

**THIS STAFF REPORT COVERS CALENDAR ITEM NO.: 12
FOR THE MEETING OF: September 20, 2007**

TRANSBAY JOINT POWERS AUTHORITY

BRIEF DESCRIPTION:

Request that the Board adopt a policy authorizing the Executive Director to execute standard form right-of-entry agreements with property owners to allow the TJPA's consultants to conduct on-site investigations of real property planned to be acquired by the TJPA for the Program.

REPORT:

Under the TJPA Articles and Bylaws, the Board of Directors is the governing body of the TJPA and establishes all significant policies for the Transbay Transit Center Program ("Program"). Under the TJPA Bylaws, the Executive Director is responsible for implementing these policies through supervision, direction and control of the day-to-day business and administration of the TJPA. Among the responsibilities of the Executive Director are the acquisition, control, and management of all real property associated with the Program, as well as oversight of the design and engineering of projects in support of the Transit Center Program.

The State of California and the FTA, two of the funding agencies for the Program, require that before the TJPA acquires real property necessary for the Program, the property either be cleaned of contamination or the purchase price of the property be reduced to account for the cost to clean the property. Accordingly, TJPA staff and consultants will need access to all real property to be acquired for the Program, as well as certain properties adjacent to properties to be acquired by the TJPA, for on-site investigations in advance of final negotiation for property acquisitions to determine the type and extent of below-grade hazardous materials that may be encountered during construction and that may affect the fair market value of the property. In addition, these site investigations are necessary to gather site-specific geotechnical information for foundation design and to explore the possibility of encountering archaeological resources during construction work. The TJPA will also require on-site investigation of existing buildings to determine the type and extent of hazardous materials in these structures.

With respect to the 17 separate properties not currently owned or under the control of TJPA necessary for Phase 1 of the Program, the TJPA will seek right-to-enter agreements with the respective property owners. Most property owners prefer to close purchase and sale transactions rapidly following the start of negotiations. Moreover, insofar as the TJPA can move quickly to close purchase and sale transactions, the TJPA will ordinarily be in a position to negotiate more favorable terms. The site investigations referenced above requiring permits to enter are essential prerequisites to reaching a final purchase

and sale agreement. Moreover, it may be necessary for the TJPA to obtain entry to property adjoining property to be used for the Program to: (a) investigate geotechnical conditions that may affect construction of the Program; and (b) inspect buildings adjacent to Program structures to establish a pre-construction baseline of cracking and settling to allow the TJPA to assess claims against the TJPA by such adjoining property owners for cracking and settling during or after construction.

To facilitate the efficient execution of these right-to-enter agreements and to relieve the Board of responsibility for approving 17 or more similar agreements, the Staff has developed a Standard Form Right-of-Entry Agreement (attached) and recommends that the Board adopt a policy authorizing the Executive Director to execute such agreements to enter real property approved by legal counsel, without the necessity of Board approval of each agreement, unless the Executive Director proposes a right-of-entry agreement that materially departs from the provisions of the Standard Form Right-of-Entry Agreement or in circumstances where entry to property for site investigation would present a higher than normal risk to the TJPA, in which case the Executive Director would seek Board approval of the agreement.

Such right-to-enter agreements are standard practice in the buying and selling of real estate and construction in urban areas. The form of each right-to-enter agreement would be in substantially the same form as the attached Standard Form Right-of-Entry Agreement. These agreements typically require the permittee/buyer to repair damage to the property at its own cost and defend and indemnify the property owner from claims by third parties resulting from the permittee/buyer's activities on the property.

The authority to enter into these routine right-to-enter agreements sought in this resolution is supported by precedent. For the reasons of efficiency listed above, the City and County of San Francisco Board of Supervisors has granted the City's Director of Property blanket authority to enter such agreements on behalf of the City. The Director of Property customarily uses a standard form agreement approved by counsel.

The Executive Director would report periodically to the Board on the activities undertaken under the right to enter agreements.

The TJPA Staff has negotiated a right-of-entry agreement with Union Pacific, the owner of 200 Main, a property necessary for the Temporary Terminal. Although at Union Pacific's request the parties used Union Pacific's standard form right-of-entry agreement, the parties negotiated an agreement that contains provisions substantially the same as the Staff's Standard Form Right-of-Entry Agreement. Execution of this agreement is necessary for the TJPA's consultants to proceed with site investigation of 200 Main.

