

OPERATING AGREEMENT BETWEEN THE COUNTY OF UNION AND THE MORRISTOWN AND ERIE RAILWAY

THIS AGREEMENT, made this 9th day of May, in the year 2002, between the COUNTY OF UNION (hereafter "the County"), having its principal offices at the Union County Administration Building, Elizabethtown Plaza, Elizabeth, NJ 07207, and the MORRISTOWN AND ERIE RAILWAY INC., its successors or assigns (hereafter "M&E"), a New Jersey corporation, having its principal offices at 49 Abbett Avenue, Morristown, NJ, 07960.

WHEREAS, the State of New Jersey ("the State"), at the urging of the Union County Board of Chosen Freeholders, purchased two rail corridors for future transportation usage; and

WHEREAS, pursuant to The State of New Jersey Bridge Rehabilitation & Improvement and Railroad Right-of-way Preservation Bond Act of 1989 (Public Law 192, Ch. 25), which was approved at a referendum, signed into law on June 30, 1992, and set up a special \$25 million dollar fund to preserve rail right-of-way segments for future use, funds were appropriated to purchase the Staten Island and Rahway Valley Railroads, both of which are located within the County of Union and which lines were acquired by the New Jersey Department of Transportation ("NJDOT") in 1994; and

WHEREAS, by virtue of Freeholder Resolution 813-2000 an agreement dated June 23, 2000 was entered into between the County and NJDOT, whereby the State granted the County the right of entry upon the property under the terms and conditions set forth in said agreement for the purposes of rehabilitating the railroad, track, structures, and right-of-way for the subsequent re-establishment of rail service on the property. (See Exhibit B, Agreement between the NJDOT and the County of Union dated June 23, 2000); and

WHEREAS, the County wishes to provide railroad service on the former Staten Island and Rahway Valley Railroads, which must be operated as a common carrier in accordance with the regulations of the federal Surface Transportation Board ("STB"); and

WHEREAS, the County wishes to grant M&E access to the Premises described hereafter to provide railroad service all in accordance with and subject to such terms and conditions as set forth in an agreement between the County and a third-party operator; and

WHEREAS, one of the key elements in providing for such rail services is the awarding of a contract to a highly qualified third-party operator, who shall undertake to perform and discharge all of the required obligations and responsibilities, and to render the performance required by a third-party operator including, but not limited to, the rehabilitation, maintenance, marketing, and operation of the railroad; and

WHEREAS, pursuant to Resolution 574-01, the County awarded a contract to the M&E to act as the third-party operator in accordance with the terms and conditions of an agreement to be entered into between the County and M&E; and

WHEREAS, M&E is a rail common carrier, and prior to the commencement of rail operations shall have all connecting trackage rights necessary to operate railroad service on the former Staten Island and Rahway Valley Railroads; and

WHEREAS, M&E will be fully responsible for providing high quality personalized service in the operation of the rail lines, to include rental and agreement administration and other matters as set forth in this Agreement between the parties, and in addition shall assume all liability for the operation of said property, and M&E will be further responsible for all routine maintenance (to FRA Class II) and for the control and upkeep of all vegetation and grass, and for the general upkeep of the railroad property; and WHEREAS, M&E is required to cooperate fully with the County, other funding agencies, and contractors for all rehabilitation and/or construction projects, and M&E will permit any authorized contractors or subcontractors working on these projects access to the property in order to complete the project, subject to advance notification to assure safe train operation; and

WHEREAS, in the aforementioned Resolution 574-01, the County did adopt and incorporate by reference both a Certification of Extraordinary Unspecifiable Service (the "Certificate"), and a certain document annexed thereto entitled: "Compliance with the Requirements of Extraordinary Services" which was annexed to the Certificate ("the Compliance Document"), and the Compliance Document did in turn, at pages 4 and 5 thereof, set forth the County's desire to address the needs of the Bayway Refining Company ("Bayway") for interim and permanent access for railroad freight service over the Staten Island Railroad right of way, Bayway being sometimes referred to in the Compliance Document as "Tosco"; and

WHEREAS, in furtherance of the County's objective of facilitating Bayway's involvement with the reactivation of the Staten Island Railroad, the Compliance Document did also direct (at page 10, paragraph 1, thereof) that, as a term of the Agreement, M&E should enter an operating agreement with Bayway incorporating a certain undertaking by Bayway, dated May 24, 2001 ("The Bayway Undertaking"), to contribute to the redevelopment of the Staten Island Railroad so that the County might thereby both obtain, the benefits of Bayway's contributions to railroad redevelopment stated therein and also induce Bayway's commitment to be a user of the Staten Island Railroad; and

WHEREAS, the incorporation of the Bayway Undertaking into the Agreement is also consistent with, and fulfills Section 11.4. (iv) of the Bayway Undertaking, which similarly anticipated the incorporation of the Bayway Undertaking into the Agreement as a condition of Bayway's contributions to the redevelopment of the Staten Island Railroad as set forth therein; and

WHEREAS, the parties agree that the terms of this Agreement shall be interpreted in the broadest possible way; and

WHEREAS, the intent of the parties is to create a corridor of sustainable economic development for the benefit of Union County and the State of New Jersey; and

WHEREAS, all parties will work together to maximize the economic and social benefits to the communities; and

WHEREAS, M&E, the County, and the State recognize that a start up operation is fragile at best, expensive and requires the mutual cooperation of all parties. In this regard, the parties pledge their cooperation in this start up and operation of the line and its continued success.

