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AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF LONG BEACH RATIFYING, CONFIRMING AND APPROVING ORDINANCE NO. HD-1965 OF THE BOARD OF HARBOR COMMISSIONERS OF THE CITY OF LONG BEACH, WHICH APPROVES AND AUTHORIZES THE EXECUTION AND DELIVERY BY THE EXECUTIVE DIRECTOR OF THE FIRST AMENDMENT TO THE ALAMEDA CORRIDOR USE AND OPERATING AGREEMENT, AND MAKING A DETERMINATION RELATING THERETO

Robert E. Shannon
City Attorney of Long Beach
333 West Ocean Boulevard
Long Beach, California 90802-4664
Telephone (562) 570-2200

WHEREAS, the Board of Harbor Commissioners of the City of Long Beach has adopted Ordinance No. HD-1965 on the 21st day of August, 2006, a complete copy of which is attached hereto as Exhibit "A" and incorporated herein by this reference; and

WHEREAS, Ordinance No. HD-1965 of the Board of Harbor Commissioners of the City of Long Beach approves and authorizes the execution and delivery by the Board of Harbor Commissioners of the First Amendment to the Alameda Corridor Use and Operating Agreement attached as Exhibit "A" and making a determination relating thereto; and

WHEREAS, this City Council concurs in the findings of, and wishes to ratify, confirm and approve the actions taken by, the Board of Harbor Commissioners of Ordinance No. HD-1965; and

WHEREAS, the Director of Planning and Environmental Services for the Harbor Department has determined a review of the applicability of the California Environmental Quality Act (CEQA) to this proposed amendment to the

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Telephone (562) 570-2200

1 Alameda Corridor Use and Operating Agreement that it will not result in a direct or
2 reasonably foreseeable indirect physical change in the environment, and that under the
3 provisions of the State Guidelines implementing CEQA, the adoption of this resolution
4 is not subject to the requirements of CEQA.

5 NOW, THEREFORE, the City Council of the City of Long Beach hereby
6 finds and ordains as follows:

7 Section 1. The City Council hereby finds and determines that the First
8 Amendment to the Alameda Corridor Use and Operating Agreement will not result in a
9 direct or reasonably foreseeable indirect physical change in the environment and that
10 this ordinance is not subject to the provisions of the California Environmental Quality
11 Act.

12 Sec. 2. The City Council of the City of Long Beach hereby concurs in the
13 findings of, and ratifies, confirms and approves the actions taken by, the Board of
14 Harbor Commissioners of the City of Long Beach in Ordinance No. HD-1965.

15 Sec. 3. The City Clerk shall certify to the passage of this ordinance by the
16 City Council and shall cause the same to be posted in three (3) conspicuous places in
17 the City of Long Beach. This ordinance shall take effect on the 31st day after its
18 approval by the Mayor of the City of Long Beach.

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I HEREBY CERTIFY that the foregoing ordinance was adopted by the City Council of the City of Long Beach at its meeting of August 22, 2006 by the following vote:

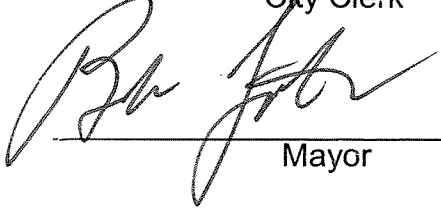
Ayes: Councilmembers: B. Lowenthal, S. Lowenthal, DeLong,
O'Donnell, Schipske, Richardson,
Reyes Uranga, Lerch.

Noes: Councilmembers: None.

Absent: Councilmembers: Gabelich.



City Clerk



Mayor

Approved: 8-24-06
(Date)

Robert E. Shannon
City Attorney of Long Beach
333 West Ocean Boulevard
Long Beach, California 90802-4664
Telephone (562) 570-2200

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ORDINANCE NO. HD- 1965

AN ORDINANCE OF THE BOARD OF HARBOR
COMMISSIONERS OF THE CITY OF LONG BEACH
APPROVING AND AUTHORIZING THE EXECUTION AND
DELIVERY OF THE FIRST AMENDMENT TO ALAMEDA
CORRIDOR USE AND OPERATING AGREEMENT, AND
MAKING A DETERMINATION RELATING THERETO

