner and User recognize that Intercity Passenger Service may also be conducted during other than times between midnight and 5 A.M. and that such Intercity Passenger Service may operate within less than a thirty (30) minute headway. Such headway shall be established by mutual agreement between the parties, their Operators and NRPC, as applicable. Neither party hereto shall unreasonably withhold its consent to such agreement. Owner's dispatching and operations on lines other than the Peninsula Main Line shall provide User with reasonable windows for operations to serve customers during non-peak hours based upon a schedule subject to mutual agreement. Neither party hereto shall unreasonably withhold its consent to such agreement.

4.4 Use of Exclusive Commute Trackage: Owner shall have the exclusive use and control of its Exclusive Commute Trackage unless otherwise agreed in writing by Owner and User and subject to Section 2.4 hereof.

4.5 Use of New Coast Main: Except to the extent of Owner's Bridge Trackage Rights, User shall have the exclusive use and control for Freight and Intercity Passenger Service operations of the New Coast Main provided, however, that Owner shall retain the control over that portion of the New Coast Main to the extent and at the location such Track Structure connects to or diverges from the Joint Facilities (excluding User's Cahill/Lick Line). To facilitate such control, User shall physically provide Owner with the capability to connect User's dispatching system with Owner's dispatching system, and User and Owner shall share equally in the costs thereof. User shall have exclusive authority to dispatch and control its Freight and Intercity Passenger Service Trains on the

New Coast Main and Gilroy Commuter Service Trains (which are operated over User's Cahill/Lick Line pursuant to Owner's Bridge Trackage Rights hereunder in conjunction with the Lick/Gilroy Trackage Rights Agreement). User shall dispatch all such Trains on User's Cahill/Lick Line on a "first-come, first served" basis, provided, however, that if User and Owner can reach agreement on a mutually satisfactory schedule for Gilroy Commuter Service Trains, pursuant to the Lick/Gilroy Trackage Rights Agreement, (and the parties expect to reach such agreement) User shall dispatch User's Cahill/Lick Line giving priority to those scheduled Gilroy Commuter Service Trains.

4.6 Limitations on Liability: Except as otherwise may be provided in Section 6, if the use of the Joint Facilities shall at any time be interrupted or traffic thereon or thereover be delayed for any cause, neither party shall have or make any claim against the other for loss, damage, or expense of any kind, caused by or resulting from such interruption or delay.

4.7 Furnishing of Fuel, Train Supplies, Etc.: Each party shall be responsible for furnishing, at its sole cost and expense, all labor, fuel, and Train supplies necessary for the operation of its own Trains over the Joint Facilities. In the event a party does furnish such labor, fuel, or supplies to another party hereto, the party receiving same shall promptly, upon receipt of billing therefor, reimburse the party furnishing same for its reasonable costs thereof, including Customary and Materials Additives.

4.8 Operating Rules: The operation by User on the Joint Facilities (excluding User's Cahill/Lick Line) shall at all times be in accordance with the rules, instructions, and restrictions of Owner. Except as otherwise provided herein, such rules, instructions, and restrictions shall be reasonable, just, and fair between the parties using the Joint Facilities and shall not unjustly discriminate against any of them.

4.9 Communications: The party using Trackage or Track Structure dispatched or controlled by the other party shall, at such using party's sole cost and expense, obtain, install and maintain in all Trains and Equipment used by it on such Trackage or Track Structure, such communication equipment as is necessary to allow the using party to communicate with dispatching and signaling facilities in the same manner as the dispatching party. The party in control of dispatching under the terms of this Agreement shall consult with the other party prior to adoption of new communication systems or signal systems for use on the Joint Facilities which theretofore have not been adopted generally in the railroad industry.

4.10 Clearing Trains and Equipment: If, by any reason of mechanical failure or for any other cause, the Trains or Equipment of Owner or User or their respective Operators become stalled or

disabled on the Joint Facilities and are unable to proceed, or fail to maintain the speed required of Trains or Equipment to meet normal schedules, or if in emergencies crippled or otherwise defective Equipment is set out from any such Trains on the Joint Facilities, then the party whose Trains or Equipment are involved in the incident shall be responsible for furnishing locomotive units or such other assistance as may be necessary to haul, help or push such Equipment or Trains, or to properly move the disabled Trains or Equipment. By mutual agreement of the parties or upon receipt of reasonable notice from the other party that the response of the party whose Trains or Equipment are involved in the incident has not been adequate relative to the scheduled uses of Joint Facilities, such other party may render such assistance as may reasonably be required in light of such scheduled uses, and the party whose Trains or Equipment are involved in the incident shall reimburse the other party, within forty-five (45) days after receipt of the bill therefor, for the reasonable cost and expense, including Customary and Materials Additives, of rendering any such assistance. The costs and expense of services referenced above in this Section 4.11, including without limitation liability (as that term is defined in Section 6) shall be treated in accordance with Section 6 hereof. If it becomes necessary to make repairs to crippled or defective Trains or Equipment of the Owner or User or their respective Operators in order to move Trains or Equipment from the Joint Facilities, such work shall be the responsibility of the party whose Trains or Equipment are involved in the incident. By mutual agreement of the parties or upon receipt of reasonable notice from the other party that the efforts of the party whose Trains or Equipment are involved in the incident to make the repairs are not adequate in light of the scheduled uses of Joint Facilities, such other party may take control of the repairs. If the repairs are performed by the other party, then the party whose Trains or Equipment are involved in the incident shall reimburse the other party for the cost thereof, within forty-five (45) days after receipt of the bill therefor, at the then current AAR dollar rate for labor charges found in the Office Manual of the AAR Interchange Rules.

4.11 Clearing Wrecks: Except as otherwise provided in Section 6, whenever the Owner's or User's Trains or Equipment on the Joint Facilities require rerailling, wrecking service or wrecking Train service, the party whose Train is involved shall be responsible for performing such service. Upon mutual agreement of the parties or upon receipt of reasonable notice from the other party that the response of the party whose Train is involved in the incident is not adequate in light of the scheduled uses of the applicable Trackage, the other party may take control of such rerailling, wrecking service or wrecking Train service as may be required. Whichever party has responsibility for maintenance and repair of the affected Trackage under the terms of Section 9 shall make such repairs to and restoration of the applicable Trackage as may be required. The cost and expense of services referenced above

in this Section, including without limitation, liability (as that term is defined in Section 6) shall be treated in accordance with Section 6 hereof. All Equipment and salvage shall be promptly picked up by the party whose Train is involved in the incident or such party's Operator or delivered to the party whose Train is involved in the incident or such party's Operator by the other party, and all costs and expenses, including Customary and Material Additives therefor, incurred by the other party shall likewise be paid to the other party by the party whose Train is involved in the incident. All costs and expenses to be borne under this Section by the party whose Train is involved in the incident shall be paid within forty-five (45) days after receipt of the bills therefor.

4.12 Furnishing Power: For the purposes of this Section 4.12 only, the term "stopped party" shall mean whichever of the following described entities whose Trains are stopped in the circumstances described in this Section: Owner, User, the Operator(s) of either Owner or User, NRPC, or any other entity permitted in accordance with the terms of this Agreement to operate Trains on the Joint Facilities. In the event Trains of a stopped party shall be forced to stop on the Joint Facilities for any reason including but not limited to, stoppage due to insufficient hours of service remaining among the stopped party's employees, and such Trains are unable to proceed, any entity referred to in this Section shall have the option to furnish motive power or such other assistance (including but not limited to the right to recrew stopped party's Trains) as may be necessary to haul, help or push such Trains, or to properly move Trains off the Joint Facilities. All cost and expense, including Customary and Materials Additives, to be borne by the stopped party under this Section shall be paid within forty-five (45) days to the party rendering motive power or other assistance after receipt of the bills therefor. Owner shall be responsible to the party rendering motive power for stoppage caused by its Operator(s) or other entities operating on its behalf and User shall be responsible to the party rendering motive power for stoppage caused by its Operator(s) or other entities operating on its behalf.

4.13 Compliance with Laws: Operations by Owner and User hereunder shall be in compliance in all material respects with all applicable laws and regulations including those relating to discharge of hazardous waste materials.

4.14 Assumption of Dispatching: In the event Owner becomes incapable of adequately performing dispatching functions on the Joint Facilities (excluding User's Cahill/Lick Line) for Freight and Intercity Passenger Service hereunder, arrangements will be made for the prompt and orderly transfer of such functions to User. In the event User becomes incapable of adequately performing dispatching functions on User's Cahill/Lick Line for Gilroy Commuter Service hereunder, arrangements will be made for the prompt and orderly transfer of such functions to Owner.