NOW, THEREFORE, in consideration of the promises and mutual covenants contained herein the parties agree as follows:

1. USE OF THE PREMISES

The County grants to M&E access to the property described in Exhibit A attached hereto and incorporated herein (hereafter the "Premises" or "the Lines").

2. TERM

The term of this Agreement shall commence on, May 15, 2002, and terminate on May 15, 2012, unless terminated prior thereto or extended to a later date in accordance with the terms of this Agreement. Provided that M&E has satisfied the terms of this Agreement without any uncured defaults or uncured material breaches during the aforementioned period, M&E shall have the option to renew this Agreement for up to two (2) additional five (5) year periods. M&E shall exercise this option by giving written notice of its intent to exercise the option at least sixty (60) days prior to the date of expiration of the Agreement.

3. COMPENSATION FOR USE OF PROPERTY

A. Base Compensation

M&E shall pay the County for its use of the Premises a base compensation of Two Dollars (\$2.00) per year for ten years for a total of Twenty Dollars (\$20.00) plus such additional compensation as provided below. Payment of the base compensation shall be made in full at the beginning of the Agreement term.

B. Compensation of the County

In addition to the Base Compensation, M&E shall pay the County the following portion of the collected rail operating, property-related revenues and other non-rail revenues. M&E shall pay the County 8% of all collected rail revenues in excess of \$65,000 per month up to and including \$ 155,000 per month and 10% of all collected rail revenues over \$155,000 per month. M&E shall pay the County 10% of all rail related property rights revenues such as those generated by the grant of trackage rights to third party railroads and various types of, easements, licenses, and crossing agreements and all other forms of non-rail revenues. These non-rail revenues shall be without regard to M&E's right to retain the first \$65,000 in monthly rail revenues.

During the first three years of operation, M&E shall be allowed to keep railroad revenues in excess of \$65,000 per month so long as the aggregate revenues collected on an annual basis do not exceed a monthly average of \$65,000. During the first three years of operation, M&E shall be entitled to suspend paying any portion of its rail revenues to the County should the average monthly revenues drop below \$65,000 per month on an annual basis unless and until the monthly average once again equals or exceeds \$65,000. In the fourth year, M&E shall pay the County 10% of all collected rail revenues in excess of \$75,000 per month. All "revenues" referred to throughout this Agreement shall be considered "gross revenues."

In the course of operating the rail lines on the Premises, M&E shall be responsible for the billing, collecting, and forwarding to the County the County's share of M&E revenues in accordance with this Agreement. Accounts between the County and the M&E shall be settled on a quarterly basis, ending March 31, June 30, September 30, and December 31, respectively, with payment due within 30 days after the quarter ends. The County shall place the funds it receives from the M&E and any other revenue relating to the railroad to which it is entitled in a dedicated interest-bearing account (hereafter "the Railroad Account"), which shall be the property of the County. The funds placed in this account will be used exclusively by the County for the purposes of funding any railroad rehabilitation or other work relating exclusively to the Line, as it may be expanded, including grade crossings and any other economic development projects mutually deemed appropriate. M&E may not bill expenses against this account without prior written approval of the County.

Should any form of passenger service be initiated over the Railroad, the parties will negotiate an agreement covering the arrangements for how service should be provided and the respective rights and liabilities of the parties. In the event that the Line is abandoned, any funds remaining in the Railroad Account shall remain the property of the County.

4. OPERATION OF THE STATEN ISLAND AND RAHWAY VALLEY RAILROADS

A. Business and Operating Plan

M&E shall prepare a Business and Operating Plan that will outline and specify the manner in which M&E will conduct the operation of the Staten Island and Rahway Valley Railroads. The Business and Operating Plan will be written in sufficient detail that it will give a clear illustration of M&E's proposed objectives and procedures, and at a minimum will include the following sections for the operating entity:

- 1) Corporate structure including relationship to corporate parent or affiliates;
- 2) Capitalization;
- 3) Marketing plan;
- 4) Operating plan;
- 5) Safety and emergency management plan;
- 6) Maintenance plan;
- 7) Landscape plan;
- 8) Capital spending plan; and
- 9) An Interim Service Plan for Bayway Refining Company's needs.

Further, the Business and Operating Plan must not contain any provisions that conflict with existing County Legislation or Policy. This Business and Operating Plan will be developed in concert with the County.