WHEREAS, pursuant to the provisions of Chapter 5, Division 7, Title 1 of
the Government Code of the State of California, as amended (the "Joint Powers Act"),
the City of Los Angeles and the City of Long Beach (together, the "Members") entered
into the certain Joint Exercise of Powers Agreement dated August 31, 1989, which has
been amended and restated by that certain Amended and Restated Joint Exercise of
Powers Agreement dated as of December 18, 1996 (as so amended and restated, and
as it may further be amended or supplemented from time to time, the "Agreement"),
creating the Alameda Corridor Transportation Authority (previously known as the
Consolidated Transportation Corridor Joint Powers Authority) (the "Authority"), a public
entity separate and apart from the Members; and

WHEREAS, the Authority has been formed for the purpose of planning,
financing, constructing and administering the operation of a rail line of approximately 20
miles from the Ports of Los Angeles and Long Beach to rail facilities near downtown
Los Angeles, including certain highway improvements (the "Project"); and

WHEREAS, the Board of Harbor Commissioners of the City of Long Beach
(the "Board"), together with the Board of Harbor Commissioners of the City of Los
Angeles, has acquired certain railroad rights of way and adjoining land and
improvements in connection with the project pursuant to separate agreements with
Southern Pacific Transportation Company ("Southern Pacific"), with Union Pacific

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Telephone (562) 570-2200

1 Railroad Company ("Union Pacific"), and with The Atchison, Topeka and Santa Fe
2 Railway Company ("Atchison Topeka"); and

3 WHEREAS, Southern Pacific and Union Pacific have merged, with Union
4 Pacific as the surviving corporation; and

5 WHEREAS, BNSF Railway Company is the successor by merger to
6 Atchison Topeka; and

7 WHEREAS, the Board wishes to enter into the First Amendment to
8 Alameda Corridor Use and Operating Agreement with the City of Los Angeles acting by
9 and through its Board of Harbor Commissioners, The Authority, Union Pacific, and
10 BNSF Railway Company, in connection with the operation of the Project, substantially
11 in the form attached hereto as Exhibit "A"; and

12 WHEREAS, the Director of Planning and Environmental Services has
13 determined in a review of the applicability of the California Environmental Quality Act
14 (CEQA) to this proposed amendment to the Alameda Corridor Use and Operating
15 Agreement that it will not result in a direct or reasonably foreseeable indirect physical
16 change in the environment, and that under the provisions of the State Guidelines
17 implementing CEQA, the adoption of this resolution is not subject to the requirements of
18 CEQA.

19 NOW, THEREFORE, the Board of Harbor Commissioners of the City of
20 Long Beach hereby finds and ordains as follows:

21 Section 1. The Board hereby finds and determines that the First
22 Amendment to the Alameda Corridor Use and Operating Agreement will not result in a
23 direct or reasonably foreseeable indirect physical change in the environment and that
24 this ordinance is not subject to the provisions of the California Environmental Quality
25 Act.

26 Section 2. The proposed form of the First Amendment to the Use and
27 Operating Agreement attached hereto as Exhibit "A" is hereby authorized and
28 approved.

1 This ordinance shall take effect on the 31st day after its final passage.

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President

7 ATTEST:

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Acting Secretary

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10 I hereby certify that the foregoing ordinance was adopted by the Board of
11 Harbor Commissioners of the City of Long Beach at its meeting of August 21, 2006 by
12 the following vote:

Robert E. Shanrod
City Attorney of Long Beach
333 West Ocean Boulevard
Long Beach, California 90802-4664
Telephone (562) 570-2200

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Ayes: Commissioners: Topsy-Elvord, Cordero, Hankla

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Noes: Commissioners: _____

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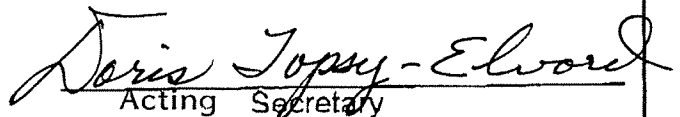
Absent: Commissioners: Walter, Hancock

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Not Voting: Commissioners: _____

