

**DRAFT, FOR DISCUSSION PURPOSES ONLY, FEBRUARY 22, 2008**  
**AGREEMENT**

This Agreement, made this \_\_\_\_ day of \_\_\_\_, 2008 by and between the STATE OF OHIO, OHIO RAIL DEVELOPMENT COMMISSION, hereinafter referred to as "ORDC", with principal offices at 50 West Broad Street, Suite 1510, Columbus, Ohio; 43215; and THE COLUMBUS & OHIO RIVER RAIL ROAD COMPANY, hereinafter referred to as the "C&OR" with principal offices at 47849 Papermill Road, Coshocton, Ohio; 43812

**WITNESSETH**

WHEREAS, this Commission as the Ohio Rail Development Commission ("ORDC") created by Chapter 4981 of the Ohio Revised Code, has the authority to lease any real property in which it has an interest for the continuation and operation of rail service; and

WHEREAS, the ORDC is authorized by Chapter 4981 to exercise all powers necessary or appropriate to carry out its corporate purposes including the authority to make and enter all agreements necessary to the performance of its duties and the execution of its powers; and

WHEREAS, on May 17, 2007, the ORDC entered into an Operating Agreement with the C&OR for the operation of the Panhandle Rail Line ("Panhandle") which expires on June 30, 2012; and

WHEREAS, the C&OR and ORDC now desire to terminate this Operating Agreement and enter into this Lease Agreement.

NOW, THEREFORE, in consideration of the mutual promises contained herein, the parties hereto, with the intention of being bound, hereby agree as follows:

**1) DEFINITIONS**

- a) "Agreement" or "Lease" or "Lease Agreement" means the terms and conditions as agreed by and between The Ohio Rail Development Commission (ORDC) and The Columbus & Ohio River Rail Road Company (C&OR) for the sole purpose of the C&OR leasing and operating the Rail Property as set forth herein.
- b) "Director" means the Executive Director of the Ohio Rail Development Commission.
- c) "Panhandle Mainline" means the so called Weirton Secondary track situated between

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Milepost 157.8 at Newark, Ohio, and Milepost 49.5 at the east side of Gould's Tunnel and the so called C&N (Columbus & Newark) track between Milepost 191.0 at Columbus and Milepost 157.8 at Newark, containing a total of 141.50 route miles of railroad line. These Panhandle Mainlines are shown in Exhibit "A", the track charts for the Panhandle Mainlines, herein attached.

- d) "Panhandle Branchline" means any and all side tracks including the Cadiz Running Track situated between Milepost 0.0 at Cadiz Junction to Milepost 12.8 at the site of the former Georgetown Mine; the Hebron Industrial Track between Milepost 133.0 at Hebron and Milepost 138.5 at Heath, Ohio; and the Trinway Secondary Track situated between Milepost 0.3 at its connection to the Panhandle main line, and Milepost 1.43 at Trinway, Ohio, containing a total of 19.43 route miles of road line. These Panhandle Branchlines are shown in Exhibit "B", the track charts for the Panhandle Branchlines, herein attached.
- e) "Purchase and Sale Agreement" means the agreement by which Conrail agreed to sell the Rail Property (hereinafter defined) to the C&OR, which the C&OR subsequently assigned to Caprail I, a copy of which agreement is on file at the offices of ORDC.
- f) "Rail Property" means Panhandle Mainlines, Panhandle Branchlines and all property conveyed by Conrail to Caprail I in 1992 via the Purchase and Sale Agreement.
- g) "Neilston Connector" means the rail line called the Neilston Secondary which was purchased by the C&OR from Conrail and is located at the westernmost portion of the Rail Property at approximately Milepost 191 and which connects the Rail Property with the Norfolk Southern Cleveland to Columbus mainline at a railroad control point called CP 138.
- h) "Mingo Connector" means the rail located at the easternmost portion of the Rail Property between Milepost 49.5 at Gould Tunnel and the nearest connection to the Norfolk Southern Railroad, or its successors, whether that connection is at MP 49.5, at Mingo Junction, or at another location. The term "Mingo Connector" is meant to define any segment of track which the C&OR might acquire in the future through purchase or lease or other method at the east end of the Rail Property which would cause the C&OR to control track between the east end of the Rail Property and a Class I rail carrier.
- i) "C&N or Columbus and Newark" means the track between Milepost 191.0 at Columbus and Milepost 157.8 at Newark.
- j) "Joint Ownership of the C&N Line" means that ORDC owns a 50% interest in the C&N

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portion of C&N track and property with the C&OR owning the other 50% interest.

- k) “Passenger Service” means intercity passenger, commuter, or high speed rail service.
- l) “Excursion” or “Excursion Rail Service” means any rail passenger service that is undertaken primarily for education, entertainment, recreation, or scenic observation and that does not involve any of the following: the carrying of freight other than personal luggage of the passengers or crew, or supplies and equipment necessary to serve the needs of the passengers or crew; the carrying of passengers who are commuting to work; and the carrying of passengers who are traveling to a final destination solely for business or commercial purposes.

## 2) COMMON CARRIER

A) C&OR Rights to Serve Line: Throughout the term hereof, C&OR shall have, and hereby assumes, full right and responsibility to provide common carrier rail service on the Rail Property, and to use and manage the Rail Property for all purposes consistent with the duties, rights, obligations and responsibilities of a rail carrier under the jurisdiction of the Surface Transportation Board, the Federal Railroad Administration, and other governing bodies or laws. Such rights shall include, but shall not be limited to, all rights of a rail carrier under the Revised Interstate Commerce Act, 49 United States Code (U.S.C). S10101, et seq. and the Interstate Commerce Commission Termination Act (Public Law 104-88, 109 Stat. 803). ORDC shall not undertake, and, subject to the terms of this Agreement, hereby waives any right it otherwise may have, to conduct or hold itself out to conduct common carrier rail operations on the Rail Property, for the term of this Agreement. *However nothing in this agreement grants C&OR the right to provide overhead and/or operating and/or trackage rights to any party without the advanced written consent of the ORDC.* Subject to the provisions of this Agreement, ORDC shall provide C&OR with quiet enjoyment of the Rail Property throughout the term of this Agreement.

B) Service on the C&N Portion of the Line: ORDC has Joint Ownership of the C&N Line with the C&OR. In the event that the C&OR or its successor or assigns no longer leases the ORDC portion of the C&N line from ORDC, ORDC and the C&OR agree that any lease operator retained by ORDC to serve the C&N shall have the unabridged right to serve existing customers on the C&N, as well as any new customers along the C&N, except those existing and new customers that are located on the side tracks connecting to the C&N near Port Columbus airport which are fully described herein in Exhibit “ ”. ORDC and the C&OR agree that this Paragraph B of Article 2, “Common Carrier” of this Agreement shall supersede any past agreements which ORDC and/or the C&OR may be party to regarding the provision of rail

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service to existing and new rail users located along the C&N line.