B. Rail Service

For the term of this Agreement the County grants M&E the exclusive right to provide local railroad service as a common carrier on the Staten Island and Rahway Valley Railroads. M&E shall implement the restoration of railroad freight service on the aforementioned rail lines in the following four (4) phases:

PHASE I - M&E shall rehabilitate and restore to regular operation The Staten Island Railroad from MP 4.7 immediately west of the NJ Turnpike in Linden to MP 2.3 immediately east of St. Georges Avenue in Linden.

PHASE II - M&E shall rehabilitate and restore to regular operation The Staten Island Railroad from MP 2.3 immediately east of St. Georges Avenue in Linden to MP 0 at the junction of the Staten Island Railroad and the NJ Transit Raritan Valley Line in Cranford, exclusive of the portion of the line immediately west of MP 2.3 to MP .5S at the municipal boundary of the Borough of Roselle and the Township of Cranford. This portion of the rail line shall be rehabilitated only upon the mutual consent of the parties to this Agreement, who will continue to develop an appropriate timeline for such rehabilitation.

PHASE III - M&E shall rehabilitate and restore to regular operation The Rahway Valley Main Line from MP 0 at the junction with the NJ Transit Raritan Valley Line in Cranford to MP 3.9 immediately southeast of the Rahway River Bridge in Union, inclusive of the branch line from the junction at MP 3.1 and extending northeast approximately 1.1 miles, and the branch line from the junction at MP 1.1 and extending southeast approximately .50 miles.

PHASE IV - M&E shall rehabilitate and restore to regular operation The Rahway Valley Main Line from MP 3.9 immediately southeast of the Rahway River Bridge in Union to MP 7.1 at the junction of the Rahway Valley Line and the NJ Transit Morris and Essex Line in Summit.

M&E shall complete all rehabilitation of the Lines specified in Phases I & II, excepting the limitation specified in Phase II and be ready to initiate rail services over this segment within 6 months of the execution of this Agreement. Within thirty (30) days of the execution of this Agreement, the County and the M&E agree to establish a timetable for public outreach to the communities along the segments of the Lines identified in Phases III & IV. The purpose of this outreach is to establish a dialogue with the affected communities and develop the most efficient plan to Maximize the benefits of the project to the County and the communities along the Lines.

The M&E agrees not to proceed with the rehabilitation and commencement of rail services specified in Phase III until it receives the written concurrence of the County. Upon receiving the written concurrence of the County, the M&E shall proceed with the rehabilitation specified in Phase III and be ready to initiate rail services over this segment of the Lines within 9 months of receiving this concurrence. Phase IV of this project shall be rehabilitated only upon the mutual consent of the parties to this Agreement, who will continue to develop an appropriate timeline for such rehabilitation.

Prior to commencing regular common carrier service on the Premises, M&E shall seek federal Surface Transportation Board ("STB") approval by means of a Modified Certificate of Public Convenience and Necessity and shall comply with the applicable regulations of the Federal Railroad Administration at 49 CFR Part 213.5(c) regarding its assumption of track maintenance obligations from the County. M&E further agrees to furnish the County with a draft of its Application for a Modified Certificate of Public Convenience and Necessity and any other required STB filings prior to their submission. M&E shall apply for the Modified Certificate of Public Convenience and Necessity within thirty (30) days of the execution of this Agreement. The M&E shall make every effort to facilitate obtaining this Certificate within six (6) months of the date of filing, but will not be responsible for any delay by the STB beyond M&E's control.

C. Marketing

M&E agrees that it shall during the term of this Agreement, and without limitation, promote, advertise, and market the availability of its services to any or all anticipated or potential rail freight service customers. M&E further agrees to provide the County with advance notice of such customer meetings and shall afford the County the opportunity to participate in these meetings. The County agrees to utilize its resources to the fullest to assist M&E with all of its marketing activities.

M&E shall identify the County's control of the Line in all marketing efforts, advertisements, and publications. M&E shall further identify the Union County Department of Economic Development as the lead agency, along with its address, telephone number, e-mail address, and contact person(s). The relationship of M&E to the County will be that of an Independent Contractor. Nothing in this Agreement shall be construed as creating an agency relationship between the parties. No M&E agent, employee, or salesman shall have the authority to obligate the County by any verbal or written representation, terms, stipulations, or conditions.

D. Railway Rehabilitation Funding

M&E acknowledges that the County's funds for the rehabilitation of the Staten Island and Rahway Valley Railroads may be financed in whole or in part by an NJDOT Grant and/or other funding sources that may require a local match. M&E agrees, regardless of funding sources, to fully cooperate with the County in the application for such funds, the maintenance of eligibility standards, and the observance of any required NJDOT and/or other applicable agencies procedures for disbursement supervision, accountability, and reporting of such funds.