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Acting Secretary

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CMG:arh 7/28/06 #06-03721

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**FIRST AMENDMENT TO
ALAMEDA CORRIDOR
USE AND OPERATING AGREEMENT**

THIS FIRST AMENDMENT TO ALAMEDA CORRIDOR USE AND OPERATING AGREEMENT (this "**Amendment**"), dated for reference purposes only as of July 5, 2006, is entered into by and among (i) **BNSF RAILWAY COMPANY**, a Delaware corporation (formerly known as The Burlington Northern Santa Fe Railway Company and successor by merger to The Atchison, Topeka and Santa Fe Railway Company) ("**BNSF**"), (ii) **UNION PACIFIC RAILROAD COMPANY**, a Delaware corporation (which also is successor by merger to Southern Pacific Transportation Company) ("**UP**"), (iii) **THE CITY OF LOS ANGELES**, a municipal corporation, acting by and through its **BOARD OF HARBOR COMMISSIONERS** ("**POLA**"), (iv) **THE CITY OF LONG BEACH**, a municipal corporation, acting by and through its **BOARD OF HARBOR COMMISSIONERS** ("**POLB**") (POLA and POLB are sometimes collectively referred to herein as "**Ports**"), and (v) **ALAMEDA CORRIDOR TRANSPORTATION AUTHORITY**, a joint powers authority created under the laws of the State of California ("**ACTA**"). BNSF, UP, POLA, POLB and ACTA are collectively referred to herein as the "**Parties**".

RECITALS

A. The Parties have previously entered into the Alameda Corridor Use and Operating Agreement dated as of October 12, 1998 (the "**Original Agreement**").

B. ACTA, UP and BNSF are parties to a mediation proceeding with Hon. Layn R. Phillips (Ret.) as mediator that occurred on May 15 and 16, 2006 (the "**Mediation Proceeding**") relating to certain provisions of the Original Agreement. The Ports actively participated in the Mediation Proceeding through designated representatives who were in attendance.

C. The matter in dispute concerns the assessment by ACTA on BNSF and UP of fees and charges against containers and/or containerized cargo that originate or terminate at the Ports and that are subject to any practice by which cargo from a container is placed in or transferred to another container, including, without limitation, practices known as "transloading," "cross-docking," "consolidating," or "repackaging" that may involve value-added services on the cargo or combining the cargo with other cargo and other similar practices regardless of how named (the "**Transloading Dispute**" and all such practices are referred to in this Agreement as "**Transloading**" or "**Transloaded**"), except the transfer of cargo from one container to another or unloading and reloading of the same container that occurs because such transfer or the cargo unloading and reloading is required by federal or state laws or regulations pertaining to homeland security, or federal laws or regulations pertaining to customs or immigration (each, a "**Governmental Transfer**") is deemed not to be "Transloading" or "Transloaded" and is excluded from the definitions of "Transloading", "Transloaded" and "Transloading Dispute".

D. The Parties have agreed to settle all questions regarding the Transloading Dispute by entering into a Settlement and Release Agreement among the Parties (the "**Settlement Agreement**").

commercial purpose. “**Non-Waterborne Containers**” shall mean all containers which are not Waterborne Containers, regardless of whether the container holds cargo that has been Transloaded from a Waterborne Container.

6. A new Section 7.3(e)(6) is added as follows:

“(6) The Transloading or other unloading of a Waterborne Container after it has been transported eastbound over the Rail Corridor will not affect the amount of the Use Fee that is due for such transportation over the Rail Corridor.”

7. Section 7.3(e)(4) is deleted in its entirety and replaced with the following language:

“4. Use Fees shall be increased effective on January 1 of each year, commencing January 1, 2003 and on January 1 of each year thereafter, based on changes in the CPI for the twelve (12) month period ending the immediately preceding October 31 (i.e., the first increase shall go into effect on January 1, 2003); provided, however, in no event shall such increase be (i) less than 1.5% or greater than 3.0% in any given calendar year for the calendar years 2003 through and including 2006, and (ii) less than 1.5% or greater than 4.5% in any given calendar year for the calendar year 2007 and each calendar year thereafter, and no reduction shall be made if the CPI decreases.”

8. The first and second sentences of Section 7.3(g) are deleted in their entirety and replaced with the following language:

“(g) Commencing April 15, 2002, each Railroad also shall pay to ACTA, in the manner specified in Section 7.6 and at the same rate per TEU set forth in Section 7.3(e) for Use Fees for loaded Waterborne Containers (as such rate is adjusted from time to time pursuant to Section 7.3(e)(4)), a charge (“**Container Charges**”) on each loaded Waterborne Container that originates or terminates at the Ports and that is moved by rail into or out of Southern California (i.e., the counties of Kern, San Bernardino, San Luis Obispo, Santa Barbara, Ventura, Los Angeles, Orange, Riverside, San Diego and Imperial) by such Railroad, unless such Waterborne Container has already been assessed the Use Fee pursuant to the provisions of Section 7.3, which payment shall be made to ACTA regardless of whether the containers have traveled on the Rail Corridor.”