3) NON-EXCLUSIVE FREIGHT OPERATIONS:

A) This Agreement does not convey to C&OR exclusive freight rights to use the Rail Property. ORDC, in its sole discretion, may grant to other rail freight carrier(s) the right to jointly use on all, or any portion of, the Rail Property as provided in this Article 3, Non-Exclusive Operations and as stated below.

- i) ORDC may grant joint use access to another rail freight carrier if C&OR has petitioned the Surface Transportation Board (STB) for authority to abandon or discontinue operations over all, or any portion of the Rail Property, or has ceased to provide common carrier rail service over all, or a portion of the Rail Property for a period of three consecutive months, other than pursuant to a lawful embargo; or because of lack of demand for service; or
- ii) ORDC may grant other rail freight carrier(s) limited access to jointly use any portion of the Rail Property, if such other carrier:
  - (1) agrees in writing to indemnify C&OR and hold it harmless against any and all liability arising in any way whatsoever from the other carrier(s) use of the Rail Property;
  - (2) is an existing rail freight carrier or, if newly created, can demonstrate its financial and operational capabilities to competently operate a railroad (which determination will be solely within the discretion of ORDC);
  - (3) agrees that at all times, the operations of the other rail freight carrier(s) shall be conducted in a manner which does not unduly interfere with the C&OR's operations and shall be in compliance with all dispatching orders, operating rules, directives and schedules of the C&OR;
  - (4) agrees to pay a users fee or trackage rights charge to the C&OR of not less than thirty-two point one five cents (\$0.3215) per car mile for movement of any locomotive or car, loaded or empty, subject to annual escalation from July 1, 2007, based upon the Rail Cost Adjustment Factor, Unadjusted, published by the Association of American Railroads for the normal wear and tear on Rail Property track and other purposes.

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B) In the event other rail freight carrier(s) agrees to meet and comply with sections (A)(ii, (1),(2), (3), and (4) above, the C&OR will make reasonable good faith efforts to accommodate the other carrier(s) operational requests.

C) Any other provision of this Article notwithstanding, the joint use appropriate exemption or operations over the Rail Property by any freight carrier other than C&OR shall be subject to such prior approval of the STB or other governmental bodies with jurisdiction over the premises as may be required under otherwise applicable law.

D) Any other provision of this Article notwithstanding, ORDC shall in no event grant any rail freight carrier other than C&OR the right to jointly use or operate over the Rail Property during the term of this Agreement pursuant to the above provisions for the purpose of (1) providing transportation service of any kind to an Existing Rail User: or (2) transporting traffic that is the subject of a valid contract between the C&OR and a shipper. For purpose of this Agreement, "Existing Rail User" is defined as any shipper presently located along the Rail Property that shipped or received a rail car or cars via the C&OR over the Rail Property at any time during the three years prior to the execution of this Agreement.

~~E)~~ The procedure by which ORDC will determine whether to grant limited operating rights under the above provisions to a rail carrier other than the C&OR pursuant to this Article shall be as follows:

1) Upon receipt of a written request for limited rights to jointly use any portion of the Rail Property under provisions of this Article 3, NON-EXCLUSIVE OPERATIONS, ORDC will provide a copy of the request to the C&OR.

2) Within forty-five (45) days after receipt of the request, the C&OR shall (a) provide ORDC and the requesting railroad with a written explanation of the terms and conditions that will apply to the requesting railroad's operations over the Rail Property, consistent with this Article; and (b) at the C&OR's option, provide ORDC with a confidential proposal of terms, including, where appropriate, rates or division of rates under which the C&OR would agree to provide the service proposed to be provided by the requesting railroad. If the requesting railroad objects to terms or conditions provided by the C&OR under Paragraph 2(a), above, it shall so inform ORDC and promptly thereafter ORDC shall confer with the C&OR with respect to the establishment of revised terms and conditions. If the C&OR and ORDC have not agreed upon such revised terms or conditions within thirty (30) days after the requesting railroad's notice hereunder, then subject to Paragraph 3, c, below, ORDC may determine the revised terms and conditions that will apply.

3) Any other provision of this Agreement notwithstanding, and subject to any necessary

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regulatory approval, in the event that ORDC grants joint rights to another rail carrier under this Article 3, Non-Exclusive Operations over the C&OR's objection, the C&OR shall have the right to terminate this Agreement without further obligation to ORDC, except for the duty to facilitate the orderly change in service from the C&OR to another carrier, and cease to operate over the Panhandle, upon one hundred eighty (180) days prior written notice to ORDC.

- a. Any grant of joint rights to another rail freight carrier under this Article shall be a matter of agreement exclusively between ORDC and such other rail freight carrier, which shall be solely responsible for procuring any regulatory approvals necessary for the exercise of such joint rights. No privity of contract shall be deemed to exist between the C&OR and a rail freight carrier granted joint rights by ORDC under this Article with respect to such rights, or any claims or liability that may arise thereunder or in connection therewith. C&OR agrees, however, that C&OR shall fully cooperate as needed with ORDC before the Surface Transportation Board, and/or any other federal or state entity with jurisdiction over the granting of joint rights, to provide any C&OR filings or documentation which is required for ORDC to provide joint rights as described in this Article 3, Non-Exclusive Operations.
- b. ORDC shall retain the absolute right to grant joint rights to freight railroads other than the C&OR under the terms and conditions of this Article.
- c. In making its determination whether to grant limited freight rights to jointly use rail facilities to a requesting railroad under this Article 3, Non-Exclusive Operations, ORDC shall consider the following:
  - 1) Providing "Operating Rights" rather than "Trackage Rights" if Operating Rights will adequately serve the requesting railroad.
  - 2) The profitability of the C&OR, especially any increase in C&OR operating or maintenance costs resulting from the provision of rights to the requesting railroad.
  - 3) The ability of the C&OR to continue to meet the requirements of this lease Agreement, including track maintenance and repairs, the C&OR's ability to invest in needed capital improvements on the Panhandle Rail Property, and the ability of the C&OR to provide effective service to Panhandle Rail Line shippers.
  - 4) The extent to which the requesting railroad is willing to trade rights on the Panhandle for rights of the C&OR or its affiliated railroads to operate over lines of the requesting railroad at terms similar to those the requesting railroad seeks from ORDC on the Panhandle to the

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| benefit of the shippers on the Panhandle.