It is the intent of this Agreement that M&E shall serve as the general contractor, and may employ qualified sub-contractors as they deem appropriate, for all rehabilitation construction on the lines. The County reserves the right to employ the services of a railroad engineering consultant who shall have the right to examine all construction plans prior to the rehabilitation work, make on-site visits to inspect the materials and equipment used, and survey the overall progress of the rehabilitation construction. The railroad-engineering consultant shall not be employed in a supervisory capacity over the general contractor and shall coordinate all on-site inspections with the M&E.

E. M&E's Compensation

As compensation for all services rendered for operating the Line and maintaining the Premises, M&E shall be entitled to collect, for its use and benefit, all revenues generated by any permissible use of said Premises including, but not limited to:

- Operating Revenue derived from handling revenue freight;
- Operating Revenue derived from trackage rights fees assessed carriers holding trackage rights over the Line;
- Operating Revenue derived from handling special non-freight rail movements;
- Operating Revenue derived from providing any future Passenger Rail Service;
- Miscellaneous income from demurrage, car hire, equipment leases, freight car repairs; and
- Non-operating Revenues from granting easements, licenses, and crossing rights to the extent not reserved to the State and otherwise consistent with this Agreement. Such rights shall be subject to the condition that any buildings or structures placed on the Premises will be non-permanent in nature.

F. Involvement of the Bayway Refining Company

The Bayway Refining Company (“Bayway”) will be a key component in the redevelopment of the Staten Island Railroad. Its rights, obligations, and conditions for participating in this project are described in a document entitled “Undertaking of Bayway Refining Company to Contribute to Union County’s Redevelopment of the Staten Island Railroad,” which is hereby incorporated into this Agreement and is attached hereto as Exhibit C.

G. Bayway Refinery Company Undertaking Provisions

Notwithstanding the compensation provisions of this Agreement, service rendered pertaining to the Bayway Uses (as defined in the Bayway Undertaking), shall be subject to, and governed by, Section II.2.iii) of the Bayway Undertaking, pursuant to which M&E shall, as a material consideration to the County, contractually undertake to provide Bayway with a Polypropylene Plant Service Agreement (as defined and described in Section II.2.ii of the Bayway Undertaking) under which, services pertaining to Bayway shall be subject to the limitation on charges to Bayway described in Section II.2.iii of the Bayway Undertaking. M&E’s accommodation of the participation of Bayway in accordance with the terms of the Bayway Undertaking is a material consideration to be rendered to the County hereunder, and M&E shall use best efforts to integrate, in a coordinated manner, the “Bayway Improvements”, which have been defined therein to include both the Bayway Improvements (as also described and defined in the Bayway Undertaking), together with the installation of three switches, which Bayway has further agreed to install, pursuant to the terms of a certain letter, dated, on or about September 25, 2001, forwarded to the County on behalf of Bayway, and as further consideration to the County, M&E shall similarly functionally integrate the “Bayway Uses” (as also defined in the Bayway Undertaking) with the redevelopment and operation of the Staten Island Railroad by M&E.

H. Necessary Provisions Required by the NJDOT

In an agreement dated June 23,2000 between the NJDOT and the County, the NJDOT required the County to ensure that specific items outlined in said agreement dated June 23, 2000 must be included in any future agreement between the County and a third-party operator. The following provisions are therefore required in order for the County to meet its obligations under the agreement with the NJDOT and are therefore incorporated into this Agreement:

1) In addition to all other provisions of this Agreement, the M&E has, subject to concurrence by the County and the State, the right to assign trackage rights, execute agreements including interchange agreements, and issue any other permits to any rail service provider, including but not limited to New Jersey Transit Rail Operations, in order for those agencies to access areas connected by the Premises, all on a case by case basis. Concurrence by the County and State of M&E’s assignment of trackage rights shall not be unreasonably withheld. These agreements shall not diminish the exclusive nature of M&E’s right to provide common carrier rail service.

2) The State reserves the right to grant a long term interest in property not required for railroad purposes, as delineated in this Operating Agreement, and to collect and retain any revenue therefrom (e.g., outdoor advertising). The State reserves the exclusive right to run or sell the right to run fiber optic cables above, on, or below the surface of the Premises. At no time, however, will the installation or maintenance of fiber optic cables or any other use by the State or any other party interfere in any way with M&E’s use or operation of the Line.

3) Neither the State nor the County will enter into any other agreements involving the railroad right-of-way unless it has the approval of both parties and its purpose is exclusively for the operation of the railroad.

I. Future Expansion of the Rail Lines

Industrial Rail Spurs, Team Tracks, Sidetracks, Additions, and/or Expansions of the Line will each be subject to a future Policy regarding their implementation. This future Policy will be developed jointly by the County, M&E, and any other affected agencies. Such Policy will be reduced to writing as an amended to this Agreement and shall be effective upon execution by the parties hereto.

5. CONDITION OF THE PREMISES

M&E has inspected and examined the Premises and has entered into this Agreement without any representation on the part of the County as to the present condition of the Premises.