Section 5. EMPLOYEES

5.1 **Owner's Employees:** Owner shall employ all persons necessary to construct, maintain, repair, renew, and perform dispatching functions for the Joint Facilities excluding User's Cahill/Lick Line (but including signal system maintenance on the New Coast Main as provided in Section 9.1). Owner shall be bound to use reasonable and customary care, skill and diligence in the construction, maintenance, repair renewal, and dispatching functions respecting said Trackage and in managing same and User shall not (except as otherwise provided in Section 6 hereof), by reason of Owner's performing or failing or neglecting to perform any construction, maintenance, repair, renewal, dispatching functions, or management of said Trackage, have or make against Owner any claim or demand for any loss, damage, destruction, injury, or death whatsoever resulting therefrom.

5.2 **User's Employees:** User shall employ or cause to be employed all persons necessary to construct, maintain, repair, renew, and perform dispatching functions for the New Coast Main. User shall be bound to use reasonable and customary care, skill, and diligence in the construction, maintenance, repair, renewal, and dispatching functions respecting the New Coast Main and in managing same; and Owner shall not (except as otherwise provided in Section 6 hereof), by reason of User's performing or failing or neglecting to perform any construction, maintenance, repair, renewal, dispatching functions, or management of said Track Structure, have or make against User any claim or demand for any loss, damage, destruction, injury, or death whatsoever resulting therefrom.

5.3 **Fair Treatment:** All officers, agents, and employees of Owner and of User engaged in the management, operation, and maintenance of the Joint Facilities or any portion thereof shall perform their duties in a fair, impartial, and just manner with respect to the rights and obligations between the parties as provided in this Agreement.

5.4 **Examinations:** User, or User's Operator, and Owner, or Owner's Operator, shall require their respective employees to pass periodic examinations on the General Code of Operating Rules effective October 29, 1989, (or any successor publication), timetables, General Orders and Track Bulletins (all as amended from time to time) which shall be applicable to the operations on or along the Joint Facilities.

5.5 **Rules Violations:**

(a) Owner, or Owner's Operator, shall notify User in writing specifying the circumstances in the event User, User's employees, or User's Operator or any other entity with which User contracts to provide Intercity Passenger Service fails to abide by the rules, instructions and restrictions of the Owner, or Owner's Operator, governing the operation on or along the Joint Facilities (other than User's Cahill/Lick Line). User, User's Operator, or any other entity with which User contracts to provide Intercity Passenger Service shall take prompt action to correct the failure to abide by the rules, instructions, and restrictions of the Owner, or the Owner's Operator, governing the operation on or along the Joint Facilities (excluding User's Cahill/Lick Line). In the event User, User's Operator, or any other entity with which User contracts to provide Intercity Passenger Service must hold a formal investigation pursuant to a collective bargaining agreement relating to the neglect, refusal or failure of User, User's employees, User's Operators or any other entity with which User contracts to provide Intercity Passenger Service to abide by the rules, instructions, and restrictions of the Owner, or Owner's Operator, governing the operation on or along the Joint Facilities, (excluding User's Cahill/Lick Line) Owner, or Owner's Operator, shall cooperate with User, User's Operator, or any other entity with which User contracts to provide Intercity Passenger Service and make available personnel of Owner, or Owner's Operator, as witnesses for User, or User's Operator, in such formal investigation at the cost and expense of User.

(b) For operations over User's Cahill/Lick Line, the provisions of Subsection (a) of this Section 5.5 shall apply with Owner subject to the obligations of User and User subject to the obligations of Owner.

Section 6. LIABILITY

6.1 Assumption of Responsibility:

(a) Except as otherwise provided in Section 4.11 each of the parties hereto shall assume, bear and pay all the liabilities allocated to it as the responsible party under the terms of this Section 6. For purposes of this Section 6, the term "liability" shall include all loss, damage, cost, expense (including costs of investigation and attorney's fees and expenses at arbitration, trial or appeal and without institution of arbitration or suit), liability, claims and demands of whatever kind or nature arising out of an incident described in the applicable provision of this Section 6. Except as otherwise expressly provided in Sections 6.2(b), 6.2(d), 6.2(e), and 6.4, the responsibility for liabilities undertaken by each party under this Section 6 is without respect to fault, failure, negligence, misconduct, malfeasance or misfeasance of any party or its employees, agents or servants.

(b) All costs and expenses incurred in connection with the investigation, adjustment and defense of any claim or suit shall be included as part of the liability for which responsibility is assumed under the terms of this Section 6, including salaries or wages and associated benefits of, and out-of-pocket expenses incurred by or with respect to, employees of either party engaged directly in such work and a reasonable amount of allocated salaries and wages of employees providing support services to the employees so engaged directly in such work.

6.2 Allocation of Responsibilities:

(a) Liability for personal injury (including bodily injury and death) to, or property damage suffered by, an invitee of either party shall be the responsibility of and borne and paid solely by that party regardless of the cause of such loss or the fault of either party or whose Train or Equipment was involved, except as specifically provided in Section 6.2(b) and Section 6.4 below. For purposes of this paragraph, and without limitation, consultants and contractors of a party and any person who is on a Train or Equipment operated by or for the account of a party (other than an employee of a party engaged in performing duties for that party) shall be deemed to be an invitee of that party. All persons at or adjacent to a passenger station or loading platform shall be deemed to be invitees of Owner (other than employees, contractors and consultants, including employees of such contractors, of User or Operator of User engaged in performing duties for User or for any such Operator of User).

(b) After Owner shall have incurred aggregate liability under this Agreement and the Lick/Gilroy Trackage Rights Agreement in an amount equal to \$25.0 million for injury to or damage suffered by its invitees for incidents occurring in any one calendar year, User shall bear a share of that portion of the aggregate liability to the Owner's invitees for that year that is in excess of \$25.0 million in proportion to the User's relative degree of fault, if any; provided, that the User shall not bear liability to Owner's invitees in an amount in excess of \$125.0 million for incidents occurring under this Agreement and the Lick/Gilroy Trackage Rights Agreement in such calendar year. In computing the \$25.0 million base amount payable by Owner prior to any participation by the User, there shall be excluded any liabilities incurred due to the Excluded Conduct (defined below in Section 6.4) of Owner. After User shall have incurred aggregate liability under this Agreement and the Lick/Gilroy Trackage Rights Agreement in an amount equal to the \$25.0 million for injury to or damage suffered by its invitees for incidents occurring in any one calendar year, Owner shall bear a share of that portion of the aggregate liability to User's invitees for that year that is in excess of \$25.0 million in proportion to Owner's relative degree of fault, if any; provided, that Owner shall not bear liability to

User's invitees in an amount in excess of \$125.0 million for incidents occurring under this Agreement and the Lick/Gilroy Trackage Rights Agreement in such calendar year. In computing the \$25.0 million base amount payable by User prior to any participation by Owner, there shall be excluded any liabilities incurred due to the Excluded Conduct of User. Liability shall be deemed incurred on the date of the incident giving rise to such liability regardless of the date on which liability is paid or established. The determination of the relative fault of the parties in any proceeding establishing the liability shall be binding on the parties.

(c) Liability for personal injury (including bodily injury and death) to, or property damage suffered by, persons other than invitees of either Owner or User and casualty losses to property owned by the Owner and/or User shall be the responsibility of and borne and paid by the parties as follows regardless of the cause of such loss or the fault of either party except as provided in paragraphs (d) and (e) of this Section 6.2 and Section 6.4 below:

- (i) Loss to Trains, Equipment and other property owned by Owner shall be the responsibility of the Owner and borne by it.
- (ii) Loss to Trains, Equipment and other property owned by and freight transported by the User shall be the responsibility of the User and borne by it.
- (iii) Loss to property jointly used by both parties and property jointly owned by Owner and User shall be the responsibility of and borne (A) totally by the single party whose Train or Equipment was involved in the incident giving rise to the loss, (B) equally by the parties if the Trains or Equipment of both parties were involved in the incident, and (C) by the party or parties responsible for costs of maintenance of the property pursuant to the cost allocation principles of Section 9 hereof if no party's Train or Equipment was involved in the incident.
- (iv) Liability for personal injury (including bodily injury and death) to, or property damage suffered by, any employee of either party which occurs during the course of employment or while traveling to or from employment (an "employee") shall be the responsibility of and borne solely by the party employing such employee.

- (v) Liability for personal injury (including bodily injury and death) to, or property damage suffered by, any person who is not an employee or invitee of either party (including without limitation persons using vehicular and pedestrian crossings and trespassers) shall be the responsibility of and borne (A) totally by the party whose Train or Equipment was involved in such loss if the Train or Equipment of only one party was involved, and (B) by the Owner if no Train or Equipment was involved in the incident; provided, however, that if no Train or Equipment was involved and the incident occurred on User's Cahill/Lick Line, User shall be responsible.

(d) Liability for personal injury (including bodily injury and death) to, or property damage suffered by, a person who is not an employee or invitee of either party shall be the responsibility of and borne by both parties in proportion to their relative degrees of fault if Trains or Equipment of both parties were involved in the incident giving rise to such injury or damage.