RECOMMENDATION:

The Staff recommends that the Board authorize the Executive Director to execute right-to-enter agreements for real property to be acquired by the TJPA for the Program or properties adjacent to the right of way for the Program that may be affected by Program

construction, where such agreements are in substantially the same form as the attached Standard Form Right-of-Entry Agreement and are approved by legal counsel. The Staff further recommends that the Board authorize the Executive Director to sign the attached Right of Entry Agreement with Union Pacific.

ENCLOSURES:

1. Standard Form Right-of-Entry Agreement
2. Right of Entry Agreement with Union Pacific
3. Resolution

**TRANSBAY JOINT POWERS AUTHORITY
BOARD OF DIRECTORS**

Resolution No. _____

WHEREAS, As the governing body of the TJPA, the TJPA Board of Directors is responsible for establishing the policies of the Transbay Transit Center Program (“Program”); and

WHEREAS, Under the Bylaws of the TJPA, the Executive Director generally supervises, directs, and controls the day-to-day business and administration of the TJPA on matters that do not raise significant questions of Program policy; and

WHEREAS, Under the Bylaws the Executive Director is responsible for the acquisition, control, and management of all real property associated with the Program; and

WHEREAS, The public agencies that provide funding for the Program require that the TJPA conduct site investigations of real property before the property is acquired for the Program; and

WHEREAS, Over the course of development of the Program, the TJPA will require entry to more than 17 properties to be acquired for the Program, and additional properties adjacent to properties to be acquired for the Program, for various technical studies; and

WHEREAS, The TJPA Staff has developed a Standard Form of Right-of-Entry Agreement that would allow the TJPA to conduct site investigations before acquiring real property for the Program and of property adjacent to properties acquired for the Program; and

WHEREAS, A policy of the Board authorizing the Executive Director to enter into the Standard Form Right-of-Entry Agreement with the owners of property to be acquired for the Program would allow the TJPA to expedite negotiations for purchase of right of way for the Program and relieve the Board of the burden of approving more than 17 individual, similar right-of-entry agreements; and

WHEREAS, Such policy would provide that in particular cases where a right-of-entry agreement would materially depart from the Standard Form Right-of-Entry Agreement or where entry to property would present a higher than normal risk to the TJPA, the Executive Director would seek Board approval of the agreement; and

WHEREAS, The TJPA has negotiated a Right of Entry Agreement with Union Pacific Railroad, the owner of 200 Main Street, a property necessary for acquisition for the Temporary Terminal; and

WHEREAS, The Union Pacific Right of Entry Agreement is substantially similar to the Standard Form Right-of-Entry Agreement developed by Staff; and

WHEREAS, Staff recommends that the Board approve the agreement with Union Pacific to allow the TJPA's consultants immediate access to 200 Main for site investigations; now, therefore, be it

RESOLVED, That the Board authorizes the Executive Director to execute right-to-enter agreements for real property to be acquired by the TJPA for the Program, or properties adjacent to the right-of-way for the Program that may be affected by Program construction, in substantially the same form as the Standard Form Agreement submitted to the Board with this item, where such agreements are approved by legal counsel; and, be it

FURTHER RESOLVED, That the Executive Director is authorized to sign right-to-enter agreements that would require the TJPA to repair damage to the property at its own cost and defend and indemnify the property owner from claims by third parties resulting from the TJPA's activities on the property; and, be it

FURTHER RESOLVED, That the Executive Director is authorized to sign the Right of Entry Agreement with Union Pacific.

I hereby certify that the foregoing resolution was adopted by the Transbay Joint Powers Authority Board of Directors at its meeting of September 20, 2007.

Secretary, Transbay Joint Powers Authority

TJPA STANDARD FORM RIGHT-OF-ENTRY AGREEMENT

This Right-of-Entry Agreement dated for reference purposes only as _____, 2007 is made by and between the Transbay Joint Powers Authority (“TJPA”) and _____, owner of the property on Block _____, Lot _____ at the address _____ in San Francisco, California (“Owner”).