The County shall, in accordance with this provision and other provisions of this Agreement, neither encumber nor obstruct the Premises in any way not otherwise permitted or contemplated in this Agreement.

6. MAINTENANCE OF THE PREMISES: NORMAL MAINTENANCE

Initially M&E shall at its own expense maintain the Premises including track, right of way, structures, and signals in the same condition as they were in at the commencement of the Agreement term. Once the railroad rehabilitation program (including track, right of way, bridges and structures, and signals) is complete and the track has been deemed by an FRA qualified track inspector to meet FRA class II standards, M&E shall thereafter at its own expense maintain the Premises to an FRA class II track standard throughout the Agreement term. This level of maintenance shall be known as "Normal Maintenance." Any disagreement between the County and M&E regarding the condition of the Premises shall be resolved by the NJDOT's Division of Freight Service, Railroad Section, P.O. Box 600, Trenton, NJ 08625-0600. Upon completion of the railroad rehabilitation program, M&E will use its best efforts to keep the right of way free of all weeds, brush, discarded track material and other debris, and shall maintain all bridges and structures and signals in good working order. The County shall inspect the Premises within a reasonable period after the commencement of the Agreement and at such additional times as required thereafter on a regular basis. In the course of conducting any normal maintenance or emergency repairs, M&E shall have the responsibility for contacting all public utilities which may be affected by any excavation or digging on the Premises to ensure that there will be no danger or hazard in conducting such activity.

Normal Maintenance shall not include: (a) replacements, repairs or reconstruction necessitated by such natural disasters or acts of God against which insurance is not normally available; (b) maintenance of the structural integrity of railroad bridges and structures; and (c) other items in the nature of major Capital improvements of the Premises. To the extent that maintenance, replacements, repairs, and improvements other than Normal Maintenance are necessary for safe and efficient operation by M&E on the Premises, M&E shall at the County's, State's or other agency's expense and upon approval of the County or State, undertake to perform such maintenance and make such replacements, repairs, and improvements within a reasonable time after the necessity to do so arises. All work performed by M&E or any of its contractors or subcontractors at County or State expense including, but not limited to, construction, repairs, or

maintenance done on the Premises shall be in accordance with standard railroad construction practices as set forth in the American Railway Engineering Association's Manual for Railway Engineering, and any further standards as specified by the FRA. M&E shall use its best efforts to secure the most fiscally prudent contracts for any construction, repairs, or maintenance performed on the Premises.

7. REPAIRS

If such maintenance, repairs or alterations are M&E's obligations pursuant to the provisions contained herein and M&E fails to make such repairs and alterations, the County may, after reasonable notice and an opportunity to remedy such problem, make such repairs or alterations that may be necessary for the proper use, safety and preservation of the Premises. The County may charge M&E for all reasonable costs and expenses incurred by making such repairs or alterations. If the financing of such maintenance, repairs or alterations are not M&E's obligation pursuant to this Agreement, the County shall, after reasonable notice from M&E, make or secure such financial provision as appropriate for such maintenance, repairs, or alterations. If the County refuses to make such provision, the matter shall be resolved by referral to NJDOT's Division of Freight Service, Railroad Section, P.O. Box 600, Trenton, NJ, 08625-0600.

Otherwise, M&E may at its option terminate this Agreement. M&E shall not make any alterations to the Premises that are inconsistent with the intended use of the Premises in accordance with this Agreement. This paragraph shall not be deemed a covenant by the County, and should not be construed as creating an obligation on the part of the County to make any inspection or repairs. M&E shall accommodate and cooperate with the exercise of (either by Bayway, or by such railroad construction contractors as Bayway may retain) those rights of access and entry made available to Bayway in accordance with Section 41 of the Bayway Undertaking, and M&E shall also provide Bayway with all reasonable notice of operations affecting the Bayway Uses, including but not limited to, notice of "Connecting Track Reactivation" (defined in Sectidntl.2.ii of the Bayway Undertaking).

8. INSURANCE

During the term of this Agreement M&E shall obtain and maintain in force at all times general liability insurance covering its operations, maintenance, and use of the Premises including, but not limited to, all tracks, side tracks, and spurs, bridges and structures, signals, and right of way located upon or comprising said Premises.

M&E's general liability insurance shall also cover death and injury to railroad employees and all invitees. In addition, this insurance must cover damage or destruction to, and replacement of, property including any claims involving environmental damage and the release or discharge of hazardous materials.

M&E shall obtain insurance from a carrier acceptable to the County and NJDOT naming the County and the State as additional insureds. Coverage for the County and the State shall include their officers, agents, employees, servants and assigns. The minimum insurance coverage required here for freight service shall be for no less than five million dollars (\$5,000,000) per occurrence with a \$50,000 deductible.

Each insurance policy maintained pursuant to this Agreement shall contain a provision that such policy shall not be cancelled or modified unless the County is notified at least thirty (30) days prior to such cancellation or modification.