9. A new Section 7.3(h)(ix) is added as follows:

“(ix) In the event that, at any time or times on or after the Fee Increase Date, a Shortfall Advance is made by POLA and POLB as required by Section 7.3(h)(i) (a “**Subsequent Shortfall Advance**”), then, commencing sixty (60) days following receipt by the Railroads of notice by ACTA that

a Subsequent Shortfall Advance has been made by POLA and POLB pursuant to Section 7.3(h)(iii) (but commencing, in no event, prior to the date that the Subsequent Shortfall Advance payment is actually due from POLA and POLB), Use Fees for loaded Waterborne Containers and Container Charges, as more fully described in Sections 7.3(e) and 7.3(g), respectively, each shall be increased by \$1.00 per TEU (which \$1.00 amount shall be increased annually per Sections 7.3(e)(4) and 7.3(g) commencing January 1, 2007, including years in which such rate increase is not imposed) (the “**Temporary Increases**”). The Temporary Increases shall only be used as provided in Section 7.3 and shall remain in effect only until such time as all then-outstanding Subsequent Shortfall Advances (plus accrued interest thereon as provided in Section 7.3(b)(5)) are either actually refunded by ACTA to POLA and POLB or required to be refunded in accordance with the order of priority listed in Section 7.3(b) (including the order of priority listed in Section 7.3(b)(5)). The amounts of any Temporary Increases collected after such time shall be promptly credited by ACTA against future Use Fees and Container Charges in the order Use Fees and Container Charges become due beginning with the month immediately subsequent to such time. ACTA shall provide written notice to UP and BNSF of (A) projected and actual Shortfall Advances concurrently with the notices provided to the Ports pursuant to Sections 7.3(h)(ii) and (iii), (B) payment of Subsequent Shortfall Advances by POLA and POLB, and (C) the actual refunding or required refunding of all Subsequent Shortfall Advances and interest thereon promptly after such refunding actually occurs or is required to occur, using the order of priority listed in Section 7.3(b) (including the order of priority listed in Section 7.3(b)(5)). The Parties acknowledge that the Temporary Increases provided for in this Section 7.3(h)(ix) may be imposed from time to time throughout the term of this Agreement whenever a Subsequent Shortfall Advance occurs.”

10. A new Section 7.3(n) is added as follows:

“(n) Notwithstanding anything to the contrary contained in Section 7.3, ACTA may, but is not required to, apply \$.40 per TEU (which \$.40 per TEU shall be increased annually by changes in the CPI per Sections 7.3(e) and 7.3(g), respectively, commencing January 1, 2007) of each of (i) the Use Fees on loaded Waterborne Containers under Section 7.3(e) and (ii) the Container Charges under Section 7.3(g), and in effect from time to time (i.e., taking into account CPI increases), to pay the Port Advances referred to in Section 7.3(b)(5)(i) and/or the Property Assembly Reimbursement (until all such obligations are paid in full), in such amounts and in such order of priority as POLA and POLB shall direct ACTA to apply; provided, however, that such application shall comply with all requirements and conditions as may be contained in the Master Trust Indenture and/or as may be imposed from time to time by any applicable lender, rating agency or bond insurer. Neither UP nor BNSF

shall have any responsibility with respect to the application of such portion of the Container Charges and Use Fees. Any inability, for any reason, to apply such portion of the Container Charges and Use Fees in the manner referred to in this Section 7.3(n) will not affect the enforceability of this Agreement or the Settlement Agreement.”

11. Mediation. Section 14.4 of the Original Agreement is deleted in its entirety and replaced with the following:

“**14.4 Mediation**. In the event of a claim or dispute arising out of the Original Agreement, Amendment or Settlement Agreement, the Parties involved with the claim or dispute shall make good faith efforts to resolve the matter through negotiations for a period of 30 days after receipt of written notice of the claim or dispute, which notice shall reference this Section 14.4. After expiration of such 30 day period for negotiation, any Party may request non-binding Mediation regarding such claim or dispute by serving a written request for Mediation, identifying the nature of the claim or dispute, on any other Party (“Mediation Notice”). Mediation shall be completed as soon as practicable after receipt by the Parties to the claim or dispute of the Mediation Notice and, unless otherwise agreed by all Parties to the Mediation, in no event later than one hundred and twenty (120) days after receipt by the last Party served with the Mediation Notice.