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4) **ORDC RIGHTS ON CONTIGUOUS LINES/ORDC RIGHT OF FIRST REFUSAL**

- a. The C&OR agrees that in the event the ORDC grants joint rights over the Rail Property to another rail freight carrier in accordance with Article 3, Non-Exclusive Operations, hereof, and this Agreement remains in effect, the C&OR will enter into an appropriate interchange access agreement with such other freight carrier allowing the carrier direct access to interchange of traffic with CSX Transportation and Norfolk Southern or their successors at Columbus via the "Neilston Connector") or with the closest Class I connection at the east end of the Rail Property via the "Mingo Connector". The terms of such agreement shall be negotiated by the C&OR with the tenant rail freight carrier; provided, however, that the C&OR shall not require compensation or terms for use of the Neilston Connector or the Mingo Connector that exceed the level of compensation or terms determined in accordance with Article 3, "Non Exclusive Operations" of this Agreement.
- b. In the event the C&OR, or a related entity, decides to abandon either the Neilston Connector or the Mingo Connector (in the event that C&OR, or a related entity, has acquired the latter), the C&OR, or a related entity, shall first offer the ORDC the opportunity to purchase the Neilston Connector and/or the Mingo Connector at Net Liquidation Value.
- c. In the event that the C&OR, or a related entity, decides to sell either the Neilston Connector or the Mingo Connector (in the event that the C&OR, or a related entity, has acquired the latter), the C&OR shall first offer the ORDC the opportunity to purchase the Neilston Connector or the Mingo Connector at the price of the Offer made by the potential purchaser. The C&OR shall provide ORDC a period of 90 (ninety) days in which to make a purchase offer, and a period of 180 (one-hundred and eighty) days to procure funds needed to close on the property acquisition.
- d. If ORDC does not exercise the Right of First Refusal in regard to an Offer of which it has been given notice in accordance with Section "c" above, and if within one hundred twenty (120) days after the date of the Notice of Offer, the Offer Premises are conveyed in accordance with the Offer, ORDC's Right of First Refusal shall terminate with respect to the Offer Leased Premises, so sold and conveyed, PROVIDED THAT:

- i. the Right of First Refusal shall remain in effect with respect to the

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balance of the Rail Property, if any, not conveyed pursuant to the Offer;

- ii. once an Offer of which C&OR has given ORDC notice is accepted by C&OR, C&OR shall not agree to a reduction of the purchase price, more favorable terms or any change in the nature or amount of the consideration to be given in exchange for the Offer Premises without first giving ORDC notice of the reduction, more favorable term or change, and upon receipt of that notice, ORDC shall again, in accordance with the provisions of Section "c" above, have the Right of First Refusal to purchase the Offer Premises at the new price and new terms.
  
- e. If any Offer is not accepted by the C&OR or if the Offer Premises are not conveyed in accordance with the accepted Offer within one hundred twenty (120) days after the date ORDC received the Notice of Offer, then ORDC's Right of First Refusal shall be applicable to the Offer Premises and to any subsequent Offer received by C&OR with respect to the Premises or any part thereof during the term of this Lease. Nothing contained in this Section concerning either the termination of ORDC's Right of First Refusal or ORDC's failure to exercise the same shall in any way affect any of ORDC's other rights and privileges under this Lease. Upon request of C&OR, ORDC shall furnish to C&OR or the purchaser of the Offer Premises an affidavit in recordable form stating the extent to which ORDC's Right of First Refusal has terminated in accordance with this Article 4, ORDC Rights on Contiguous Lines/Rights of First Refusal and setting forth such other matters as C&OR shall deem necessary or appropriate.
  
- f. At the closing of the purchase of the Offer Premises pursuant to ORDC's exercise of the Right of First Refusal, C&OR shall deliver its transferable and recordable quitclaim deed conveying to ORDC title to the Offer Premises. Real estate taxes and assessments, the rentals under this Lease (to the extent applicable to the Offer Premises), and all other income and expenses of the Offer Premises shall be prorated as of the date of closing.
  
- g. The closing for the payment of the purchase price and for delivery of C&OR's deed shall be held at a place in Columbus, Ohio, and at a time mutually agreed to by the parties within sixty (60) days after the date that ORDC exercises its Right of First Refusal unless the Offer provides a longer period.

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- h. In the event this Agreement expires or is terminated and the C&OR, or a related entity, no longer conducts rail freight operations over the Rail Property, the C&OR, or a related entity, shall agree to immediately provide to the new operator of the Rail Property trackage rights over the Neilston Connector and the Mingo Connector (in the event that the C&OR, or a related entity has aquired the latter). The terms of such agreement shall be negotiated by the C&OR with Lessor's tenant rail carrier; provided, however, that the C&OR shall not require compensation or terms for use of these Connection Tracks that exceed the level of compensation or terms determined in accordance with Article 3, "Non Exclusive Operations" of this Agreement.

#### 5) C&OR RIGHT OF FIRST REFUSAL

- a. If, during the term of this Lease, ORDC receives and desires to accept or desires to make any bona fide offer (an "Offer") for the sale of the Rail Property in whole or in part, ORDC shall notify C&OR in writing of each Offer. This notice (the "Notice of Offer") shall contain a copy of the Offer and all other terms and conditions applicable to the Offer. The whole or that part of the Rail Property to which the Offer applies is referred to as the "Offer Leased Premises." C&OR shall have the right to purchase ("Right of First Refusal") the Offer Leased Premises at the purchase price set forth in the Offer. C&OR shall exercise its Right of First Refusal, if at all, by giving written notice of exercise to ORDC no later than the ninety (90) days after C&OR's receipt of the Notice of Offer.
- b. If C&OR does not exercise the Right of First Refusal in regard to an Offer of which it has been given notice in accordance with Section a above, and if within one hundred twenty (120) days after the date of the Notice of Offer, the Offer Leased Premises are conveyed in accordance with the Offer, C&OR's Right of First Refusal shall terminate with respect to the Offer Leased Premises, so sold and conveyed, PROVIDED THAT:
- i. the Right of First Refusal shall remain in effect with respect to the balance of the Leased Premises, if any, not conveyed pursuant to the Offer;
  - ii. once an Offer of which ORDC has given C&OR notice is accepted by ORDC, ORDC shall not agree to a reduction of the purchase price, more favorable terms or any change in the nature or amount of the

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consideration to be given in exchange for the Offer Leased Premises without first giving C&OR notice of the reduction, more favorable term or change, and upon receipt of that notice, C&OR shall again, in accordance with the provisions of Section a above, have the Right of First Refusal to purchase the Offer Leased Premises at the new price and new terms.