TJPA and Owner Agree as follows:

- A. Grant of Right of Entry. Owner grants to the TJPA and its officers, employees, agents, consultants, contractors and authorized representatives relating to the construction work for the Transbay Transit Center Program (collectively, “Agents”) an irrevocable right to enter upon and use that certain real property owned by Owner, located in the City and County of San Francisco and known as xxx, San Francisco, California (the “Property”) for the purposes and upon the terms and conditions set forth below. This Permit gives TJPA a temporary, non-possessory and non-exclusive license to use the Property and is not intended to grant any interest in real property.
- B. Use of Property. As part of design efforts for the Transbay Transit Center Program in the areas of San Francisco described on the attached map, TJPA and its Agents shall have the right to enter the Property during normal business hours for the purpose of performing the following work (collectively, the “work”), which are checked below:
 - 1. Engineering surveys for the purposes of defining the parcel boundaries, locating surface features on the parcel.
 - 2. Geotechnical work consisting of soil borings and soil sampling.
 - 3. Visual inspections of the exterior and interior of buildings, structures and other features of the property, including basements and crawl spaces. Photographs will be taken to document the building’s construction type and the existing condition of the property.
 - 4. Engineering survey of the building structure to document: a) the size and location of structural and non-structural elements, including but not limited to columns, walls, beams, foundations; b) major utilities and building services, such as electrical, mechanical and communications rooms; and c) elevations of existing floor and basement elevations.
- C. Request for Existing Documents. TJPA requests that any drawings, specifications, photographs or other records that describe the structures or boundaries of this property shall be made available for TJPA review and reproduction. TJPA also requests permission to secure from the Department of

Building Inspection and the Planning Department any drawings, permit applications or documents that are on file and are related to the property.

- D. Notification of Commencement of Work. TJPA shall coordinate with Owner and give Owner ____ days' written notice prior to entering the Property to commence the work. The written notice shall include a description of the work to be performed.
- E. Term of Permit. The rights granted to TJPA under this permit shall commence on ____, 2007 and shall terminate on ____ 200__ or on the earlier of the following dates:
1. The date on which TJPA notifies Owner that TJPA does not intend to commence the work or TJPA has elected to terminate the work under Section G below
 2. The date on which TJPA notifies Owner that the work has been completed and that the City has completed all post-construction inspections.
- F. Commencement/Termination Dates. This Permit refers to the dates on which this Permit commences and terminates as the "Commencement Date" and the "Termination Date."
- G. TJPA's Right to Terminate Work. Notwithstanding anything to the contrary contained in this Permit, TJPA shall have no obligation to commence or complete any of the work. Without limiting the foregoing, TJPA reserves the right, at its sole option, to withdraw from the work at any time prior to completion if TJPA determines, in its sole and absolute discretion, that it is inappropriate or impractical to complete the work for any reason whatsoever, including, by way of example only and without limitation, economic unfeasibility, unavailability of funds, impracticality or difficulty of site conditions, or TJPA's re-evaluation of the desirability of the Project. If TJPA elects to terminate the work prior to completion, TJPA shall make reasonable efforts to return the Property to its condition prior to commencement of work related to the Project, and the term of this Permit shall be extended if necessary for this purpose.
- H. Repair of Damage. If any portion of the Owner's property is damaged as a direct result of any of the work conducted by TJPA, TJPA shall, at its sole expense, repair any and all such damage and restore Owner's property to its previous condition.
- I. Insurance. Owner acknowledges that TJPA maintains comprehensive general liability insurance or other insurance with respect to this Permit and the activities allowed hereunder.
- J. Non-Liability of Owner. TJPA shall indemnify and hold harmless Owner from any damage to the Property including compensation for any loss of income and any bodily injury or death resulting directly from the use of the Property by TJPA

or its Agents provided, however, that TJPA shall not be obligated to indemnify Owner to the extent any claim arises out of the negligence or willful misconduct of Owner.

- K. Authority of Owner. Owner represents and warrants to TJPA that Owner is the sole owner in fee of the Property, that no other person or entity has any ownership or possessory interest in any portion of the Property, and that Owner has full right and authority to grant this Permit to TJPA.
- L. Transfer by Owner. In the event that title to or possession of the Property or any portion thereof, is sold, conveyed or otherwise transferred for any reason before the Termination Date, Owner shall immediately notify TJPA in writing of such transfer and the name and address of the new owner or occupant.
- M. No Joint Venture or Partnership. This permit does not create a joint venture or partnership between Owner and TJPA as to any activity conducted by TJPA on, in or under Owner's property. This permit does not constitute authorization or approval by TJPA of any activities conducted by Owner on, in or under the property.
- N. Notice. Except as otherwise specified herein, any notices given under this Permit shall be effective only if in writing and given by delivering the notice in person, by sending it first class mail or certified mail with a return receipt requested or U.S. Express Mail, return receipt requested, with postage prepaid, addressed as follows:

TJPA: Transbay Joint Powers Authority
201 Mission Street, Suite 1960
San Francisco, CA 94105
Attn: Maria Ayerdi, Executive Director

Owner: tbd

- O. Notices herein shall be deemed given two (2) days after the date it is mailed if sent by first class, certified or U.S. Express Mail, or upon the date personal delivery is made.
- P. General Provisions.
 - 1. This Permit may be amended or modified only in writing signed by TJPA and Owner.
 - 2. No waiver of by any party of any of the provisions of this Permit shall be effective unless in writing and signed by an officer or other authorized representative and only to the extent expressly provided in such written waiver.

3. All approvals and determinations of TJPA requested or required hereunder may be made in the sole and absolute discretion of the TJPA Executive Director or other authorized TJPA representative.
4. This instrument contains the entire agreement between the parties.
5. The section and other headings of this Permit are for convenience of reference only and shall be disregarded in the interpretation of this Permit.
6. This Permit shall be governed by California law.
7. This Permit shall be binding upon and inure to the benefit of the parties and their respective successor and assigns.
8. If either party commences an action against the other under this Permit, the prevailing party shall be entitled to recover from the other reasonable attorney's fees and costs. For purpose hereof, reasonable attorneys' fees of TJPA shall be based on fees regularly charged by private attorneys in San Francisco with comparable experience.
9. If owner consists of more than one person, then the obligation of each person shall be joint and several.

Owner

Dated: _____, 2007 By: _____

Its: _____

Transbay Joint Powers Authority

Dated: _____, 2007 By: _____

Its: _____

APPROVED AS TO FORM

TJPA Legal Counsel

RECOMMEND APPROVAL

Right of Way Coordinator

RIGHT OF ENTRY AGREEMENT

THIS AGREEMENT is made and entered into as of _____, 2007, by and between **UNION PACIFIC RAILROAD COMPANY**, a Delaware corporation ("Railroad"), and **TRANSBAY JOINT POWERS AUTHORITY**, a joint powers agency created under California Government Code Sections 6500 *et seq.*, to be addressed at 201 Mission Street, Suite 1960, San Francisco, California 94105 ("Licensee").

RECITALS:

Licensee, in connection with discussions with Railroad about the possible purchase by Licensee of certain property in the City and County of San Francisco, California, commonly known as 200 Main Street and shown on the print attached hereto as **Exhibit A** and hereby made a part hereof (the "Property"), wishes to have access to the Property for the purpose of conducting Phase 1 and Phase 2 environmental studies.

AGREEMENT:

NOW, THEREFORE, it is mutually agreed by and between Railroad and Licensee as follows:

Article I. DEFINITION OF LICENSEE.

For purposes of this Agreement, all references in this Agreement to the Licensee shall include the Licensee's contractors, subcontractors, officers, agents and employees, and others acting under its or their authority.

Article II. RIGHT GRANTED; PURPOSE.

The Railroad hereby grants to the Licensee the right, during the term hereinafter stated and upon and subject to each and all of the terms, provisions and conditions herein contained, to enter upon and have ingress to and egress from the Property for the purpose of performing Phase 1 and Phase 2 environmental studies of the Property. The Phase 1 study will include, among other things, a reconnaissance survey of the Property, interviews with the owner and tenant, and inspections of the Property for asbestos and lead-based paint. The Phase 2 study will include, among other things, soils borings at various locations and depths to collect samples for chemical analysis and backfilling of drilled boring holes. Licensee shall give Railroad advance notice of any environmental sampling of the Property, so that Railroad or its consultants will have the opportunity to be present. Any environmental sampling shall be conducted in accordance with generally acceptable professional standards. Licensee shall provide Railroad, for Railroad's review and approval, with a copy of Licensee's environmental assessment and sampling plan prior to carrying out such plan, and shall deliver to Railroad any data or report obtained from any environmental investigation and/or other related work that may be performed on the Property, and all related documents containing test results and information derived from the Property (hereinafter "the Environmental Report") promptly after Licensee's receipt thereof. The test results and information derived from the Property may be consolidated in a single Environmental Report with test results and information from Phase 1 and 2 environmental studies on surrounding properties on the same

block bounded by Main, Mission, Beale, and Folsom Streets. The right herein granted to Licensee is limited to the Property, or as designated by the Railroad Representative named in Article IV.