(e) Except to the extent of any contrary provision in the Sale Agreement, each party shall indemnify and hold harmless the other party, and that party's directors, officers, employees, agents, successors and assigns, and defend them with counsel reasonably satisfactory to the indemnitee, from and against any and all Environmental Claims, Environmental Expenses, and any damages or liabilities arising out of the discharge or release of any Hazardous Materials in, on or about the Joint Facilities by such party, or its employees, contractors, lessees, invitees, representatives, agents, Operators (including, but not limited to, NRPC), successors, or assigns. User shall further indemnify and hold Owner harmless, and defend Owner with counsel reasonably satisfactory to Owner, against any damages or liability caused by or arising out of a release or discharge of Hazardous Materials in, on or about the Joint Facilities occurring prior to the Effective Date of this Agreement. For purposes of this Subsection, the capitalized terms not otherwise defined in this Agreement shall have the meaning as the definition given to these terms in that certain Environmental Indemnity Agreement between the parties which is part of the Sale Agreement. Nothing herein is intended to, nor shall abrogate the rights and responsibilities of the parties contained in the aforesaid Environmental Indemnity Agreement.

6.3 Insurance:

(a) Owner and User shall each maintain general liability insurance in the amount of at least \$100,000,000 per occurrence and shall either include all of their respective Operators (other than NRPC) as insureds under their respective policies or furnish

evidence of separate insurance of the same amount and type for each Operator (other than NRPC). Insurance shall be placed with a company or companies authorized to conduct business in California. Owner and User (and any Operator of either party if such Operator demonstrates to the reasonable satisfaction of the Owner and User sufficient financial capacity) may self insure to a level not to exceed \$10.0 million.

(b) The general liability insurance required by Section 6.3(a) shall provide coverage for personal injury, bodily injury, death and property damage with respect to all operations of the Owner, User, and Operators, respectively. Such insurance shall include blanket contractual coverage, including coverage for written, oral and implied contracts and specific coverage for the indemnity provisions set forth in this Section 6. Each policy of general liability insurance obtained by the Owner and User shall name the other as an additional insured with respect to any liability to be borne by the party obtaining such insurance pursuant to the provisions of this Section 6.

(c) For any claims arising out of activities, products or operations resulting from or related to this Agreement, the insurance obtained pursuant to Section 6.3(a) shall be primary with respect to the obligation under this Agreement of the party obtaining the insurance and with respect to the interests of all parties added as additional insureds. Any other insurance maintained by an additional insured shall be excess of this coverage herein defined as primary and shall not contribute with it.

(d) Unless otherwise agreed by the Owner and User, the insurance required by Section 6.3(a) shall be maintained by each of the parties specified therein for the full term of this Agreement and shall not be permitted to expire or be canceled or materially changed except upon sixty (60) days' written notice to the other parties. Each insurance policy required by Section 6.3(a) shall be endorsed to state that coverage shall not be suspended, voided, canceled by either party, or reduced in coverage or limits except after sixty (60) days' prior written notice has been given to all insureds.

(e) Each of Owner and User shall cause its and/or its Operator's (other than NRPC's) insurers to provide the other with certificates of insurance and endorsements evidencing the provisions specified above in this Section 6.3 prior to commencement of operations under this Agreement.

(f) A failure of any party to maintain the insurance required by this Section 6.3 shall not relieve such party of any of its liabilities or obligations under this Agreement.

6.4 Limitations on Indemnification:

(a) The provisions of this Section 6.4 shall apply notwithstanding the provisions of Section 6.2 above. "Excluded Conduct" shall mean (i) an entire failure of care or the exercise of so slight a degree of care as to raise a presumption that there was a conscious indifference to the things and welfare of others, (ii) conduct constituting a reckless or wanton disregard of the probable results of such conduct, (iii) wilful misconduct, or (iv) conduct which would permit the award of exemplary or punitive damages. Neither party shall be indemnified for any loss or liability resulting from its own Excluded Conduct, and in any such case such party shall be responsible for and bear loss or liability in proportion to its relative degree of fault and such party shall be responsible for and bear all exemplary or punitive damages, if any, resulting from its Excluded Conduct. If any of the provisions of Section 6.2 would otherwise indemnify a party against liability, loss or damage that would be prohibited by or unenforceable under the laws of the State of California (including a determination that indemnification under the circumstances involved is against the public policy of the state), the indemnity provided by such provision shall be deemed to be limited to and operative only to the maximum extent permitted by law. Without limitation, if it is determined that any law or public policy of the State of California prohibits the indemnification of a party for its own sole negligence in any instance covered by the provisions of Section 6.2, those provisions shall be deemed to exclude indemnification for such party's sole negligence but to permit full indemnification, as specified in Section 6.2, if both parties were negligent. In the case of any liability, loss or damage for which the provisions of this Section 6.4 would prevent the indemnification of a party, such party shall be responsible for and bear such liability, loss or damage.

(b) Notwithstanding Section 6.2 above, Owner and User shall bear liability in proportion to their relative degrees of fault if, but only if, the liability arises solely out of a collision between a Train of Owner and a Train of User that occurs on User's Cahill/Lick Line during a "peak commuter period", as hereinafter defined, on a day during which Owner operates scheduled Gilroy Commuter Service Trains. This Subsection 6.4(b) shall cease to apply upon completion of Owner's construction of its Trackage on the Joint Facilities between Azurais Street at or near Milepost 47.5 and Lick at or near Milepost 51.4 and the commencement of the Gilroy Commuter Service operations thereover. As used in this Section 6.4(b), the term "peak commuter period" shall mean a single uninterrupted period in the morning and a single uninterrupted period in the afternoon to be designated by Owner from time to time upon not less than 90 days written notice from Owner to User; provided, however, that neither of such periods shall exceed five (5) hours and the two periods together shall not exceed nine (9) hours in the aggregate.

6.5 Scope of Indemnification:

In any case where a party is required under the provisions of this Section 6 to bear a loss or liability, it shall pay, satisfy and discharge such liability and all judgments that may be rendered by reason thereof and all costs, charges and expenses incident thereto, and such party shall forever indemnify, defend and hold harmless the other party and its commissioners, directors, officers, agents, employees, shareholders, parent corporation and affiliated companies or governmental entities from, against and with respect to any and all liabilities which arise out of or result from the incident giving rise thereto. If a party asserts that the other was guilty of Excluded Conduct and denies liability for indemnification of the other party based thereon, the party asserting such Excluded Conduct shall have the burden of proof in establishing such conduct. It is the intent of the parties that the indemnification provisions of this Section 6 shall apply to both the passive negligence and the active negligence of an indemnified party.

6.6 Procedure:

(a) If any claim demand shall be asserted by any person against an indemnified party under this Section 6, the indemnified party shall, within 30 days after notice of such claim or demand, cause written notice thereof to be given to the indemnifying party, provided that failure to notify the indemnifying party shall not relieve the indemnifying party from any liability which it may have to the indemnified party under this Section 6, except to the extent that the rights of the indemnifying party are in fact prejudiced by such failure. If any such claim or demand shall be brought against the indemnified party and it shall have given notice thereof to the indemnifying party, the indemnifying party shall have the right, at its own expense, to control (including the selection of counsel reasonably satisfactory to the indemnified party) or to participate in the defense of, negotiate or settle, any such claim or demand, and the parties hereto agree to cooperate fully with each other in connection with any such defense, negotiation or settlement. In any event, the indemnified party shall not make any settlement of any claims which might give rise to liability on the part of the indemnifying party under this Section 6 without the prior written consent of the indemnifying party, which consent shall not be unreasonably withheld, conditioned or delayed. If any claim or demand relates to a matter for which the parties, under the terms of Section 6.2, are to share liability equally or in proportion to their relative degrees of fault, each party shall be entitled to select its own counsel and defend itself against the claim at its own expense, and neither party shall make any settlement of any such claims without the prior written consent of the other party, which consent shall not be unreasonably withheld, conditioned or delayed.

(b) Subject to the provisions of Section 6.6(a), on each occasion that the indemnified party shall be entitled to indemnification or reimbursement under this Section 6, the indemnifying party shall, at each such time, promptly pay the amount of such indemnification or reimbursement. If the indemnified party shall be entitled to indemnification under this Section 6 and the indemnifying party shall not elect to control any legal proceeding in connection therewith, the indemnifying party shall pay to the indemnified party an amount equal to the indemnified party's reasonable legal fees and other costs and expenses arising as a result of such proceeding.

(c) Any dispute between the parties as to the right to indemnification or the amount to which it is entitled pursuant to such right with respect to any matter shall be submitted to arbitration pursuant to Section 7.