- c. If any Offer is not accepted by ORDC or if the Offer Leased Premises are not conveyed in accordance with the accepted Offer within one hundred twenty (120) days after the date C&OR received the Notice of Offer, then C&OR's Right of First Refusal shall be applicable to the Offer Leased Premises and to any subsequent Offer received by ORDC with respect to the Leased Premises or any part thereof during the term of this Lease. Nothing contained in this Section concerning either the termination of C&OR's Right of First Refusal or C&OR's failure to exercise the same shall in any way affect any of C&OR's other rights and privileges under this Lease. Upon request of ORDC, C&OR shall furnish to ORDC, or the purchaser of the Offer Leased Premises, an affidavit in recordable form stating the extent to which C&OR's Right of First Refusal has terminated in accordance with this Section and setting forth such other matters as C&OR shall deem necessary or appropriate.
- d. At the closing of the purchase of the Offer Leased Premises pursuant to C&OR's exercise of the Right of First Refusal, ORDC shall deliver its transferable and recordable quitclaim deed conveying to C&OR title to the Offer Leased Premises. Real estate taxes and assessments, the rentals under this Lease (to the extent applicable to the Offer Leased Premises), and all other income and expenses of the Offer Leased Premises shall be prorated as of the date of closing.

The closing for the payment of the purchase price and for delivery of ORDC's deed shall be held at a place in Columbus, Ohio, and at a time mutually agreed to by the parties within sixty (60) days after the date that C&OR's exercises its Right of First Refusal unless the Offer provides a longer period.

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6) TWENTY FIVE YEAR TERM

The term of this Agreement shall be twenty five (25) years and shall commence on 2008 and end on 2033.

However, no less than one-hundred and eighty (180) days before the fifth ( 2013), tenth ( 2018), fifteenth ( 2023), and twentieth ( 2028) anniversary of the date of this Agreement, the ORDC may notify the C&OR in writing of its intent to enter negotiations with the C&OR to modify the following Articles: Article 8, "Rent", Article 11, "Maintenance and Repairs", Article 14, "Insurance and Indemnification", Article 26, "Passenger Service", and Article 27, "Excursion Service". It is expressly understood by the parties to this agreement that all other terms, covenants and conditions contained in this Agreement shall remain in full force and effect, but this Article shall not preclude the parties to this Agreement from mutually agreeing to re-negotiating or adjusting any of the other terms and conditions of this Agreement.

7) PERFORMANCE MEASURES

a. Beginning on or about July 2012 and at five (5) year intervals throughout the term of this Agreement the ORDC shall conduct a review of the C&OR performance in relation to this Agreement. That review will consist of the following:

i. Shipper Satisfaction: ORDC shall conduct a survey of twenty rail users on the Rail Property including the ten (10) most active rail users plus ten (10) others selected at random. ORDC shall deem the performance of the C&OR to be satisfactory in this category if ninety percent (90%) of responses or more are in the "3", "4", or "5" classifications. A copy of the Shipper Survey document is attached herein as Exhibit " ".

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ii. Safety: ORDC shall contact the Federal Railroad Administration (FRA) to determine the C&OR's safety performance for the previous five year period for the following Ratios: FRA Incidents, Employee Injury, and Track Accidents/1000 miles. ORDC shall deem the C&OR's performance to be satisfactory if the corresponding average annual performance standards are lower than the Class 1 Railroad Average.

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iii. Track Maintenance: ORDC shall deem the C&OR's performance to be

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satisfactory in this category if the C&OR meets maintains the rail property in the standards set out in Article 11, "Maintenance and Repairs", of this Agreement.

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- iv. Connectivity/Value Added: ORDC shall deem the C&OR's performance to be satisfactory in this category if the C&OR, through its affiliated Ohio Central System rail companies, maintains effective interchanges with Class I railroads at Warwick, Ohio, and Massillon, Ohio, or at points equivalent or better to these locations.
  - v. Compliance With Operating Agreement: ORDC shall deem the C&OR's performance to be satisfactory in this category if the C&OR is not in default of any of the provisions of this Agreement. In the event that ORDC's analysis under this category is done at such time when the C&OR is in default of this Agreement, the C&OR shall have the full time allotted in Article 30 "Default" of this Agreement, to correct the default to meet the stipulations of this Article.
  - vi. Compliance with Loan Requirements: ORDC shall deem the C&OR's performance to be satisfactory in this Category if the C&OR is in compliance with all terms and conditions of the Federal Railroad Administration loan from its Railroad Rehabilitation and Improvement Financing loan program for projects on the Rail Property, the closing documents for said loan which are dated "\_\_\_" and included as part of this Agreement by reference. Compliance with Capital Improvement Plan: ORDC shall deem the C&OR's performance satisfactory if the C&OR is in compliance with the Panhandle Capital Improvement Plan herein attached to this Agreement as Exhibit "\_\_\_".
- b. In the event that ORDC deems the C&OR's performance in all of the Categories included in this Section to be satisfactory, the agreement shall continue in its current form.
  - c. In the event that ORDC deems the C&OR's performance unsatisfactory in any category, ORDC will then conduct a review of that category on an annual basis. If, after three consecutive years of additional review, the C&OR's performance is still unsatisfactory, the C&OR will be considered in Default of the agreement.

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## 8) RENT

SEE ATTACHMENT FOR COMMITTEE DISCUSSION

## 9) INSPECTION AND AUDIT

- a. The C&OR agrees that ORDC, or its duly authorized representatives, shall, at all reasonable times and upon reasonable notice, be permitted to inspect said Rail Property, and such records and data maintained by the C&OR as may be necessary to monitor the C&OR's compliance with this Agreement; provided, however, that so long as C&OR is not in default hereunder, ORDC shall not audit C&OR's financial and non-financial records more frequently than once each year. Upon request by ORDC the records of the C&OR parent and affiliates shall be made available to ORDC for the purposes of documenting those revenues and expenses that are prorated between C&OR, said parents and affiliates and the methodology used for that proration. Disclosure of information on parent and affiliates shall be limited to that information that applies to the proration basis among Summit View enterprises and/or methodology of proration.
- b. To the extent possible under applicable law, all aspects of ORDC's exercise of audit rights and the results thereof shall be held confidential, and shall not be disclosed without C&OR's prior consent. However, to the extent that disclosure is required by law or by court or administrative order, the C&OR's prior consent shall not be required.
- c. Subject to this Article, C&OR shall provide confidential carloading information in connection with operations over the Rail Property by customer, commodity, origin and destination, and interchange point (s) as of the end of the C&OR's fiscal year. Further, C&OR shall provide to ORDC Gross ton miles/mile information broken down by various segments as requested by ORDC.
- d. The C&OR and ORDC agree that it is the interest of both parties to develop new business along the Rail Property including the facilitation of plant and business expansion as well as the facilitation of new businesses locating along the line. Upon the request of ORDC, but not more often than once every year, the C&OR shall provide to ORDC a written narrative of the marketing and development efforts undertaken by the C&OR in the previous

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year to help with business expansion and location along the Rail Property.