Article III. TERMS AND CONDITIONS CONTAINED IN EXHIBITS B AND C.

The terms and conditions contained in **Exhibits B and C**, hereto attached, are hereby made a part of this Agreement.

Article IV. ALL EXPENSES TO BE BORNE BY LICENSEE;
RAILROAD REPRESENTATIVE.

The Licensee shall bear any and all costs and expenses associated with any work performed by the Licensee. All work performed by Licensee on the Property shall be performed in a manner satisfactory to the representative local Manager of Environmental Site Remediation of the Railroad or his authorized representative (hereinafter the Railroad Representative):

Michael J. Grant
Manager Environmental Site Remediation
Union Pacific Railroad Company
1408 Middle Harbor Road
Oakland, California 94607
Telephone: (510) 891-7433
Facsimile: (510) 233-2791
E-Mail: mjgrant@up.com

Article V. TERM; TERMINATION.

A. The grant of right herein made to Licensee shall commence on the date that this Agreement is signed by both parties, and continue through and including October 31, 2007, unless sooner terminated as herein provided, or at such time as Licensee has completed its work on the Property, whichever is earlier. Licensee agrees to notify the Railroad Representative in writing when it has completed its work on the Property.

B. This Agreement may be terminated by either party on ten (10) days' written notice to the other party.

C. This Agreement shall not be effective unless and until it is approved by the TJPA Board of Directors and signed by the TJPA's Executive Director.

Article VI. CERTIFICATE OF INSURANCE.

A. Before commencing any work, the Licensee shall provide the Railroad with a Certificate issued by its insurance carrier providing the insurance coverage required pursuant to **Exhibit C** of this Agreement in a policy which contains the following type of endorsement:

"Union Pacific Railroad Company is named as additional insured with respect to all liabilities arising out of Insured's, as Licensee, performance of any work on the Property of the Railroad."

B. All insurance correspondence shall be directed to: Union Pacific Railroad Company, Director (Attn.: Joan Preble- Folder No. 1643-32), 1400 Douglas Street STOP 1690, Omaha, Nebraska 68179-1690.

Article VII. PROTECTION OF FIBER OPTIC CABLE SYSTEMS.

Fiber optic cable systems may be buried on the Property. Protection of the fiber optic cable systems is of extreme importance since any break could disrupt service to users resulting in business interruption and loss of revenue and profits. Prior to beginning any work, the Licensee shall telephone the Railroad at **1-800-336-9193** (a 24-hour number) to determine if fiber optic cable is buried anywhere on the Property. If it is, the Licensee shall also comply with and be subject to the provisions contained in Section 6 of **Exhibit B**.

Article VIII. ENFORCEABILITY; CHOICE OF LAW; CHOICE OF FORUM.

This Agreement will be governed, construed, and enforced in accordance with the laws of the State of California. Litigation arising out of or connected with this Agreement may be instituted and maintained in the courts of the State of California only, and the parties consent to jurisdiction over their person and over the subject matter of any such litigation, in those courts, and consent to service of process issued by such courts.

Article IX. SPECIAL PROVISION.

Intentionally Deleted.

Article X. CONFIDENTIALITY.

A. Licensee acknowledges that the Environmental Report is confidential in nature and agrees that Licensee shall distribute the Environmental Report to only those officers, directors, employees and consultants of Licensee who are directly involved in the environmental investigation and/or other related work that may be performed on the Property, except this provision shall not apply to any instance when Licensee is required by law to disclose information in or distribute the Environmental Report, as determined by Licensee's counsel in a written opinion, copy of which Licensee shall provide to Railroad.

B. The Licensee agrees to take all reasonable measures to assure continuous confidentiality and protection of the Environmental Report, including keeping copies to a minimum and maintaining a log that identifies who has possession of the Environmental Report.

C. Adequate instructions shall be issued by the Licensee to all affected officers, directors, employees and consultants of the Licensee as necessary to satisfy the confidentiality provisions in this Article X.

D. The consultants or advisors hired by Licensee to conduct, prepare and review the Environmental Report shall not begin any work on the Property until such advisors or consultants agree in writing to adhere to all the provisions of this Agreement, including, but not limited to, the confidentiality provisions. Licensee's lenders and legal counsel may also review the Environmental Report, but only after agreeing in writing to adhere to the confidentiality provisions.