6.7 Operators:

Any Operator other than NRPC shall agree to be bound by the provisions of this section 6 unless otherwise agreed in writing by Owner and User. The parties will use reasonable efforts to extend the benefits of existing NRPC indemnities to Owner. For purposes of this Section 6, as between Owner and User, the Trains, Equipment, and actions of any Operator (including NRPC) or any other entity acting on behalf of and for the account of a party hereto shall be deemed to be the Trains, Equipment, and actions of such party. Nothing contained herein shall be construed to limit or waive the rights of a party hereto to seek indemnification or damages from its Operator(s) or other entities acting on its behalf, for actions of said Operator(s) or said entities.

6.8 Dollar Amount Adjustments:

Each of the dollar amounts set forth in Section 6.3(a) above shall be adjusted annually and every three years, respectively, for changes in the Consumer Price Index, but shall not be reduced below their initial levels. As used in this Section 6.8, the term "Consumer Price Index" shall mean the United States Department of Labor's Bureau of Labor Statistics' Consumer Price Index, All Urban Wage Earners and Clerical Workers, All Items, for the San Francisco area (1967=100). If the base year for the Consumer Price Index is changed from 1967, the Consumer Price Index shall be converted in accordance with the conversion factor published by the United States Department of Labor's Bureau of Labor Statistics. If the Consumer Price Index is discontinued or revised, such other governmental index or computation with which it is replaced shall be used in order to obtain substantially the same result as would be obtained if the Consumer Price Index had not been discontinued or revised.

6.9 Not For Benefit Of Third Parties:

The provisions of this Section 6 are not intended to confer any right, benefit, or cause of action upon any third party and are intended solely to deal with the allocation of liability, if any, as between the parties to this Agreement.

7. DISPUTE RESOLUTION AND BINDING ARBITRATION

7.1 Settlement of Disputes: Both of the parties hereto shall make every reasonable effort to settle any disputes arising out of their respective rights and obligations under this Agreement by prompt and diligent negotiations.

7.2 Controversies Subject to Arbitration: Any and all claims, disputes or controversies between Owner and User arising out of or concerning the interpretation, application or implementation of this Agreement, which cannot be resolved by the parties by negotiations, shall be submitted to binding arbitration as hereinafter provided.

7.3 Arbitration Procedure: The procedure for arbitration shall be as follows:

(a) In the event a claim, dispute or controversy subject to arbitration hereunder arises, either party may serve a written demand for arbitration in accordance with Section 7.3 of this Agreement upon the other party. If the claim, dispute or controversy is not resolved by the parties within thirty (30) calendar days after the service of the demand, the matter will be deemed submitted to arbitration.

(b) Within fifty (50) calendar days of service of a demand for arbitration, each party shall designate an arbitrator in writing and serve its designation upon the other party ("Noticed Party") in accordance with Section 7.3 of this Agreement. If the Noticed Party fails to timely designate the arbitrator to be designated by it, such arbitrator shall be appointed by the Presiding Judge (or Acting Presiding Judge) of the Superior Court of the County of Sacramento, State of California upon application of either party after ten (10) days' written notice to the other party. If each party has timely designated its arbitrator, or the Presiding Judge or Acting Presiding Judge has appointed an Arbitrator for one of the parties pursuant to the previous sentence, the two designated arbitrators shall, within seventy (70) calendar days of service of the demand for arbitration, designate a neutral third party arbitrator. The third party arbitrator shall be a qualified disinterested person, knowledgeable and experienced in rail operational matters and in the type of services contemplated by this Agreement. If the two arbitrators designated

by the parties fail to timely select a neutral third party arbitrator, either party may apply to the Presiding Judge (or Acting Presiding Judge) of the Superior Court of the County of Sacramento, State of California to select the neutral third party arbitrator.

(c) At any time, the parties may agree in writing on a sole arbitrator to decide the controversy.

7.4 Rules of Arbitration: The arbitration is to be conducted pursuant to Part 3, Title 9, of the Code of Civil Procedure, commencing with Section 1280, or to any successor or replacement provisions of said Code, and the arbitrators shall have all the powers and duties specified therein.

7.5 Arbitration Schedule: (a). The arbitration hearing shall commence no later than four months after service of the demand and shall be concluded no later than forty (40) calendar days after the hearing commencement date. The arbitration decision and award shall be rendered by the arbitrators within thirty (30) calendar days after conclusion of the arbitration hearing.

(b) The parties may extend any of the deadlines or time periods set forth above by mutual written stipulation. The arbitrators may extend the time for commencement of the arbitration hearings, conclusion of the arbitration hearings and/or the time for rendition of the arbitrators' decision and the award (but, with respect to rendition of the arbitration award, by no longer than an additional 30 calendar days), upon motion of either party or upon the arbitrator's own motion, upon a showing of good cause therefor.

7.6 Pending Resolution: During the pendency of such arbitration proceedings, the business, the operations to be conducted, physical plant to be used, and compensation for service under this Agreement, to the extent that they are the subject of such controversy, shall continue to be transacted, used, and paid in the manner and form existing prior to the arising of such controversy, unless the arbitrator shall make a preliminary ruling to the contrary. In the case of monetary disputes relating to amounts billed for the payment of operating, maintenance or capital costs and expenses under the terms of this Agreement, the party from whom a payment is allegedly owing shall make such payment notwithstanding such dispute and may submit the dispute to arbitration under this Section 7 only by seeking a refund through such arbitration.

7.7 Cost of Arbitration: Each party hereto shall bear the costs and expenses incurred by it in connection with such arbitration, including the cost of the arbitrator appointed by it, and both parties shall share equally the costs and expenses attributable to the services of the third arbitrator.

7.8 **Compliance:** For all purposes of this Agreement, each party is responsible for the compliance with all provisions of this Agreement by its Operator or Operators and User shall be responsible for compliance by NRPC.

Section 8. GOVERNMENTAL APPROVAL, TERM, AND ABANDONMENT

8.1 **Applications:** User shall, at its own cost and expense, initiate by appropriate application or petition and thereafter diligently prosecute any necessary proceedings for the procurement of consent, approval, or authority from any governmental agency for the sanction of this Agreement and the operations to be carried on by User hereunder. Owner, at its expense, shall assist and support said application or petition and will furnish such information and execute, deliver, and file such instrument or instruments in writing as may be necessary or appropriate to obtain such governmental consent, approval, or authority. User and Owner agree to cooperate fully to procure all such necessary consent, approval, or authority.

8.2 **Term:** Except as otherwise provided in Section 8.3 hereof, the term of the Agreement and the trackage rights provided for hereunder shall be perpetual.

8.3 **Abandonment or Discontinuance:**

(a) In the event that Owner contracts to sell all or substantially all of the Joint Facilities (other than User's Cahill/Lick Line) to a third party (other than those parties described in Section 3(a)), Owner may, at its sole cost and expense, file for permission from the ICC to abandon any Freight Service over the portion of the Joint Facilities (other than User's Cahill/Lick Line) that is to be sold. While User shall not object to such a filing, it shall be allowed to participate in the abandonment proceedings.

(b) In the event that Owner intends with reasonable certainty to commence construction of facilities on all or substantially all of the length of the Joint Facilities (other than User's Cahill/Lick Line) that are incompatible with the double mainline Freight Service, User shall consent to such diminished rights, provided that Owner shall have completed, at its sole cost and expense, the modification (whose plans and specifications have been approved by User) of the remaining single track (together with side track passing tracks and spur tracks) to be reasonably suitable for the volume and speed of the then existing Freight Service. Upon completion of such construction, User shall execute such documents as are reasonably necessary to extinguish the portion of the operating rights retained hereunder no longer required for Freight Service.

(c) In the event that Owner demonstrates a reasonably certain need to commence construction on all or substantially all of the length of the Joint Facilities (including User's Cahill/Lick Line) of a transportation system that is a significant change in the method of delivery of Commuter Service which would be incompatible with Freight Service on the Joint Facilities (other than User's Cahill/Lick Line), Owner may, at its sole cost and expense, file no sooner than nine months prior to the commencement of such construction for permission from the ICC to abandon the Freight Service over the portion of the Joint Facilities (excluding User's Cahill/Lick Line) upon which the construction is to occur. User shall not object to or oppose such a filing; however, it shall be allowed to participate in the abandonment proceedings.

(d) In the event that (1) Owner notifies User in writing that it has permanently ceased to provide Commuter Service on all or substantially all of the Joint Facilities (other than User's Cahill/Lick Line) and within six months after such notice, no other public or private entity has evidenced a willingness to provide such Commute Service, and (2) if Owner has not filed an ICC application to abandon under subsection (a) above, and (3) User desires to continue to provide Freight Service over such portion, then, within one year after Owner's notice, User shall purchase, and Owner shall sell, all of the applicable Joint Facilities at Net Liquidation Value including Owner's interest in the underlying real property at the mileage pro rata share of the purchase price in the Sale Agreement attributable to the portion of the Joint Facilities being purchased. Should the parties be unable to agree on the sale price within after sixty days after Owner has advised User of its proposed sale price, either party may submit the matter to binding arbitration under this Agreement. If neither party submits the matter to arbitration by the thirtieth day after such sixty-day period, Owner's contractual right to require User to purchase hereunder shall lapse.