If the Mediation Notice is served on or before August 31, 2008, the Mediation shall be conducted by retired United States District Judge Layn R. Phillips, unless he is unavailable to conduct the Mediation within the time period allowed for completion of the Mediation. Otherwise, the Parties shall attempt to agree on a mediator within fifteen (15) days after receipt by all Parties of the Mediation Notice or having been informed of Judge Phillips’ unavailability. If the Parties are unable to agree on a mediator, any Party may make a written request to the Los Angeles office of JAMS to provide the Parties the names of three mediators, each of whom must be a retired state or federal judge who is available within the remaining time period for completion of the Mediation. If the Parties are unable to agree to one of the three mediators, JAMS shall select one of the three proposed mediators. The mediator’s fees and costs shall be shared as may be agreed upon by the Parties in advance of the Mediation or, in the absence of agreement, one-half by ACTA, POLA, and POLB and one-half by the Railroad(s) regardless of the number of Parties actually participating in the Mediation. However, in disputes between ACTA, POLA and /or POLB only, the Railroads shall not contribute toward the fees and costs, in disputes between BNSF and UP only, ACTA, POLA and POLB shall not contribute toward the fees and costs. Mediation under this Section shall be confidential.

In the event a claim or dispute submitted to Mediation under this Section is not resolved by Mediation, any subsequent lawsuit based upon such

claim or dispute shall be initiated in Superior Court for the County of Los Angeles.”

12. Fee Increase Date. The Fee Increase Date is sixty (60) days after the last to occur of (i) notice is given to the Railroads by POLA of final approval of this Amendment and the Settlement Agreement by the City Council of the City of Los Angeles, (ii) notice is given to the Railroads by POLB of final approval of this Amendment and the Settlement Agreement by the City Council of the City of Long Beach, and (iii) execution of this Amendment and the Settlement Agreement by each of POLA, POLB and ACTA.

13. Binding Effect. This Agreement is not effective until fully executed and delivered by the Parties. If this Agreement is not delivered to BNSF and UP, fully executed by ACTA, POLA and POLB on or before November 1, 2006, then BNSF’s and UP’s execution of this Agreement will be null and void.

14. Original Agreement to Remain in Effect. Except as amended by this Amendment, the Original Agreement shall remain in full force and effect.

15. Counterparts. This Amendment may be executed in one or more counterparts, each of which shall be deemed to constitute an original, but all of which shall constitute one and the same instrument. Facsimile copies of an executed counterpart shall be deemed sufficient for execution of this Amendment.

IN WITNESS WHEREOF, the Parties to this Agreement have caused their duly authorized representatives to execute it as of the day and year first above written.

BNSF

BNSF RAILWAY COMPANY,
a Delaware corporation

Approved as to form this _____
day of _____, 2006

By: _____
Name: _____
Its: _____

By: _____
Name: _____
Its: _____

UP

UNION PACIFIC RAILROAD COMPANY,
a Delaware corporation

Approved as to form this _____
day of _____, 2006

By: _____
Name: _____
Its: _____

By: _____
Name: _____
Its: _____

By: _____
Name: _____
Its: _____

[SIGNATURES ON NEXT PAGE]

POLB

CITY OF LONG BEACH,
acting by and through its
Board of Harbor Commissioners

Approved as to form this _____
day of _____, 2006

_____, City Attorney

By: _____
Name: _____
Its: _____

By: _____
Name: _____
Its: _____

POLA

CITY OF LOS ANGELES,
acting by and through its
Board of Harbor Commissioners

By: _____
Name: _____
Its: _____

ATTEST:

By: _____
Name: _____
Its: _____

Approved as to form this _____
day of _____, 2006

_____, City Attorney

By: _____
Name: _____
Its: _____

ACTA

ALAMEDA CORRIDOR
TRANSPORTATION AUTHORITY,
a Joint Powers Authority

By: _____
Name: _____
Its: _____

Approved as to form this _____
day of _____, 2006

By: _____
Name: _____
Its: _____