- e. The C&OR shall provide the Executive Director, or his or her designee, and the ORDC legal counsel the opportunity to review the C&OR succession plan upon the request of ORDC, but not more often than once a year. ORDC agrees to keep any information about the C&OR succession plan strictly confidential to the full extent allowed by law.

## 10) ALTERATIONS AND IMPROVEMENTS

- a. C&OR, for the duration of this Agreement, shall have the right and responsibility to maintain the Rail Property. The C&OR shall be allowed to perform normal "Maintenance" as defined herein below in this Article 10, "Alterations and Improvements" without any prior approval of ORDC. However, the prior written approval of the Executive Director of ORDC, said approval of which shall not be unreasonably withheld, shall be required before the C&OR makes "Alterations and Improvements" as defined below in this Article 10, "Alterations and Improvements" upon the Rail Property provided that the rail alterations and improvements: 1) are necessary to support rail operations; 2) do not unduly, negatively impact rail service to rail shippers; 3) do not unduly, negatively impact local communities or adjacent property owners; and 4) and are kept in good order, repair and in a safe condition.
- b. "Alterations and Improvements" shall mean any activity which substantially changes the nature of the Rail Property, including but not limited to, the taking up of any portion of rail or track (mainline, branchline, or siding), the changing of the centerline of any track (mainline, branchline, or siding) modifications of any bridges or culverts, construction of any new track, structure, or appurtenances on or along the Rail Property, modification of drainage systems, or any other non-maintenance activity. "Maintenance" shall include, but not be limited to, tie replacement, surfacing, aligning, bolt tightening, replacement of rail, rail switches, or rail hardware (including signals), turning worn rail, replacing or augmenting ballast, maintaining proper drainage, normal bridge and tunnel maintenance, and other normal railroad maintenance activities.

- c. ORDC reserves the right to request, not more than once per year, that the

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C&OR provide an itemized list of improvements and alterations in the property for the previous calendar year including a certified statement that all charges for labor and materials furnished have been paid, or all schedules of such payments are current, and provide to ORDC copies of releases of liens. The creation or imposition of any lien or charge upon the Rail Property through the failure of the C&OR, its agents, contractors, or subcontractors to render any such payments when due shall be deemed a default under the provisions of this Agreement with the C&OR remaining liable for liens and any other encumbrance so incurred.

- d. It is specifically understood and agreed to by the parties that all improvements to the Rail Property are owned by ORDC. Nothing in this Article shall be construed to grant to the C&OR the right to sell, trade or otherwise profit from the removal of track, track structures or appurtenances. C&OR agrees that ORDC reserves the right to be the sole beneficiary of the proceeds of any salvaging of any track, track structure or appurtenances on the Rail Property. However, the C&OR shall have the right to request in writing to the Director that the C&OR be allowed to salvage un-needed track or track structures. The C&OR's written request shall contain the reasons why the track or track structures are no longer needed for the operation of the Rail Property, an estimation of the net liquidation value of the items to be salvaged, and a detailed description of the improvements to the Rail Property which will be made with the proceeds from the salvaging, including the exact location of such improvements. The C&OR may commence with the salvaging of materials upon written permission to do so by the Director, and such permission will not be unreasonably withheld.

e. ORDC reserves the right to require the C&OR to, at C&OR's sole cost and expense, remove and restore to the conditions previous it its construction, any Alteration or Improvement performed by the C&OR without the express written consent of the Executive Director of ORDC.

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## 11) MAINTENANCE AND REPAIRS

- a. The C&OR has inspected and accepts the Rail Property in its present condition and agrees that no representations or warranties with regard to condition and fitness for use of the Rail Property have been made.
- b. The C&OR agrees that, at the C&OR's sole cost and expense, to put, keep, and maintain the Rail Property in good order, repair, and safe condition. The

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C&OR agrees that the following level of Federal Railroad Administration (FRA) Track Class will be attained and maintained in the following territories:

Main Line -- Newark to Columbus: FRA III  
Main Line - Newark to Coshocton: FRA III  
Main Line -- Coshocton to Bowerston: FRA II  
Main Line -- Bowerston to Jewett: FRA III  
Main Line -- Jewett to Gould: FRA II  
Georgetown Line - MP 0.0 to 6.5: FRA I  
Georgetown Line -- MP 6.5 to 12. 8: Out of Service  
Trinway Industrial: Excepted  
Hebron Line: FRA I

It is understood that the above FRA standards shall be attained and maintained independent of the number of rail carloads generated over and upon the Rail Property or any segment thereof. The C&OR may petition ORDC to downgrade any segment of the track at anytime during the period of this Lease Agreement. The ORDC reserves the right to re-evaluate the class of track every five years. In no event shall the C&OR be required to expend any of its funds for the maintenance, repair, and/or replacement of an over-grade highway bridge without first apprising the ORDC of the total cost attributable to any single project and of its possible negative impact on the C&OR's contractual maintenance and capital repair commitments. Should ORDC agree with the C&OR's findings, ORDC will take action including, but not limited to:

- i. ORDC will accept the C&OR's application for a grant equal to at least 90% of the total cost of the project which grant shall be promptly considered.
- ii. In no event will ORDC require the C&OR to fully fund both over-grade highway bridges and maintenance and capital projects which would unduly affect the C&OR's ability to continue profitable operations.

With every five year renewal of this Lease Agreement, the C&OR and ORDC shall readjust the FRA designations of all segments of the Rail Property. This readjustment shall be done in one of two methods, i.e, by mutual agreement, or, if no mutual agreement can be obtained, ORDC shall establish the FRA class of track by obtaining expert evaluation as to what FRA class the tracks should be maintained. This expert evaluation shall include, but not limited to, the following considerations: 1) the train speeds needed for efficient operation; 2) the costs to the C&OR of maintaining track to a particular FRA class compared to the economic benefits to the C&OR of that level of maintenance; 3) safety of C&OR operations; and 4) other pertinent considerations. ORDC and the C&OR must mutually agree to the person or firm, as well as the methodology, for  
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providing ORDC this expert evaluation. ORDC shall undertake this expert evaluation at its sole cost and expense.

## 12) TAXES AND ASSESSMENTS

The C&OR shall have the sole responsibility to pay all taxes and assessments arising after the effective date of this Agreement for the Rail Property, or C&OR's use of the rail property including, but not limited to, real estate taxes and other assessments if any, throughout the term of this Agreement, or in any renewals of this Agreement. The C&OR shall pay such taxes and assessments directly to the taxing or assessing authority before such payments become delinquent and shall certify to ORDC that these tax obligations have been met. It is further agreed that C&OR shall have the right, at its sole cost and expense, to challenge the application, assessment or computation of any tax, as provided under applicable law.