8.4 Release: Upon termination of this Agreement, or any part thereof, each party shall forever release and discharge the other party of and from any and all manner of obligations, claims, demands, causes of action, or suits which it might have, or which might subsequently accrue to it growing out of or in any manner connected with, directly or indirectly, the contractual obligations under this Agreement in the involved Trackage, provided, however, the aforesaid relinquishment, abandonment, surrender, renunciation, release, and discharge of the parties shall not in any case affect any of the rights and obligations of either party which may have accrued, or liabilities accrued or otherwise, which may have arisen prior to such termination or partial termination. Upon any partial termination of the Agreement, however the same may occur, the terms and conditions hereof shall continue and remain in full force and effect for the balance of the Joint Facilities.

8.5 **Employees:** In the event of sale or of termination by abandonment pursuant to Section 8.3 hereof, Owner and User shall each be responsible for and shall bear labor claims of, and employee protection payable to, its own respective employees including any amounts that either Owner or User may be required to pay to its own respective employees pursuant to labor protective conditions imposed by the ICC.

8.6 **Limitation on Obligations:** Neither shall Owner have obligation to provide Freight or Intercity Passenger Service nor shall User have any obligation to provide Commuter Service. The abandonment of Freight or Intercity Passenger Service by User shall not create any obligation upon Owner to provide such Services, and the abandonment of Commuter Service by Owner shall not create any obligation upon User to provide such Service.

Section 9. MAINTENANCE

9.1 **Responsibility for Performance and Costs:** Owner shall physically perform the ordinary and capitalized maintenance on the Joint Facilities, (excluding User's Cahill/Lick Line) with the cost of such maintenance (other than for Exclusive Commute Trackage and Designated Freight Trackage) apportioned as described in Section 9.2 below. Owner shall physically perform the signal system maintenance on the New Coast Main. User shall pay the cost thereof with respect to the No. 1 Track, and the cost thereof with respect to User's Cahill/Lick Line shall be apportioned as provided in Section 9.2(b) below. Owner shall be responsible for all costs and expenses of the maintenance on Exclusive Commute Trackage except as provided in Sections 1.10 and 2.4 hereof. Owner shall perform the maintenance on Designated Freight Trackage, and all costs and expenses associated with such maintenance on Designated Freight Trackage shall be the responsibility of User except as provided in Sections 1.7 and 2.6 hereof. User shall either physically perform the maintenance on the New Coast Main (excluding signal system maintenance) or, upon written agreement of the parties, contract with Owner to perform such maintenance. All costs and expenses associated with such maintenance shall be apportioned pursuant to Section 9.2(b) hereof. No later than March 31 of each year, the party responsible for performing maintenance on any portion of the Joint Facilities (excluding User's Cahill/Lick Line) and the New Coast Main for which the other party has an obligation to pay or share the costs of hereunder will present such other party with a written estimated budget for costs and expenses for the applicable maintenance for the next-succeeding Fiscal Year. The party performing such maintenance may submit to the other party written proposed amendments, supplements or adjustments to said budget from time to time after submission of the initial estimated budget. Such initial estimated budget, and any amendments, supplements and adjustments shall be subject to the written consent of the

receiving party which shall not be unreasonably withheld, conditioned or delayed. The party performing such maintenance, during such next succeeding Fiscal Year shall bill the other party monthly on an estimated actual cost basis (including Customary and Materials Additives) for the other party's share of such maintenance costs. If it appears to the billed party that the monthly billing deviates substantially from that projected in the estimated budget, the billed party may request a written explanation from the party performing maintenance as to the reason for such deviation and such party shall provide such written explanation within fifteen (15) days after receipt of the request. If the parties are in disagreement as to any such monthly billings or the amounts claimed for such maintenance, such disputes shall be resolved in accordance with Section 7 of this Agreement. At the end of each Fiscal Year there shall be an adjustment if billed costs deviate from actual costs. To the extent possible, the parties shall negotiate appropriate flat rates for such maintenance costs within twelve months of the Effective Date unless extended in writing by the parties.

9.2 Apportionment of Costs: Costs of ordinary and capitalized maintenance (but not the costs of Changes and/or Additions themselves) of the Peninsula Main Line (other than Exclusive Commute Trackage and Designated Freight Trackage) for the first four (4) years after the Effective Date shall be solely the responsibility of Owner. Otherwise, Owner and User will share ordinary maintenance costs and capitalized maintenance costs for the Joint Facilities (excluding Exclusive Commute Trackage and Designated Freight Trackage) on the basis of the SFGTF, for which purpose User shall provide Owner with required data regarding User's Freight and Intercity Passenger Service operated on the Joint Facilities within ninety (90) days after the end of each Fiscal Year of this Agreement. Owner and User shall each respectively bear responsibility for the costs attributable to its respective Operator(s) and other entities acting on its behalf and for its account. The SFGTF shall be applied to the traffic on said Joint Facilities as follows:

(a) On the Peninsula Main Line. The SFGTF will be applied with Owner as the "dominant user." However, capital expenditures which are unique for Commuter Service only (e.g., electrification or station platforms) will be paid solely by Owner and not included in the SFGTF. Similarly, capital expenditures which are unique for Freight and Intercity Passenger Service (e.g., a gauntlet track in tunnels for oversized intermodal traffic) will be paid solely by User and not included in the SFGTF.

(b) On User's Cahill/Lick Line. The SFGTF will be applied with User as the "dominant user" until the total number of Owner's Trains in Gilroy Commuter Service in any Fiscal Year exceeds the number of User's Trains in Freight and Intercity Passenger Service in that Fiscal Year, in which case Owner will

become the "dominant user" as defined in the SFGTF for that Fiscal Year. Thereafter, the determination as to who is the "dominant user" shall be made for each Fiscal Year, with the party having the greater number of Trains designated as the "dominant user" for the applicable Fiscal Year. The same provisions prevail for applying capital expenditures which are unique to Gilroy Commuter Service or unique to Freight and Intercity Passenger Service to the SFGTF as stated in Section 9.2(a).

(c) On the main track portion of Exclusive Commute Trackage between Cahill Yard and Lick. During any period that User is provided access to and use of such Trackage pursuant to Section 2.9 hereof the SFGTF will be applied in the same manner as provided in Subsection 9.2(b) hereof, except that Owner shall be the initial "dominant user" instead of User, and the same conditions will prevail for applying capital expenditures which are unique to Commuter Service or unique to Freight and Intercity Passenger Service to the SFGTF as stated in Section 9.2(a).

9.3 Level of Maintenance: The Joint Facilities (other than Exclusive Commute Trackage) shall be maintained at the levels necessary to accommodate User's present and future Freight and Intercity Passenger Train operations, to allow User to maintain competitive service levels. The maintenance of Designated Freight Trackage shall be pursuant to an annual maintenance program mutually agreed by the parties. User shall maintain User's Cahill/Lick Line to a minimum of the existing condition as reflected in train speeds shown in User's Timetables, General Orders and Track Bulletins in effect as of the date of this Agreement, as attached hereto as Exhibit F. If Owner makes Changes and/or Additions to the User's Cahill/Lick Line in accordance with Section 10.8 below, User shall maintain User's Cahill/Lick Line as provided in Section 10.8 below.

9.4 Protection of Operations: Owner further agrees that maintenance and Changes and/or Additions activities affecting the Joint Facilities (excluding User's Cahill/Lick Line) shall not be scheduled to unreasonably delay or impair User's rights under Section 4.3 to provide Freight or Intercity Passenger Service on the Joint Facilities (excluding User's Cahill/Lick Line). User shall be given the same advance notice of maintenance plans and schedules as is provided to Owner's personnel. User further agrees that maintenance and Changes and/or Additions activities affecting User's Cahill/Lick Line shall not be scheduled to unreasonably delay or impair Owner's rights under Section 4.5 to provide Gilroy Commuter Service on User's Cahill/Lick Line. Owner shall be given the same advance notice of maintenance plans as is provided to User's personnel.

9.5 Assumption of Maintenance: In the event Owner becomes incapable of adequately performing maintenance functions hereunder for Freight and Intercity Passenger Service, arrangements will be

made for the prompt and orderly transfer of such functions to User. In the event User is physically performing maintenance on User's Cahill/Lick Line and becomes incapable of adequately performing maintenance functions hereunder for Gilroy Commuter Service, arrangements will be made for the prompt and orderly transfer of such functions to Owner.