E. Railroad shall have the right to enjoin the Licensee and the Licensee's consultants and advisors in any court of competent jurisdiction, in addition to any other remedy at law, for breach of the confidentiality provisions of this Agreement.

F. The terms contained in this Agreement shall survive completion of discussions and/or negotiations, except the confidentiality provisions contained in Article X shall terminate as of the closing date of the proposed transaction with respect to any documents assigned to Licensee.

Article XI. LICENSEE SHALL FURNISH INFORMATION TO THE RAILROAD.

Prior to entering the Property, the Licensee shall also furnish to Railroad a copy of all correspondence (which shall remain a continuing obligation that includes all past and any future correspondence) with any regulatory agencies, or others, that may be involved in this project and that relates to the environmental studies conducted under this Agreement; a copy of a work plan and a location plan. Prior to the conclusion of this Agreement, the Licensee shall also furnish to the Railroad a copy of all boring logs, and all analytical results obtained hereunder; and advise the Railroad of any and all clean-up activities undertaken with respect to Licensee's environmental studies of the Property and the results and conclusion of same. All required information shall be directed to Union Pacific Railroad Company, c/o Mr. Joel Strafelda, 1400 Douglas Street, STOP 1030, Omaha, NE 68179-1030.

Article XII. NO COMMITMENT TO SELL.

Any proposal by Licensee to purchase the Property is being considered as a separate matter and nothing contained in this Agreement shall in any way be construed as a commitment on Railroad's part that said proposal shall be accepted and approved.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the date first herein written.

UNION PACIFIC RAILROAD COMPANY
Federal Taxpayer I.D. #94-6001323

TRANSBAY JOINT POWERS AUTHORITY

By: _____
Director or Manager – Contracts

By: _____
Maria Ayerdi – Executive Director

Dated: _____

Dated: _____

(Pursuant to ordinance, resolution, or other evidence of proper authority to execute this instrument, a copy of which shall be attached to the Railroad's original counterpart of this document.)

EXHIBIT B

Section 1 - NOTICE OF COMMENCEMENT OF WORK.

The Licensee agrees to notify the Railroad Representative at least ten (10) days in advance of Licensee commencing its work.

Section 2 - LIMITATION AND SUBORDINATION OF RIGHTS GRANTED.

a. The foregoing grant of right is subject and subordinate to the prior and continuing right and obligation of the Railroad to use and maintain its entire property including the right and power of the Railroad to construct, maintain, repair, renew, use, operate, change, modify or relocate communication, fiber optics, or other wirelines, pipelines and other facilities upon, along or across any or all parts of the Property, all or any of which may be freely done at any time or times by the Railroad without liability to the Licensee or to any other party for compensation or damages.

b. The foregoing grant is also subject to all outstanding superior rights (including those in favor of licensees and lessees of the Property, and others) and the right of the Railroad to renew and extend the same, and is made without covenant of title or for quiet enjoyment.

Section 3 - NO INTERFERENCE WITH RAILROAD'S OPERATION.

No work performed by Licensee shall cause any interference with the constant, continuous and uninterrupted use of the Property by the Railroad, its lessees, licensees or others, unless specifically permitted under this Agreement, or specifically authorized in advance by the Railroad Representative. Nothing shall be done or suffered to be done by the Licensee at any time that would in any manner impair the safety thereof.

Section 4 - PERMITS.

Prior to beginning any work, the Licensee, at its sole expense, shall obtain all necessary permits to perform any work contemplated by this Agreement.

Section 5 - MECHANIC'S LIENS.

The Licensee shall pay in full all persons who perform labor or provide materials for the work to be performed by Licensee. The Licensee shall not create, permit or suffer any mechanic's or materialmen's liens of any kind or nature to be enforced against any property of the Railroad for any such work performed. The Licensee shall indemnify and hold harmless the Railroad from and against any and all liens, claims, demands, costs or expenses of whatsoever nature in any way connected with or growing out of such work done, labor performed, or materials furnished.

Section 6 - FIBER OPTIC CABLE SYSTEMS.

In addition to other indemnity provisions in this Agreement, the Licensee shall indemnify and hold the Railroad harmless from and against all costs, liability and expense whatsoever (including, without limitation, attorneys' fees, court costs and expenses) arising out of any act or omission of the Licensee, its contractor, agents and/or employees, that causes or contributes to (1) any damage to or destruction of any telecommunications system on the Property, and (2) any injury to or death of any person employed by or on behalf of any telecommunications company, and/or its contractor, agents and/or employees, on the Property. Licensee shall not have or seek recourse against Railroad for any claim or cause of action for alleged loss of profits or revenue or loss of service or other consequential damage to a telecommunication company using the Property or a customer or user of services of the fiber optic cable on the Property.