## 13) ASSIGNMENT AND SUBLETTING

This Agreement and all the terms and conditions hereof shall inure in favor of, and be binding upon, the parties hereto and upon their respective successors and permitted assigns.

Further, the C&OR shall not assign or transfer this Agreement in whole or in part, or sublet the Rail Property, or any part thereof, without the prior written consent of the Director of ORDC which shall not be unreasonably withheld. An assignment, or transfer, or merger, or consolidation by operation of law or proceeding in equity, bankruptcy, insolvency or reorganization, or a transfer of any controlling interest of the stock of the C&OR to a person or persons not now in control, shall be deemed to be an assignment within the meaning of this provision.

For the purpose of timely filing of a Notice of Exemption pursuant to 49CFR Part 1150 and 49 U.S.C. 10901, the C&OR shall be allowed to assign a parent, subsidiary, or corporate affiliate of the C&OR and/or to a voting trustee under 49CFR Part 1013, a controlling interest of stock in the C&OR without prior ORDC approval.

## 14) INSURANCE AND INDEMNIFICATION

- a. This Agreement is without force and effect until such time that the C&OR demonstrates to the satisfaction of ORDC that the C&OR has liability insurance coverage (i.e., bodily injury and property damage coverage) in amounts not less than Ten million dollars (\$10,000,000.00) for each individual claim with regard to the operation of the Rail Property. The C&OR shall provide a certified complete copy of all such insurance policies

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to ORDC not more than ten (10) days prior to the execution of this Agreement. Each such policy of insurance must (i) name ORDC and the State of Ohio as an additional insured, and (ii) prohibit cancellation or material changes (including but not limited to any decrease in the amount of insurance) without at least thirty (30) days prior written notice to ORDC. The C&OR shall deliver to ORDC verification as to the replacement or renewal of each such policy not less than thirty (30) days prior to the expiration (or other termination) date of any such policy. This amount is subject to review and revision at the request of C&OR or ORDC.

- b. The C&OR agrees to indemnify and hold ORDC and the State of Ohio harmless from and against any loss, claim, damage, cause of action or absolute liability, (including without limitation, counsel fees) caused by the C&OR's negligent, reckless, intentional, willful or wanton actions or inactions, including such actions or the failures to act of any contractors, subcontractors or employees hired by or working under the direction of the C&OR. *Provided, however, that this indemnification and hold harmless provision shall not apply to any claims, demands, actions or causes of action arising out of or resulting from (a) a party other than C&OR using the Rail Property pursuant to an agreement or other arrangement with or approved or caused by ORDC, or (b) a party other than the C&OR being on bike trails located on or adjacent to the Rail Property. (Language from the C&OR draft that merits discussion and consideration.)*
- c. However, nothing in this Article shall be construed as imposing on the C&OR any liability or duty of indemnification whatsoever with respect to any acts or omission of rail carriers other than the C&OR conducting operations on or over the Rail Property pursuant to Article 3, "Non-Exclusive Operation", Article 26 "Passenger Service", and Article 27, "Excursion Services"..
- d. In no event shall the C&OR or any of its employees, agents, contractors or subcontractors be considered agents or employees of ORDC and the State of Ohio. The C&OR agrees that none of its employees, agents, contractors or subcontractors shall hold themselves out as, or claim to be, agents, officers or employees of ORDC and the State of Ohio, and will not, by reason of any relationship with ORDC and the State of Ohio, make any claim, demand or application to any agent, officer, or employee of the State of Ohio including, but not limited to, rights and privileges concerning worker's compensation benefits, social security coverage or retirement membership or credit.

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- e. At the time of every renewal of this Lease Agreement, the amount of insurance coverage required for the C&OR shall be readjusted. This readjustment shall be done in one of two methods, i.e. by mutual agreement, or, if no mutual agreement can be obtained, ORDC shall establish the level of insurance required by obtaining expert evaluation as to what the level of insurance should be. This expert evaluation shall include, but not limited to, the following considerations: 1) the level of risk inherent in C&OR operations over the Panhandle; 2) the costs to the C&OR of the insurance premium compared to the risks of C&OR operations; 3) the insurance coverage being purchased by other comparable rail operations; and 4) other pertinent considerations. ORDC and the C&OR must mutually agree to the person or firm, as well as the methodology, for providing ORDC this expert evaluation. ORDC shall undertake this expert evaluation at its sole cost and expense.

### 15) TAX PENALTIES

The C&OR agrees to pay any penalties assessed to ORDC or to the C&OR due to lack of payment or late payment by C&OR of any taxes described in Article 12, "Taxes and Assessments", of this Agreement.

### 16) UTILITIES

The C&OR, at its sole cost and expense, shall arrange for and obtain necessary water, electricity and other utility services required for its use. ORDC shall not be liable for any such services, or the suspension of such services.

### 17) PROPERTY MANAGEMENT

- a. The C&OR may enter into new non-rail service related property leases, easements, or other property management responsibilities, hereinafter referred to as Property Transactions, which C&OR might enter into under the terms of the Lease but only after the C&OR obtains written permission from the Director of ORDC, which permission shall not be unreasonably withheld. ORDC shall have no obligations under such Property Transactions unless the Director accepts such obligations in writing.

- b. The C&OR will pay directly to ORDC Fifty Percent (50%) of all fees,

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revenues, or other payments which accrue from Property Transactions.

- c. Nothing in this Article 17, Property Management, precludes ORDC from entering into a Property Transaction involving the Rail Property with parties of ORDC's selection under terms and conditions consistent with this Agreement. However, ORDC shall coordinate and cooperate with the C&OR to ensure that the interests of the C&OR are not unduly harmed before entering into the proposed Property Transaction. In the event that the C&OR has an objection to a proposed ORDC Property Transaction, the parties agree to mediate the disagreement as provided for in Article "Alternative Dispute Resolution", of this Agreement.

#### **18) FORCE MAJEURE**

- a. In the event of an occurrence beyond the reasonable control of C&OR, such as an act of God, a flood, a major explosion or fire or an act of any government, which prevents or materially impairs C&OR's ability to provide rail service over part or all of the Rail Property, the C&OR's obligation to provide rail service under this Agreement is excused until such time the Rail Property becomes operational. In the event of such an occurrence, ORDC and the C&OR shall determine jointly and in good faith how the expense of repairing or rebuilding the Rail Property shall be divided between ORDC and the C&OR; provided, however, that in the absence of ORDC's commitment to pay for same, C&OR shall not be obligated to undertake any repair or replacement of asset or equipment that would not be required under otherwise applicable law.
- b. An incidence of Force Majeure shall not excuse C&OR's obligations under Article 8 "C&OR Rent". However, it is expressly agreed that ORDC or the C&OR retains the option to terminate this Agreement in accordance with Article 28, "Termination", upon the occurrence of any act deemed to be "Force Majeure" under this Article.
- c. Normal track rehabilitation shall not be considered an occurrence of Force Majeure under this Agreement. Normal track rehabilitation includes, but is not limited to, extensive track repair necessary because of the lack of adequate maintenance or extraordinary use of the line over a period of five (5) or more years.