Section 10. CAPITAL IMPROVEMENTS

10.1 Owner Responsibility: Owner shall provide, at its sole cost and expense, or reimburse User for the following Changes and/or Additions: (a) upgrading the present No. 1 Track to main line standards to not less than current Federal Railroad Administration Class 4 for the segment from Santa Clara Jct. at or near Milepost 44.0 to the magnetic north end of Cahill Yard at or near Milepost 46.75; (b) installation of a bidirectional centralized traffic control system for the No. 1 Track; and (c) all Changes and/or Additions on the Joint Facilities, excluding User's Cahill/Lick Line, (including but not limited to grade separations on the Peninsula Main Line) other than those Changes and/or Additions subject to Section 10.2 or Section 10.3. The Changes and/or Additions described in (a) and (b) above, which shall be owned by Owner, are set forth in Exhibit G and shall be completed within twenty-four (24) months of the Effective Date subject to the provisions of Section 2.13 hereof. The costs payable by Owner to User for the Changes and/or Additions described in (a) and (b) above shall be \$1,980,000. Payment shall be due and payable by Owner upon the later of: (1) the ninetieth (90th) day after completion of such Changes and/or Additions; or (2) the second anniversary of the Effective Date. If payment is not made by Owner within the period above specified, Owner will pay to User interest on the amounts due at a rate equal to the interest rate paid by User during the then current applicable period to its major bank lenders under its principal financing facility. Such interest shall be payable monthly in arrears and shall be due on the first day of each calendar month with the final interest payment due on the day that the remaining principal balance is paid in full. Notwithstanding anything to the contrary above, the full amount of principal and interest due and payable by Owner hereunder shall be paid not later than forty-eight (48) months after the Effective Date.

10.2 User Responsibility: User shall bear the costs of Changes and/or Additions on Joint Facilities (excluding User's Cahill/Lick Line), including Designated Freight Trackage, which User has requested to be effected and which are not used in connection with Commuter Service.

10.3 Shared Responsibility: The cost of Changes and/or Additions on the Joint Facilities (excluding User's Cahill/Lick

Line) which User has requested and, based thereon, which Owner has agreed to undertake and has actually undertaken and which are used for both User's and Owner's operations shall be shared on a basis to be agreed by the parties.

10.4 Grade Separations and Crossing: Notwithstanding any other provisions of Section 10 of this Agreement (other than Section 10.9), the cost of new and upgraded grade separations and new or upgraded pedestrian or vehicular road crossings at grade on the Santa Clara/Lick Line and the New Coast Main (but not including the cost of maintenance or capitalized maintenance of any of the foregoing) shall be borne by the parties as follows:

(a) **Owner Responsibility:** Owner shall be solely responsible for the cost and expense of those separations and crossings covered hereunder which (i) it has instituted and undertaken for its benefit and which were not requested by User, (ii) Owner has requested, and based thereon, User has actually undertaken, or (iii) were requested, required or funded by any other party and which Owner has instigated, induced, actively and substantially supported, or solely caused.

(b) **User Responsibility:** User shall be solely responsible for the cost and expense of those separations and crossings covered hereunder which (i) it has instituted and undertaken for its benefit and which were not requested by Owner, (ii) User has requested, and based thereon, Owner has actually undertaken, or (iii) were requested, required or funded by any other party and which User has instigated, induced, actively and substantially supported, or solely caused.

(c) **Shared Responsibility:** Owner and User shall share the costs and expenses for all other grade separations and crossings not subject to Subsections (a) and (b) above on the basis of the number of Trains of each party operated over the applicable grade separation or crossing during the twelve calendar month period immediately preceding the approval of the final plans for construction of such grade separation or crossing.

(d) **Identity of Parties:** For purposes of this Section 10.4, Owner shall include any one or more of Owner's member agencies, its Operator(s) or other entities acting on Owner's behalf or for its account, and its respective successors or assigns; and User shall include User's Operator(s) or other entities acting on User's behalf and for its account and its respective successors and assigns.

10.5 User's Improvements: Changes and/or Additions which are User's responsibility pursuant to Section 10.2 (if it decides to make such improvements) shall include, but are not limited to, the following: (i) two storage tracks and turnouts between Bayshore at Milepost 4.9 and Brisbane at Milepost 7.1, on the

westerly side of and no less than twenty (20) feet from Owner's eastward main track and trackage necessary to construct the wye and tail tracks at Brisbane and Bayshore (however, the twenty (20) foot space shall not be used for motor vehicles); (ii) a gauntlet track from the north end of Tunnel No. 3 (at Milepost 3.1) to the south end of Tunnel No. 4 (at Milepost 5.3) along with an interlocking signal protection system; (iii) four (4) new power operated crossovers between Owner's main tracks in connection with the construction of (i) and (ii) above; and, (iv) upon the approval of Owner (which shall not be unreasonably withheld), such additional support trackage and other facilities to meet User's Freight Service needs. Such construction, reconstruction, or use shall not unreasonably interfere with Owner's Commuter Service and the completion of the above projects shall not result in the degradation of the track and signal system of the Joint Facilities.

10.6 User Requests: Engineering and design plans for the construction of any Changes and/or Additions requested by User on Joint Facilities (other than User's Cahill/Lick Line) and on the New Coast Main (but only to the extent and at the location diverging from or connecting to those portions of the Joint Facilities other than User's Cahill/Lick Line) must be submitted to and approved by Owner prior to any construction. Owner's approval for such construction shall not be unreasonably withheld, conditioned or delayed.

10.7 Caltrans Improvements: Owner will arrange for Caltrans to waive any and all rights to receive payment for unamortized capital improvements on the Joint Facilities which Owner has funded and Owner shall continue the State of California's current participation in capital improvement programs without User's participation.

10.8 Changes and/or Additions to User's Cahill/Lick Line: Owner shall have the right to request Changes and/or Additions to User's Cahill/Lick Line. Any such Changes and/or Additions requested by Owner shall be subject to the approval of User (which shall not be unreasonably withheld, conditioned or delayed), and shall be at Owner's sole cost and expense. If Owner and User agree to the Changes and/or Additions, they shall further agree in writing as to the nature of such Changes and/or Additions, as to the level of utility to the line effected by the Changes and/or Additions, and the consequent level of maintenance required under Section 9.3, above, by reason of such Changes and/or Additions. Any Changes and/or Additions to User's Cahill/Lick Line effected by User pursuant to its rights under this Agreement shall be at User's sole cost and expense. The parties may, but are not required to, agree on a cost sharing for Changes and/or Additions to User's Cahill/Lick Line that are mutually beneficial.

10.9 Necessary Changes and/or Additions: Notwithstanding any other provisions of Section 10 of this

Agreement, if Changes and/or Additions are determined to be necessary to reinstate Service or are then currently necessary to maintain the integrity of the Trackage or Track Structure for its then current utility to both parties on User's Cahill/Lick Line, on the Trackage over which User's Cahill/Lick Line is situated, or, during any period that User is provided access to and use of such Trackage pursuant to Section 2.9 hereof, the main Trackage portion of Exclusive Commuter Trackage between Cahill Yard and Lick, the party owning the element of the affected Trackage or Track Structure ("responsible party") shall be responsible for undertaking the necessary Changes and/or Additions and Owner and User shall share the costs of such Changes and/or Additions on a mutually agreeable basis taking into account the benefits to each party derived from the continued use of the Trackage or Track Structure. (Notwithstanding use of the SFGTF elsewhere in this Agreement, there shall be no presumption that the SFGTF is the appropriate basis for allocating costs under this Section 10.9 in any given situation.) Changes and/or Additions effected pursuant to this Section shall be subject to the procedures set forth in Subsections (a) through (e) below.

(a) In the event of an occurrence (other than that for which a party is liable under Section 6) resulting in (i) cessation or interruption of Service and damage to the Trackage or Track Structure, and the costs of Changes and/or Additions to reinstate Service and to bring the Trackage and Track Structure to the then current level of utility is in excess of \$15,000,000, or (ii) significant disruption of Service and damage to the Trackage or Track Structure, and the costs of Changes and/or Additions to reinstate Service and to bring the Trackage and Track Structure to the then current level of utility is in excess of \$5,000,000 for the first twenty (20) years after the Effective Date and \$10,000,000 thereafter, the responsible party will elect whether to make the necessary Changes and/or Additions to reinstate Service and to bring the line to its then current level of utility. If the responsible party elects to abandon Service in lieu thereof, it will notify the other party, in which case the notified party will have the option to acquire the applicable Trackage or Track Structure at a value to be agreed upon; and, if the parties cannot agree on the value, the issue of the value will be submitted to arbitration pursuant to Section 7 hereof. If the responsible party elects to effect the Changes and/or Additions, it will so notify the other party, and the notified party will have the option of agreeing to share the costs of such Changes and/or Additions on the basis described above or to abandon its Service on the affected Trackage or Track Structure. If either party elects to abandon Service pursuant to this Subsection and is prevented from such abandonment by regulatory authority, it will share the costs of Changes and/or Additions with the party making any Changes and/or Additions under this Subsection on the basis described above.