Section 7 - COMPLIANCE WITH LAWS.

In the prosecution of the work covered by this Agreement, the Licensee shall comply with all applicable federal, state and local laws, regulations and enactments affecting the work. The Licensee shall use only such

methods as are consistent with safety, both as concerns the Licensee, the Licensee's agents and employees, the officers, agents, employees and property of the Railroad and the public in general. The Licensee (without limiting the generality of the foregoing) shall comply with all applicable state and federal occupational safety and health acts and regulations. All Federal Railroad Administration regulations shall be followed when work is performed on the Property. If any failure by the Licensee to comply with any such laws, regulations, and enactments, shall result in any fine, penalty, cost or charge being assessed, imposed or charged against the Railroad, the Licensee shall reimburse and indemnify the Railroad for any such fine, penalty, cost or charge, including without limitation attorneys' fees, court costs and expenses. The Licensee further agrees in the event of any such action, upon notice thereof being provided by the Railroad, to defend such action free of cost, charge, or expense to the Railroad.

Section 8 - SAFETY INSTRUCTIONS.

Safety of personnel, property and the public is of paramount importance in the prosecution of the work pursuant to this Agreement. As reinforcement and in furtherance of overall safety measures to be observed by the Licensee (and not by way of limitation), the following special safety rules shall be followed:

a. The Licensee shall keep the job site free from safety and health hazards and ensure that its employees are competent and adequately trained in all safety and health aspects of the job. The Licensee shall have proper first aid supplies available on the job site so that prompt first aid services can be provided to any person that may be injured on the job site. The Licensee shall promptly notify the Railroad of any U.S. Occupational Safety and Health Administration reportable injuries occurring to any person that may arise during the work performed on the job site. The Licensee shall have a non-delegable duty to control its employees, while they are on the job site or any other property of the Railroad to be certain they do not use, be under the influence of, or have in their possession any alcoholic beverage or illegally obtained drug, narcotic or other substance that may inhibit the safe performance of work by an employee.

b. The employees of the Licensee shall be suitably dressed to perform their duties safely and in a manner that will not interfere with their vision, hearing or free use of their hands or feet. Only waist length shirts with sleeves and trousers that cover the entire leg are to be worn. If flare-legged trousers are worn, the trouser bottoms must be tied to prevent catching. The employees should wear sturdy and protective footwear. Employees shall not wear boots (other than work boots), sandals, canvas-type shoes or other shoes that have thin soles or heels that are higher than normal. In addition, the Licensee shall require its employees to wear personal protective equipment as specified by Railroad rules, regulations or Railroad officials overlooking the work at the job site. In particular, the protective equipment to be worn shall be:

(1) Protective head gear that meets American National Standard-Z89.1-latest revision. It is suggested that all hardhats be affixed with Licensee's or subcontractor's company logo or name.

(2) Eye protection that meets American National Standard for occupational and educational eye and face protection, Z87.1-latest revision. Additional eye protection must be provided to meet specific job situations such as welding, grinding, burning, etc.; and

(3) Hearing protection which affords enough attenuation to give protection from noise levels that will be occurring on the job site.

c. All heavy equipment provided or leased by the Licensee shall be equipped with audible back-up warning devices.

Section 9 - INDEMNITY.

a. As used in this Section, "Loss" includes loss, damage, claims, demands, actions, causes of action, penalties, costs, and expenses of whatsoever nature, including court costs and attorneys' fees, which may result from: (i) injury to or death of persons whomsoever (including the Railroad's officers, agents, and employees, the Licensee's officers, agents, and employees, as well as any other person); and (ii) damage to or loss or destruction of property whatsoever (including Licensee's property, damage to any roadbed, equipment, or other property of the Railroad, or property in its care or custody).

b. As a major inducement and in consideration of the license and permission herein granted, the Licensee agrees to indemnify, defend and hold harmless the Railroad from any Loss which is due to or arises

from the work performed under this Agreement, a breach of the Agreement or the failure to observe the health and safety provisions herein, or any activity or omission arising out of performance or nonperformance of this Agreement, and regardless of any negligence of the Railroad except that Licensee shall have no obligation to indemnify, defend and hold harmless the Railroad from any Loss which is caused solely by the negligence of the Railroad.

c. Any liability of either party hereunder to one of its employees under any Workers' Compensation Act or the Federal Employers' Liability Act shall not be questioned or in any way challenged by the other party, nor shall any jury or court findings, resulting from any employee's suit against either party pursuant to any such Act(s), be relied upon or used by either party in any attempt to assert common law liability against the other.