#### **19) EEO REQUIREMENTS**

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In the hiring of employees or for any contract or subcontract, the C&OR, its sublessee, contractors or subcontractors shall not by reason of race, color, religion, sex, age, disability, national origin, or ancestry discriminate in the employment of persons qualified and available to perform the work. Neither the C&OR nor its sublessees, contractors, subcontractors, or any person acting on behalf of C&OR, sublessee, or any contractors or subcontractors shall, in any manner, discriminate against, intimidate, or retaliate against any employee on account of race, color, religion, sex, age, disability, national origin, or ancestry.

## 20) NOTICES

All notices, requests, demands, directions and other communications (collectively "notices") given to or made upon any party hereto under the provisions of this Agreement shall be in writing (including electronic mail) and shall be delivered or sent by first class, certified, return receipt requested, or first class express mail or overnight air courier service, or by electronic mail with confirmation in writing mailed first class, in all cases with postage or charges prepaid, to the applicable party, addressed:

If to ORDC:  
Executive Director  
Ohio Rail Development Commission  
50 West Broad Street, Suite 1510  
Columbus, Ohio 43215

If to C&OR  
President  
Columbus & Ohio River Rail Road Company  
47849 Papermill Road  
Coshocton, Ohio 43812

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Or, notice may be given to another party and/or at another address in accordance with any unrevoked written direction from any party to any other party hereto. Each such notice shall be deemed to have been given or received on the date sent except when sent by first class express mail or overnight air courier service, in which case on the next Columbus Banking Day thereafter, and except when sent by first class mail, in which case on the third Columbus Banking Day thereafter.

## **21) REMEDIES**

No remedy herein conferred upon or reserved by either party is intended to be exclusive of any other available remedy, but each and every such remedy shall be cumulative and shall be, in addition to every other remedy given under the Agreement now or hereafter existing at law or in equity.

## **22) NO WAIVER**

No delay or omission to exercise any right or option accruing to either party upon any breach by the other party shall impair any such right or option or shall be construed to be waiver thereof, but any such right or option may be exercised from time to time and as often as may be deemed necessary by the non-breaching party.

Further, if any term, provision, covenant or condition contained in this Agreement is breached by either party and thereafter such breach is waived by the other party, such waiver shall be limited to the particular breach so waived and shall not be deemed to waive any other breach hereunder. A written record of such waiver shall be included in the records of this Agreement.

## **23) COMPLIANCE WITH FEDERAL, STATE, AND LOCAL LAWS AND REGULATIONS REQUIREMENTS**

The C&OR agrees to comply with applicable federal, state, and local laws and regulations in its performance under this Agreement. In the event that any provision of this Agreement conflicts with any law or regulation, the law or regulation shall prevail.

## **24) SEVERABILITY**

If any provision of this Agreement is held to be invalid or unenforceable by a court of competent jurisdiction, such holding shall not affect the validity or enforceability of the remainder of this Agreement. All provisions of this Agreement shall be deemed severable except that if the savings clause as set forth in Article 30, "Limitations", herein is determined to be invalid, unenforceable

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or unconstitutional, this Agreement shall terminate.

## 25) NO ABANDONMENT

The C&OR shall not apply for abandonment of or discontinuance of service over any portion of the Rail Property without securing the advance written consent of the ORDC.

## 26) PASSENGER SERVICE

### a. REQUESTED BY LESSEE:

- i. Lessee may provide "Passenger Service" as defined in this Lease Agreement in "Article 1, "Definitions" on the Leased Premises by providing Lessor's Director a written notice of such intent sixty (60) days in advance of any proposed rail passenger service. Such notice shall include, but not be limited to, evidence that Lessee has obtained all necessary Federal or other approvals to operate such service, and the location, times, schedules and dates of any and all passenger trains the Lessee proposes to operate. Lessee may request blanket approvals from Lessor of certain types or classes of rail service over a specified time period.
- ii. Lessor's Director shall respond to Lessee's request no later than thirty (30) days from Lessor's receipt of such notice. Further, Lessor reserves the right to request that Lessee change, alter or amend such request. Lessor reserves the right to reject Lessee's requests under this Article; however, such requests shall not be unreasonably denied. Lessor may deny requests for passenger service on grounds that Lessee is not in compliance with otherwise applicable safety regulations, or has failed to procure the insurance required in paragraph 3 hereof.
- iii. Before approving any Lessee request to operate Passenger Service, Lessor will require that Lessee demonstrate to the satisfaction of Lessor that Lessee has the necessary liability insurance coverage as defined by Lessor to operate Passenger Service on the Leased Premises and that all passenger equipment is certified by Amtrak to meet their operating standards and requirements. In addition, Lessee agrees to indemnify and hold Lessor harmless from and against any loss, claim, damage, cause of action, destruction, liability, (including, without limitation, counsel fees) relating to passenger service requested by Lessee caused

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by Lessee's negligent, intentional, willful or wanton actions or inactions, including such actions or the failures to act of any contractors, subcontractors or employees hired by Lessee including independent contractors.

b. REQUESTED BY LESSOR:

- i. Lessor reserves the right to permit qualified rail passenger operators other than Lessee to operate Passenger Service on the Leased Premises subject to the terms and conditions set forth herein.
- ii. In order to qualify to conduct rail passenger service on the Leased Premises, the proposed rail Passenger Service operator shall:
  1. Agree in writing to indemnify the C&OR and hold them harmless against any and all claims, damages or liability resulting from the passenger operator's use of the Leased Premises.
  2. Provide and maintain insurance against the liability described in subparagraph above naming Lessor and Lessee as additional insureds in the amount of at least \$200 Million. If at any time for any reason said insurance shall lapse, be cancelled or otherwise cease to be in effect, Lessor shall require the qualified operator to immediately vacate the Leased Premises and refrain from any use thereof or operation thereof until said insurance is again fully effective.
  3. Demonstrate its financial and operational capabilities to competently operate a rail passenger service to the satisfaction of the ORDC.
  4. Abide by special operating terms and conditions concerning radios, telemetry, flagging and other matters which Lessee may from time to time bring to the attention of Lessor.
  5. ORDC agrees that the C&OR will not be compelled to operate or accept for operation passenger equipment which does not meet passenger car standards as determined by a qualified independent passenger car inspector who shall be selected by the ORDC and the C&OR. Charges of the inspector will be paid by the party offering the passenger equipment for operation. In no

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event shall passenger equipment which does not meet FRA standards be accepted for passenger operation nor shall equipment which does not meet Amtrak standards be accepted for regular scheduled intercity, commuter, or suburban service.