(b) In the event of an occurrence (other than that for which a party is liable under Section 6) resulting in (i) cessation or interruption of Service and damage to the Trackage or Track Structure, and the costs of Changes and/or Additions to reinstate Service and to bring the Trackage and Track Structure to the then current level of utility does not exceed \$15,000,000, or (ii) significant disruption in service and damage to the Trackage or Track Structure, and the costs of Changes and/or Additions to reinstate Service and bring the Trackage and Track Structure to the then current level of utility does not exceed \$5,000,000 for the first twenty (20) years after the Effective Date and \$10,000,000 thereafter, the responsible party shall notify the other party and shall immediately undertake such Changes and/or Additions. The cost of such Changes and/or Additions shall be shared on the basis described above.

(c) In the event that either party determines that Changes and/or Additions are then currently necessary to maintain the integrity of the Trackage or Track Structure at its then current level of utility and Service thereover, such party shall notify the other party of its decision. If the notified party agrees with said decision, the responsible party shall undertake the necessary Changes and/or Additions and the costs of such Changes and/or Additions shall be shared on the basis described above. If the notified party does not agree with the notifying party's decision, the issue of whether the Changes and/or Additions are then currently necessary to maintain the integrity of the Trackage or Track Structure and Service thereover shall be arbitrated pursuant to Section 7 hereof. If it is determined that such Changes and/or Additions are then currently necessary, the costs of such Changes and/or Additions shall be shared on the basis described above.

(d) If the Changes and/or Additions subject to Subsections (a), (b) or (c) above result in Trackage or Track Structure of greater utility than that in place prior to such Changes and/or Additions, the incremental costs thereof, if any, attributable to such greater utility shall be borne as follows:

(i) If the increased utility results from the fact that the particular Change and/or Addition resulting in such increased utility was required by then current standards imposed by law, regulations or applicable codes in order to restore the Track or Track Structure to the level of utility existing prior to effecting the Change and/or Addition, the incremental costs shall be borne in the manner provided in Subsections (a), (b) or (c) above, whichever is applicable.

(ii) If the increased utility was requested by one of the parties, or effected by the party for its benefit, but otherwise would not have been required by then current standards to restore the Track Structure or Trackage to the level of utility

existing prior to the Change and/or Addition, then the incremental cost shall be borne by the party requesting or effecting the increased utility.

(e) In the event that the parties cannot agree on their respective share of costs for Changes and/or Additions described in (a), (b), and (c) above, the matter will be submitted to arbitration pursuant to Section 7 hereof. A decision from the arbitrator must be rendered prior to the commencement of any Changes and/or Additions effected pursuant to Subsection (c) hereof.

Section 11. MISCELLANEOUS

11.1 Other Costs: Costs of operations and administration will be borne by the party incurring such costs (unless one party's duty to perform the operations and to bear the costs thereof under the terms of this Agreement was undertaken by the other party pursuant to this Agreement because of the first party's failure to perform its obligations hereunder in which event the failing party shall reimburse the other party for such costs) and any costs which cannot be identified as a cost solely applicable to one party will be apportioned between the parties on the basis of the SFGTF applied in the same manner as in Section 9.2.

11.2 Force Majeure: Neither party shall be liable to the other in damages nor shall a default be deemed to have occurred, and each party shall be excused from performance of any of its obligations hereunder, except obligations involving the payment hereunder of money to the other party or to a third party, during the time when such non-performance is occasioned by fire, earthquake, flood, explosion, wreck, casualty, strike, unavoidable accident, riot, insurrection, civil disturbance, act of public enemy, embargo, war, act of God, inability to obtain labor, materials or supplies, or any other similar cause beyond the party's reasonable control; provided, that if either party suffers a work stoppage due to a labor dispute, such party shall make such reasonable efforts, if practicable, to staff its operations so as to minimize disruptions to the Service provided by the other party on the Joint Facilities.

11.3 Billing: Billing shall be accomplished on the basis of data contained in a billing form mutually agreed to between the parties. Such billing forms shall contain sufficient detail to permit computation of payments to be made hereunder. Unless otherwise specifically provided herein, billing shall be prepared in accordance with the schedules of the rules, Customary Additives, Materials Additives, material prices and equipment rental rates as agreed upon by the chief accounting officers of the parties hereto (or their designees) from time to time. User shall pay to Owner at

the office of the Treasurer of Owner, or at such other location as Owner may from time to time designate, all the compensation and charges of every name and nature which, in and by this Agreement User is required to pay in lawful money of the United States, within forty-five (45) days after the rendering of bills therefor by the Owner. Bills shall contain a statement of the amount due on account of the expenses incurred and services rendered during the billing period.

Errors or disputed items in any bill (including disputes arising under Section 9.1 but excluding disputes arising under Section 10.9) shall not be deemed a valid excuse for delaying payment, but shall be paid subject to subsequent adjustment; provided, no exception to any bill shall be honored, recognized or considered if filed after the expiration of three years from the last day of the calendar month during which the bill is rendered and no bill shall be rendered later than three years (i) after the last day of the calendar month in which the expense covered thereby is incurred, or (ii) if in connection with a project for which a Roadway Completion Report (as that term is presently understood by the railroad industry) is required, three years after the last day of the calendar month in which the Roadway Completion Report is made covering such project, or (iii) in the case of claims disputed as to amount or liability, after the amount is settled and/or the liability is established. This provision shall not limit the retroactive adjustment of billing made pursuant to: (a) exception taken to original accounting by or under authority of the ICC or (b) retroactive adjustment of wage rates and settlement of wage claims.

So much of the books, accounts and records of each party hereto as are related to the subject matter of this Agreement shall at all reasonable times be open to inspection by the authorized representatives and agents of the parties hereto and by the Auditor General of the State of California pursuant to Government Code Section 10532. If work relating to this Agreement is funded in whole or in part by a federal grant, the Comptroller General of the United States and authorized representatives of the federal agency furnishing the grant shall have the right to examine and audit such books, accounts and records in accordance with applicable federal laws and regulations.

Should any payment become payable by Owner to User under this Agreement, the above provisions of this Section shall apply with User as the billing party and Owner as the paying party.

In the event that either party fails to make any payment required to be made to the other party in accordance with the provisions of this Agreement by the date upon which it is due, interest shall accrue from the due date until payment is made, at the Federal Discount Rate in effect on the due date plus three (3) percent; provided, however, that no interest shall be due and

payable on any amounts in dispute which are determined, either by subsequent review or by arbitration, to be not validly due hereunder.

11.4 Notices: All notices and other communications under this Agreement shall be in writing and shall be deemed to have been duly given (i) on the date of delivery, if delivered personally to the party to whom notice is given, or if made by telecopy directed to the party to whom notice is to be given at the telecopy number listed below, or (ii) on receipt, if mailed to the party to whom notice is to be given by registered or certified mail, return receipt requested, postage prepaid and properly addressed as follows:

If intended for Owner:

Peninsula Corridor Joint Powers Board
1250 San Carlos Avenue
San Carlos, CA 94070-1306
Attention: Gerald T. Haugh
Phone No.: 415-508-6221
Telecopy No.: 415-508-0281

With a copy to:

Hanson, Bridgett, Marcus, Vlahos & Rudy
333 Market Street, Suite 2300
San Francisco, CA 94105
Attention: David J. Miller
Phone No.: 415-777-3200
Telecopy No.: 415-541-9474

If intended for User:

Executive Vice President-Operations
Southern Pacific Transportation Company
One Market Plaza
San Francisco, CA 94105
Phone No.: 415-541-2125
Telecopy No. 415-541-1829

With a copy to:

Director-Contracts & Joint Facilities
Southern Pacific Transportation Company
One Market Plaza, Room 1004-P
San Francisco, CA 94105
Phone No.: 415-541-2772
Telecopy No. 415-541-1802

And to:

Vice President & General Counsel
Southern Pacific Transportation Company
One Market Plaza
San Francisco, CA 94105
Phone No.: 415-541-1781
Telecopy No. 415-495-5436

A party may change its person designated to receive notice, its telecopy number, or its address from time to time by giving notice to the other party in accordance with the procedures set forth in this Section 11.4.

11.5 Preferences: Except as hereafter determined by the mutual agreement of the parties, neither of them shall seek in any administrative, legislative or judicial proceeding or otherwise to obtain rights in the use of the properties subject to this Agreement in excess of those provided to it, or seek to diminish such rights provided to the other. Notwithstanding the provisions of Section 7, the parties shall have recourse to the courts or any governmental agency having jurisdiction in the event of a violation of this Section 11.5, and, in addition to any available remedies for damages, the remedy of specific enforcement shall be available with respect thereto.