Section 10 - RESTORATION OF PROPERTY.

In the event the Railroad authorizes the Licensee to take down any fence of the Railroad or in any manner move or disturb any of the other property of the Railroad or its lessees or licensees in connection with the work to be performed by Licensee, then in that event the Licensee shall, as soon as possible and at Licensee's sole expense, restore such fence and other property to the same condition as the same were in before such fence was taken down or such other property was moved or disturbed, and the Licensee shall indemnify and hold harmless the Railroad, its officers, agents and employees, against and from any and all liability, loss, damages, claims, demands, costs and expenses of whatsoever nature, arising from the taking down of any fence or the moving or disturbance of any other property of the Railroad or its lessees or licensees.

Section 11 - WAIVER OF BREACH.

The waiver by the Railroad of the breach of any condition, covenant or agreement herein contained to be kept, observed and performed by the Licensee shall in no way impair the right of the Railroad to avail itself of any remedy for any subsequent breach thereof.

Section 12 - ASSIGNMENT – SUBCONTRACTING.

The Licensee shall not assign, sublet or subcontract this Agreement, or any interest therein, without the written consent of the Railroad and any attempt to so assign, sublet or subcontract without the written consent of the Railroad shall be void. If the Railroad gives the Licensee permission to subcontract all or any portion of the work herein described, the Licensee is and shall remain responsible for all work of subcontractors and all work of subcontractors shall be governed by the terms of this Agreement.

Exhibit C

Union Pacific Railroad Contract Insurance Requirements

Licensee shall, at its sole cost and expense, procure and maintain during the life of this Agreement (except as otherwise provided in this Agreement) the following insurance coverage:

A. Commercial General Liability Insurance. Commercial general liability (CGL) with a limit of not less than \$1,000,000 each occurrence and an aggregate limit of not less than \$5,000,000. CGL insurance must be written on ISO occurrence form CG 00 01 12 04 (or a substitute form providing equivalent coverage).

B. Business Automobile Coverage Insurance. Business auto coverage written on ISO form CA 00 01 (or a substitute form providing equivalent liability coverage) with a combined single limit of not less than \$1,000,000 for each accident.

C. Umbrella or Excess Insurance. If Licensee utilizes umbrella or excess policies, these policies must “follow form” and afford no less coverage than the primary policy.

Other Requirements

D. All policy(ies) required above (except worker’s compensation and employers liability) must include Railroad as “Additional Insured” using ISO Additional Insured Endorsements CG 20 26, and CA 20 48 (or substitute forms providing equivalent coverage). The coverage provided to Railroad as additional insured shall, to the extent provided under ISO Additional Insured Endorsement CG 20 26, and CA 20 48 provide coverage for Railroad’s negligence whether sole or partial, active or passive, and shall not be limited by Licensee’s liability under the indemnity provisions of this Agreement.

E. Punitive damages exclusion, if any, must be deleted (and the deletion indicated on the certificate of insurance), unless the law governing this Agreement prohibits all punitive damages that might arise under this Agreement.

F. Licensee waives all rights of recovery, and its insurers also waive all rights of subrogation of damages against Railroad and its agents, officers, directors and employees. This waiver must be stated on the certificate of insurance.

G. Prior to entering property, Licensee shall furnish Railroad with a certificate(s) of insurance, executed by a duly authorized representative of each insurer, showing compliance with the insurance requirements in this Agreement.

H. All insurance policies must be written by a reputable insurance company acceptable to Railroad or with a current Best’s Insurance Guide Rating of A- and Class VII or better, and authorized to do business in the state(s) in which the work is to be performed.

I. The fact that insurance is obtained by Licensee, or by Railroad on behalf of Licensee, will not be deemed to release or diminish the liability of Licensee, including, without limitation, liability under the indemnity provisions of this Agreement. Damages recoverable by Railroad from Licensee or any third party will not be limited by the amount of the required insurance coverage.