6. ORDC agrees that the C&OR will not be compelled to provide personnel, equipment, or services for the operation of passenger service by a third party.
7. C&OR and the operator seeking to use the Rail Property will negotiate the compensation to be paid for allowing Passenger Service but such compensation shall be approximately equal to the actual costs to the C&OR caused by the Passenger Service on the Rail Property, including a management fee and other C&OR personnel costs. In no event will the C&OR be compelled to subsidize or otherwise underwrite expenses of the Passenger Service operator on the Rail Property. ORDC shall be the final arbiter in determining compensation to be paid to the C&OR in accordance with the terms and conditions of this Article.
8. In any grant of passenger rights to an operator the ORDC will not require the C&OR to pay for or maintain the track at its expense to a higher standard than is noted in Article 11, "Maintenance and Repairs" of this Agreement.

#### 27) EXCURSION SERVICE

(SEE ATTACHED COPIES FOR DISCUSSION BY COMMITTEE)

#### 28) C&OR CONTRACTS

The C&OR recognizes that ORDC has an interest in knowing the terms and conditions of said C&OR contracts which may be in effect beyond the termination of this Agreement and must receive ORDC's written approval of such agreements prior to their execution.

#### 29) TERMINATION

The C&OR shall have the right to terminate this Agreement at its discretion upon written notification to the Director of ORDC ONE HUNDRED AND EIGHTY (180) DAYS in advance of the C&OR's actual cessation of service. ORDC shall have the right to terminate this Agreement, or any renewal of this Agreement, only in accordance with the provisions Article \_\_,

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"Term", Article \_\_, "Force Majeure", Article \_\_, "Severability", Article \_\_, "Default" or Article \_\_, "Limitations" of this Agreement.

### 30)ARTICLE 29 – DEFAULT

- a) ORDC may notify the C&OR in writing that the C&OR is in default of this agreement if the C&OR is not performing or complying with any condition or provision of this Agreement, or if the C&OR is insolvent or files, or consents to the filing against it of a petition for relief or reorganization in bankruptcy or insolvency under the laws of any jurisdiction.
- b) In the event that ORDC informs the C&OR in writing of a C&OR default, the C&OR shall have Sixty (60) days to cure the default except that: 1) there shall be no grace period for the payment of any monetary obligations; and 2) for obligations that would be reasonably expected to take more than Sixty (60) days to cure, the C&OR shall begin steps to cure the default within Thirty (30) days and there after make good faith efforts to prosecute same with due diligence so that the cure shall take place in a reasonable amount of time. If C&OR fails to so cure within this period, or pay all monetary amounts when due, then ORDC may terminate this Agreement. In the event ORDC terminates this Agreement, in addition to any other action or remedy which ORDC may have at law or in equity to recover damages or otherwise by reason of breach by C&OR of any provision of this Agreement, ORDC shall have the right to remove C&OR from the Rail Property and take possession thereof by all available legal means, including, but not limited to, the assignment of trackage operating rights to another carrier at ORDC's discretion without regard to Article 3, "Non-Exclusive Operation" of this Agreement, free and clear and discharged of this Agreement and of all right of the C&OR hereunder. C&OR shall pay to ORDC upon demand all fees and expenses, including reasonable attorney's fees, incurred in connection with and in obtaining possession of the Rail Property as aforesaid.
- c) At its discretion, ORDC may request that the C&OR continue operations on the line for an agreed upon period of time after ORDC's termination of this Agreement because of C&OR default to facilitate the orderly change in service from the C&OR to another carrier. Such continued operations shall be governed by the terms of this Agreement but shall not constitute a reinstatement of this Agreement.

### 31),LIMITATIONS

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Notwithstanding anything stated in this Agreement to the contrary, any provision, agreement, condition, understanding, or the like contained in this Agreement which contravenes, violates, conflicts with or is not authorized by the Constitution or Statutes of the State of Ohio shall be void ab initio. It is further understood that if at any time sufficient funds are not appropriated or available to continue funding the payments due under the Lease, this Agreement will terminate on the date the available appropriation expires without further obligation by the State of Ohio. Notwithstanding any other provision of this Agreement, ORDC shall not be required to expend funds under this Agreement unless funds for such purpose are appropriated by the General Assembly and certified as available by the Director of the Office of Budget and Management of the State of Ohio.

32) ENTIRE AGREEMENT

This Agreement and its attachments constitute the entire Agreement between the parties. All prior discussions and understandings between the parties are superseded by this Agreement. No terms shall be altered or otherwise amended except by an instrument in writing signed by each party hereto.

33) CAPTIONS

The article captions in this Agreement are for the convenience of reference only and in no way define, limit or describe the scope or intent of this Agreement or any part hereof and shall not be considered in any construction hereof.

34) CONSTRUCTION

This Agreement shall be construed, interpreted, and the right of all parties determined, in accordance with the laws of the State of Ohio. The parties agree that the exclusive venue for any dispute regarding this Agreement shall be in a court of competent jurisdiction located in Franklin County, Ohio.

35) EFFECTIVE DATE

This Agreement shall become effective on \_\_\_\_\_ which will be termed the "effective date".

36) ALTERNATIVE DISPUTE RESOLUTION

The parties hereby agree that they will attempt in good faith to promptly resolve any controversy or claim arising out of or relating to this Agreement through negotiation. If a disputed matter

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cannot be timely resolved between the parties, ORDC and C&OR further agree to pursue the alternative dispute mechanism of mediation, and to share in the costs of the same, to resolve any controversy or claim under this agreement before pursuing litigation.

**37) DRUG FREE WORKPLACE**

C&OR agrees to comply with all applicable state and federal laws regarding drug-free workplace. C&OR shall make good faith efforts to ensure that all of its employees while working on Rail Property will not purchase, transfer, use or possess illegal drugs or alcohol or abuse prescription drugs in any manner.

IN WITNESS WHEREOF, the parties hereto have caused this AGREEMENT to be executed as of the day and year first above:

ATTEST:

\_\_\_\_\_

BY: \_\_\_\_\_

William A. Strawn II, President  
The Columbus & Ohio River Rail Road

ATTEST:

\_\_\_\_\_

BY: \_\_\_\_\_

State of Ohio  
Ohio Rail Development Commission  
Matthew R. Dietrich, Executive Director

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