M&E shall provide all insurance at the levels required by the New Jersey Transit Corporation for its use of New Jersey Transit trackage in Union County.

9. TAXES & UTILITIES

M&E shall pay, when due, all taxes, if any, assessments, and government charges of any kind that may be lawfully assessed or levied with respect to all or that portion of the Premises which is Class 1 or Class 2 railroad property as defined by the State of New Jersey for tax purposes. In addition, M&E shall pay, when due, all charges for utilities arising out of M&E's use and operation of the Premises. Nothing contained in this paragraph is intended or shall be construed to prohibit M&E from lawfully contesting the validity of any tax, assessment, or governmental charge assessed or levied with respect to the Premises.

10. MATERIAL BREACH & CURE: GROUNDS

A. The existence of default or an uncured material breach shall be a basis for termination of the Agreement. Upon discovery of a default or a material breach, the party who has committed the breach shall have thirty (30) calendar days in which to make a good faith effort to contest or cure the default or breach from the time notice of the default or breach is transmitted to that party in accordance with the notice provisions of section 22 of this Agreement. If the breaching party has not cured the alleged breach at the end of the notice period, the other party may terminate this Agreement by giving the other party at least thirty (30) days written notice of termination in accordance with section 22.

B. The following shall be grounds of default or material breach entitling the County to terminate the Agreement:

- (1) Failure to maintain the track, right-of-way, bridges and structures, and signals as required in section 6;
- (2) Failure to secure required federal operating authority;
- (3) Conducting train operations in a manner deemed unsafe or hazardous by a state or federal agency having jurisdiction or deemed unsafe or hazardous under customary industry practices;
- (4) Failure to keep records or provide the County with access to the Line or records as provided in Section 13;
- (5) Failure to market the Line in accordance with the requirements of Section 4.C;
- (6) Failure to provide service upon reasonable demand as defined in the Business and Operating Plan;
- (7) Committing acts or allowing others to commit acts on the right of way which would be deemed a violation of state or federal environmental laws, failure to remove promptly hazardous substances from the right of way, or failure to eliminate promptly an environmental hazard or emission that would be deemed a violation of state or federal environmental laws;
- (8) Failure to report and pay promptly all compensation due the County;
- (9) Failure to maintain insurance as required by Section 8;
- (10) Failure to pay all other than property taxes during the first five years of operation, and utilities as required by Section 9, unless contested;
- (11) Any assignment, mortgage, hypothecation, or transfer of this Agreement or the rights created by it in violation of Section 18;
- (12) Exercising as its own any property rights reserved by the State or the County; and
- (13) Using or permitting others to use the property for an illegal purpose.

11. COMPLIANCE WITH GOVERNING LAW

M&E shall comply with all laws, statutes, ordinances, rules, orders, regulations and requirements of the pertinent federal, state and local agencies and courts that are applicable to the Premises and railroad lines generally. M&E shall not use or permit the Premises to be used for any illegal purposes, conduct its operations for any illegal purposes, conduct operations in an unsafe or hazardous manner, or intentionally cause or allow another to place hazardous substances on the Premises or discharge hazardous substances into the air. Notwithstanding this provision, M&E may transport hazardous commodities or freight pursuant to federal regulation.

12. REQUIRED RECORDKEEPING: ACCESS TO RECORDS: PROPERTY INSPECTION

M&E shall prepare and file all reports, returns, and information required in connection with its operation of the Premises by any and all federal, state and local governmental regulatory and taxing authorities with jurisdiction over the Premises.

M&E shall submit to the County: (1) its annual financial report prepared and signed by its accountant for operations conducted over the Premises, (2) a detailed written quarterly report on all rail traffic handled on the Premises; and (3) an annual written report on its efforts to increase freight traffic handled on the Line.

M&E shall furnish the County any and all reports generated or issued which pertain to the Premises within 48 hours of M&E's receipt of such materials. M&E shall within 48 hours of its receipt provide the County any and all reports pertaining to the physical condition of the Premises issued by those federal and state agencies having regulatory jurisdiction over the track, right of way, bridges and structures, and signals including, but not limited to, the STB, NJDOT, FRA, the United States Environmental Protection Agency, and the New Jersey Department of Environmental Protection. M&E agrees to provide the County with written quarterly and annual reports detailing the accounting of revenues and expenses generated in the operation of the Premises, as well as the number and type of car loads handled for each customer. M&E shall utilize generally accepted accounting procedures for recording said revenues and expenses.

M&E shall also be responsible to provide to the County a quarterly Maintenance Report that outlines all maintenance and inspections completed during the previous quarter year.

The County reserves the right to audit M&E's statements, and M&E agrees to disclose its records for auditing purposes.

The County, its agents, or representatives shall have the right to enter upon and inspect the Premises and M&E's business records applicable to the Line at any time during normal business hours subject to the County providing three business days' advance notice. The County shall also have the right to conduct an inspection of any train or rail car at no cost to the County.

M&E shall indemnify and hold the County harmless against any penalty and/or damages resulting from its failure to file any such reports, returns, or information.

13. NOTICE OF CASUALTY

Other than for de minimus damage or injury, M&E shall give immediate notice to the County of any damage to property, death, personal injury, or other casualty occurring upon the Premises. Notice shall be delivered to the Union County Police Department within three (3) hours of the incident.

14. IMPROVEMENTS TO THE PREMISES

Except as otherwise provided in section 6 and 7, the M&E shall not make any alterations, additions, obstructions, encumbrances or improvement to the Premises without the prior written consent of the County, which consent shall not be unreasonably withheld.

Additions and improvements made by the County to the Premises shall become the property of the State upon termination of this Agreement except for such additions and improvements which, subject to prior written Agreement of the parties, may be easily removed from the Premises without causing any damage thereto.

15. LIMITATIONS ON NON-OPERATING REVENUE SOURCES

M&E shall not place nor permit to be placed any signs, structures, or other non-operating revenue sources of any kind upon or about the Premises, Without the prior written consent of the County which shall not be unreasonably withheld. Any non-operating revenue sources such as signs and structures permitted by the County shall at all times conform to all applicable municipal ordinances or other laws or regulations. Notwithstanding the foregoing, M&E may without the consent of the County place and maintain such signs that are necessary for the safe operation of railroad freight services or to the operation of grade crossings, bridges, and other facilities on the Premises. M&E shall not enter into any agreement for access or use of the Line or any son of license agreement or any other form of agreement with any third-party that exceeds five (5) years without prior written consent of the County, whose consent shall not be unreasonably withheld. However, at no time shall any agreement between the M&E and a third party have a term or duration for a period longer than the remaining term of M&E's Agreement with the County.

16. ALLOCATION OF LIABILITY: INDEMNIFICATION

Liability for death, personal injury, or property damage, including liability for any environmental claims within the meaning of applicable federal and state laws pertaining to the condition of the environment and transportation, use, or spillage of hazardous materials, shall be allocated between the parties as follows:

a. The County shall defend, indemnify, and hold harmless M&E against any and all liabilities, expenses, claims, or causes of action relating to conditions which occurred before the commencement of this Agreement or after its termination.

b. Except where the sole proximate cause of such liability, expense, claim, or cause of action is the negligence of the State and/or the County and/or parties on or about the Premises pursuant to access agreements or licenses granted third parties by the State and/or the County or as a result of property rights reserved by the State and/or County, M&E will defend, indemnify, and hold harmless the County and its officers, agents, employees, successors, and assigns against any and all liabilities, expenses, claims, or causes of action for:

(1) injury to or death of any person occurring on or about the Premises during the term of this Agreement; and

(2) the loss of or damage to any property whatsoever, including, but not limited to any property whatsoever, including, but not limited to, the property covered by this Agreement, where such injury, death, loss, or damage is caused by, arises out of, results from, or is incident to (A) the condition or existences of the property covered by this Agreement (except that M&E will not defend, indemnify, and hold harmless the County' for any loss or damage to the Premises due to an Act of God) or (B) actions of M&E and its officers, agents, employees, successors, and assigns upon the property.

c. Notwithstanding the provisions of paragraph (b), M&E will defend, indemnify, and hold harmless the County and its officers, agents, employees, successors, and assigns against any and all liabilities, expenses, claims, or causes of action, including attorneys fees, arising from M&E's violation of or from its failure to comply with any provisions of this Agreement, regardless of whether the negligence of the County, its officers, agents, or employees, and regardless of degree, contributes thereto.

d. M&E shall defend, indemnify, and hold harmless the County and the State and their officers, employees, agents, successors or assigns from all suits and actions of any kind or character that may be brought or instituted by any subcontractor, or laborer who has performed work or furnished materials for or upon the Premises, or for any claim or amount recovered from any infringement of patent, trademark, or copyright.

e. M&E shall be responsible for and shall defend, indemnify, and hold the County harmless for the actions of any parties who obtained rights under easements, licensing, and crossing rights granted by it.

17. NON-ASSIGNABILITY

M&E shall not assign, mortgage, or hypothecate this Agreement nor permit the Premises to be occupied or used for any purpose other than those uses contemplated herein. Moreover, M&E's shareholders or management may not transfer stock or management control of M&E to persons who do not constitute existing M&E management during the term of this Agreement. Notwithstanding these provisions, M&E's shareholders and management may assign this Agreement or transfer control of M&E upon the County's written consent, which shall not be unreasonably withheld. Moreover, M&E may grant trackage rights, occupancy rights, licenses, or easements to third parties to the extent permitted by this Agreement.

18. WAIVER

The failure of the County or the M&E to insist upon strict performance of any of the covenants or conditions of this agreement shall not be considered as a waiver of any legal rights or claims. Nothing contained in this Agreement shall be deemed in derogation of any right or remedy that the County or M&E may have at law or equity.

19. DEFAULT BY M&E: TERMINATION

In the event that there should occur any default or uncured material breach, in accordance with section 10 of this Agreement, on the part of M&E in the performance of any terms, conditions, or covenants contained herein, which default results in the disruption of the railroad services as provided for in this Agreement, or if M&E shall file a petition in any Bankruptcy Court of the United States, or make an assignment for the benefit of creditors, or if this Agreement shall pass to another party by virtue of any court proceeding or operation of law, or be placed in receivership, or take advantage of an Insolvency Act, then the County may immediately terminate this Agreement and take possession of the Premises and any improvements thereon. The County may, upon taking such possession, obtain the services intended herein from any other party.

20. RETURN OF THE PREMISES

A. By Termination

Upon receiving notice of termination, M&E shall peacefully surrender possession of the Premises, promptly removing all of its property and leaving the Premises in the same physical condition as it was at the completion of the rehabilitation program or any additional improvements agreed upon between the parties, normal wear and tear excepted. In addition, M&E shall provide notice of termination to all customers on the line and connecting railroads and shall follow the procedures of 49 CFR 1150.50 for notice to customers to the extent not inconsistent with this Agreement.

B. End of the Agreement

Upon the end of the Agreement term, M&E shall return the Premises to the County in the same physical condition as it was at the completion of the rehabilitation program or any additional improvements agreed upon between the parties, normal wear and tear excepted.

However, at the end of the Agreement term or upon termination of this Agreement, M&E may be held financially responsible to the County if it has failed to maintain any improvements to the Premises as required to achieve and maintain the track to an FRA Class II standard pursuant to Section 6 herein. Financial responsibility shall be limited to the amount necessary for restoration of the Line or any portion thereof to that standard.

21. EMINENT DOMAIN AND CONDEMNATION

If at any time during the term of this Agreement the Premises or any part thereof or any interest therein shall be taken under eminent domain or condemnation, or if a suit or other action shall be instituted for the taking or condemnation of the Premises to a governmental or other public authority, agency, or body then this Agreement at the option of M&E may terminate immediately.

22. NOTICE

All notices required pursuant to this Agreement shall be in writing and addressed to the parties at their respective addresses as set forth below. All such notices shall be deemed duly given if personally delivered or if deposited in the United States mail, registered or certified, return receipt requested. This section shall not be construed as waiving proper service of process. Notice to each party will be to the following:

COUNTY OF UNION:

County of Union
Union County Administration Building
Elizabethtown Plaza
Elizabeth, NJ 07207

MORRISTOWN AND ERIE:

RAILWAY INC.:
Morristown & Erie Railway Inc.
49 Abbett Avenue
Morristown, NJ 07960

In addition to the notices required to be in writing as described above, all communications, either oral or written, from M&E to the County will be directed exclusively to the Division of Policy and Planning in the Department of Economic Development.

23. SECTION AND PARAGRAPH HEADINGS

Section and paragraph heading in this Agreement are for ease of reference only and shall have no bearing on the construction or interpretation of this Agreement.

24. ENTIRE AGREEMENT

This Agreement and the exhibits and attachments set forth all the covenants, provisions, agreements, conditions and understandings between the parties and there are no other covenants, promises, agreements, conditions or understandings, either oral or written, between them. No modification or addition to this Agreement shall be binding or effective unless executed in writing as an amendment to this instrument and signed by the parties.

25. PARTIAL ILLEGALITY

If any provision of this Agreement is held to be illegal, the remainder of the Agreement shall not be affected thereby.

26. GOVERNING LAW

This Agreement and all rights of the parties thereunder shall be governed by the laws of the State of New Jersey.

27. DISPUTE RESOLUTION

All disputes between the parties shall be resolved through arbitration pursuant to the commercial arbitration rules of the American Arbitration Association.

28. FORCE MAJEURE

M&E shall have no obligation to operate over any portion of the Premises as to which it is prevented or hindered from operating by Acts of God, public authority, strikes, riots, labor disputes, orders of the 5Th, or any cause beyond its control; PROVIDED, HOWEVER, M&E shall use its best efforts to take whatever action is necessary or appropriate to be able to resume operations. In the event of damage or destruction caused by an Act of God, the parties shall develop a plan to commence all necessary repairs and shall pursue these repairs with reasonable diligence.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals the day and year written on page one of this Agreement.

ATTEST
M. ELIZABETH GENIEVICH
Clerk of the Board

COUNTY OF UNION
BY: GEORGE W. DEVANNEY
County Manager

APPROVED AS TO FORM:
JEREMIAH D. O'DWYER, ESQ.
County Counsel

ATTEST
RICHARD P. CAMPANA
Superintendent

MORRISTOWN & ERIE RAILWAY INC.
BY: GORDON R. FULLER
Chief Operating Officer