11.6 Headings: The section and subsection headings in this Agreement are for convenience only and shall not be used in its interpretation or considered part of this Agreement.

11.7 Recording: Either party may, at its sole election and expense, record this Agreement with the appropriate governmental authorities. The parties agree that, should it be necessary to modify or amend any property description for such recording purposes, they shall cooperate in making said modifications or amendments.

11.8 Entire Agreement: This Agreement and its Exhibits together with the Sale Agreement represent the entire Agreement between Owner and User concerning the terms of the trackage rights retained and confirmed hereby.

11.9 Amendments: No modification, addition or amendment to this Agreement shall be effective unless and until such modification, addition or amendment is reduced to a writing executed by authorized officers or agents of each party and delivered to the other party.

11.10 Not For The Benefit Of Others: This Agreement and each and every provision herein is for the exclusive benefit of the parties hereto and not for the benefit of any third party. Nothing herein shall be construed to create or increase any right in any

third person to recover by way of damages or otherwise against any of the parties hereto.

11.11 Access: Each party, its employees, agents, and designees, shall have access to the Joint Facilities and to the operating and maintenance records of the other concerning the movement of Trains or Equipment on and maintenance of the Joint Facilities for the purpose of monitoring conformance to the principles and standards expressed in this Agreement.

11.12 Effective Date: The Effective Date of this Agreement shall be contingent upon receipt of all necessary regulatory approvals or exemptions and, assuming such receipt, shall be the earlier of (i) the date that an Operator commences Commuter Service for Owner or (ii) June 30, 1992; provided, however, that portion of this Agreement involving Bridge Trackage Rights, Gilroy Commuter Service and the use by Owner of User's Cahill/Lick Line in connection therewith (including any rights of User pursuant to Section 2.9 hereof), shall be effective only as of the "Effective Date" of the Lick/Gilroy Trackage Rights Agreement (as said term is defined in such Agreement). Any necessary regulatory approvals or exemptions for such Bridge Trackage Rights, Gilroy Commuter Service, and the use of User's Cahill/Lick Line shall be sought concurrent with any necessary approvals or exemptions of the Lick/Gilroy Trackage Rights Agreement. During that period between receipt of necessary regulatory approvals or exemptions and the Effective Date, User shall have the right to conduct Freight and Intercity Passenger Service and operations in support thereof over the Joint Facilities (excluding User's Cahill/Lick Line) but only in the same manner and to the same extent as provided as of the date hereof. User agrees during such period to indemnify and defend Owner against all liability in connection with User's Freight and Intercity Passenger Service except to the extent caused by Owner's willful or negligent acts or omissions. During the interim period, User shall provide Commuter Service for Owner as interim Operator pursuant to its service contract with the State of California Department of Transportation.

11.13 Track Agreements. As a condition precedent to the effectiveness of this Agreement, User shall deliver to Owner documentation satisfactory to Owner, assigning to Owner as an additional beneficiary, User's rights and benefits of the indemnity provisions contained in the track agreements identified in Exhibit H. User will cooperate with Owner to jointly call on parties with whom User has track agreements to have such parties assign the indemnity provisions of such agreements directly to Owner.

11.14 Sale Agreement Controlling. This Agreement is entered into by the parties pursuant to and in furtherance of the Sale Agreement. In the event that there are terms in this Agreement which are inconsistent with the terms of the Sale Agreement, the terms of the Sale Agreement shall govern. Except as may be

otherwise specifically stated herein, nothing contained in this Agreement shall be construed to limit or otherwise modify the rights and obligations of the parties under the Sale Agreement.

11.15 **Survival of Rights.** The rights of a party under this Agreement shall survive the bankruptcy or other insolvency of the other party to the maximum extent permitted by law.

11.16 **Quitclaim of User's Easement.** From time to time, Owner may desire to develop portions of the Joint Facilities (excluding the New Coast Main) which are not being used by User for Freight or Intercity Passenger Service. In connection with such developments, Owner may desire User to release its easement with respect to specified portions of the Joint Facilities (excluding the New Coast Main) in order to permit such development. Any such quitclaim shall be subject to the procedures set forth below and shall be further subject to any necessary regulatory approvals or exemptions:

(a) At any time after the Effective Date, and from time to time thereafter, Owner may request User to release a portion of its railroad easement. User shall release such easement upon the following terms and conditions:

Each request (a "Request") shall be in writing and shall contain (i) a legal description of the portion of the Joint Facilities (excluding the New Coast Main) to be released (the "Requested Portion"); (ii) a survey of the Requested Portion prepared by an engineer licensed by the State of California and showing the location of all railroad lines within 25 feet of the Requested Portion; (iii) a reasonably detailed description of the improvements to be constructed by Owner on the Requested Portion; (iv) to the extent available, the latest plans and specifications, conceptual drawings, renderings or similar graphic material regarding the proposed development; (v) an estimate of the costs of the development and the manner in which funds therefor will be provided; and (vi) the proposed times for commencement and completion of the development.

(b) Within 60 days after the receipt of the information requested by Subsection (a) above, User will, except as set forth in Subsection (c) below, execute and deliver to Owner a quitclaim deed in form and substance reasonably satisfactory to Owner releasing the Requested Portion from User's easement. Such quitclaim deed shall reserve to User any fiber optic easement executed pursuant to Section 7.1(a) of the Sale Agreement.

(c) User shall not be required to execute or deliver such quitclaim deed if (i) any part of the Requested Portion lies within 25 feet of any property (A) then used by User for its Freight or Intercity Passenger Service operations, or (B) for which User has a reasonable certainty of using for such purposes, as

further described below, or (ii) Owner's proposed development will not be commenced within twelve (12) months of the Request. The provisions of Subsection (c)(i)(B) hereof shall not apply to Trackage which has not been used for a continuous five-year period and is thereby subject to the provisions of Section 2.17.

(d) If within 60 days after receiving a Request User determines that under Subsection (c) it is not required to execute and deliver a quitclaim deed for a Requested Parcel, User shall, within such period, notify Owner of such fact in writing stating the reason therefor (a "Refusal Notice"). If User's reason for refusing to execute and deliver a quitclaim deed is based upon the fact that User has a reasonable certainty that all or a portion of the Requested Parcel will be used for its Freight or Intercity Passenger Service operations, it shall provide Owner with (i) a reasonably detailed statement of such planned use, (ii) the most recent plans or specifications, conceptual drawings or other graphic materials with respect to such planned use, (iii) an estimate of the cost of constructing any improvements needed for such planned use, (iv) a statement of the source of funds for such planned use, and (e) the proposed time for commencement of the planned use. The provisions of the preceding sentence shall not apply to Trackage which has not been used for a continuous five-year period and is thereby subject to the provisions of Section 2.17. Any planned use of the property by User for its Freight or Intercity Passenger Service operations will not be considered a reasonably certain planned use, if it is unlikely that construction of the improvements therefor will not commence within twelve (12) months after the Refusal Notice.

(e) If Owner disagrees with User's determination that it is not required to deliver a quitclaim deed with respect to any request, Owner may submit such matter to arbitration pursuant to Section 7 hereof within 60 days after receiving a Refusal Notice.

11.17 Counterparts: This Agreement may be executed in any number of counterparts, each of which shall be and shall be taken to be an original, and all such counterparts shall together constitute one and the same instrument.

11.18 User's Separate Property: Trackage and/or other facilities owned by User that are located on real property owned by User shall not be part of the Designated Freight Trackage, Joint Facilities, or Exclusive Commute Trackage.

IN WITNESS WHEREOF, Owner and User have executed this Agreement as of the day and year first written above.

PENINSULA CORRIDOR STUDY
JOINT POWERS BOARD

SOUTHERN PACIFIC
TRANSPORTATION COMPANY

By: Tom Nolan
Name:
Title:

By: _____
Name:
Title:

Approved as to Form:
*Henson, Budgett, Marcus, Vlachos
and Rudy*
by John J. Vlachos

Approved as to Form:

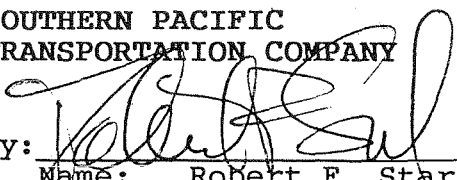
6/22/01
OWNER
6/22/01
USER

IN WITNESS WHEREOF, JPB and SPT have executed this Agreement as of the day and year first written above.

PENINSULA CORRIDOR STUDY
JOINT POWERS BOARD

SOUTHERN PACIFIC
TRANSPORTATION COMPANY

By: _____
Name:
Title:

By: 
Name: Robert F. Starzel
Title: Vice Chairman

Approved as to Form:

Approved as to Form: