

Union Pacific Agreement Number \_\_\_\_\_

## WAYSIDE HORN AGREEMENT

THIS AGREEMENT, for good and valuable consideration, the receipt of which is hereby acknowledged, is made and entered into effective this \_\_\_\_ day of **[month]**, 2008, by and between UNION PACIFIC RAILROAD COMPANY, a Delaware corporation (hereinafter, the "Railroad") and the **[name of public authority]**, a \_\_\_\_\_ of the State of \_\_\_\_\_ (hereinafter, the "Public Authority").

The Public Authority has requested the Railroad's cooperation in connection with the implementation of a Wayside Horn System (hereinafter, "WHS," as defined more fully below), for the grade crossings at the **[name of UP subdivision]** Subdivision at the locations shown in Exhibit 1, attached hereto and hereby made a part hereof. Hereinafter, any work associated with engineering, design, construction, installation, interconnection, operation, or maintenance concerning the WHS is called "the Work" and the WHS project is called "the Project." The Railroad is willing to cooperate with the Public Authority in facilitating the Project, and the Railroad is providing certain goods and services to the Public Authority, upon the terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the premises and of the promises and conditions hereinafter set forth, the parties hereto agree as follows.

**AGREEMENT:**

**1. The Public Authority's Sole Financial Responsibility for the Work and Project.**

a. The Public Authority shall be solely financially responsible for all labor and materials for the preparation by Railroad of estimates, engineering, design, construction, installation, maintenance, operation, interconnects, for interconnect costs, for all costs of flagging provided by the Railroad, and for all other costs and expenses referred to herein associated with the Work or the Project or required to facilitate, implement, maintain, and operate the WHS that comprises the Project, including without limitation as set out more fully below. "WHS" as used herein includes the system and any and all parts or components thereof or associated therewith, including without limitation, the horn, utility poles, the horn confirmation signal, the advance confirmation indicators and systems, control cables, interconnect cables, circuitry, and power supply for each installation.

b. The Public Authority shall pay the Railroad for and fully reimburse the Railroad for, and shall be responsible for, any and all costs or expenses incurred by the Railroad in connection with the Work and this Project, including without limitation as set out more fully elsewhere herein.

**2. Other Responsibilities and Obligations of the Public Authority with Respect to the Work and the Project.**

a. (1) The Public Authority shall install, own, and maintain, at its sole expense, the WHS and all parts and components thereof and any interconnecting

cables provided for interconnection and all applicable advance confirmation indicators and systems at each crossing.

**(2)** The Public Authority shall comply with all applicable law in respect to the Work and the Project, including, but not limited to, 49 CFR Part 222. The Public Authority shall comply with all FRA regulations and requirements with respect to the WHS.

**(3)** The Public Authority shall be responsible for ensuring the reliable operation and proper functioning of the WHS after installation.

**b.** The Public Authority shall endeavor to place all WHS components, including without limitation utility poles and power supplies, at locations within the Public Authority's existing street rights of way. The proposed locations are identified in Exhibit 1 hereto. The Railroad's approval of these locations is provided by its execution of this Agreement. If the Public Authority desires to change placement of the WHS in any respect, the Public Authority shall apply to the Railroad for approval (if the change is a location still within the Public Authority's existing street right of way) or a license (if the change is to a location outside of the Public Authority's existing street right of way). The Railroad may issue approvals or licenses on application, subject to reasonable terms and conditions, provided that no existing or planned facilities of the Railroad, in the judgment of the Railroad, shall be adversely impacted by such placement.

**c. (1)** The Public Authority in conducting any Work or activities in, around, or regarding the WHS or Railroad tracks, crossings, bungalows, crossing protection, or other facilities, whether directly or through contractors or subcontractors, shall ensure compliance in all respects with such rules and requirements of the Railroad

referred to more specifically herein or in Exhibits or attachments hereto, or that the Railroad may later provide to the Public Authority.

(2) If the Public Authority directly, but not through its contractors or their subcontractors, wishes to perform Work on the Public Authority's existing street rights of way on or over Railroad property, it may do so through its employees without being required to obtain an approved Right of Entry Agreement, as required by Section 2.c.(3) hereof, but in any event still shall be required to obtain the flagging protection described in the Right of Entry Agreement for any activity within twenty-five (25) feet from the center of the Railroad's nearest track and to comply with Sections 2.c.(1), (6), and (7) hereof, and shall comply with the terms of the provision for Protection of Subsurface Facilities on Railroad Property, in accordance with Exhibit 3 hereto, and shall comply with any other rules and requirements of the Railroad referred to more specifically herein or in Exhibits or attachments hereto, or that the Railroad may later provide to the Public Authority. Flagging will not be required, however, when the Public Authority under this Section 2.c.(2) is performing routine maintenance behind the crossing arms.

(3) Under no circumstances will the Public Authority enter onto the Railroad's property in an area that is outside of the Public Authority's existing street right of way without first executing the Right of Entry Agreement, Exhibit 2 hereto (hereinafter, REA). In no circumstances will the Public Authority's contractors or their subcontractors enter onto the Railroad's property (including without limitation Railroad property located within the Public Authority's existing street rights of way) without first executing the REA and the Contractor's Endorsement, Appendix B to the REA

(hereinafter, the Contractor's Endorsement). In all cases, the Railroad's written approval of the REA must be obtained for it to be effective. The Public Authority acknowledges that it understands the terms, provisions, and requirements of the REA. The Public Authority shall ensure that its contractors and their subcontractors understand the REA and the Contractor's Endorsement. Furthermore, the Public Authority shall be responsible for its contractors' and subcontractors' compliance with the REA and Contractor's Endorsement, and such contractors and subcontractors shall provide the Railroad with a certificate issued by the applicable insurance carriers providing the insurance coverage for their activities required pursuant to the REA, Appendix A, Exhibit C.

(4) Prior to initiating any Work to remedy an urgent public safety concern under this Agreement, the Public Authority shall notify the Railroad's Risk Management Control Center at 1-888-877-7267.

(5) The parties intend that they and the Public Authority's contractors and subcontractors shall cooperate to assure that REA's are timely and expeditiously submitted and that all conditions thereof are satisfied. Upon satisfaction of all conditions, Railroad will exercise reasonable efforts to approve such REA's within thirty (30) days.

(6) The Public Authority shall ensure that persons performing any Work by, for, or on behalf of the Public Authority on Railroad property (whether within or outside the Public Authority's existing street rights-of way) shall undergo and complete the training required by the Railroad which the Railroad will identify to the

Public Authority, and by the FRA, including without limitation that for roadway worker protection set out at “[contractororientation.com](http://contractororientation.com),” or other approved training.

(7) The Public Authority shall protect underground systems in connection with its Work, the Project, and the WHS, in accordance with Exhibit 3 hereto, Protection of Subsurface Facilities on Railroad Property, and shall require its contractors and subcontractors to agree to do so.

**d.** Costs and expenses associated with or resulting from any relocation of the WHS, including without limitation any such relocation work that results from track alignment changes, new track construction, signal upgrades, or from any work implemented in the discretion of the Railroad, or resulting from the Railroad’s business needs or the requirements of an administrative agency, shall be at the Public Authority’s sole cost and expense. The Railroad shall provide reasonable prior notification of such relocation or other work.

**e.** The Public Authority shall prevent any interference (whether by induction, leakage of electricity, or otherwise) by or of the WHS with the operation or function of the Railroad’s signals, communication lines, or any other installation or facility. If the WHS causes interference, the Railroad, in its sole discretion, may require the Public Authority, at its sole expense, to immediately take such remedial action as may be necessary to eliminate such interference.

**f.** The Public Authority shall maintain all vegetation at or near the WHS sites, to ensure that vegetation does not interfere with the performance or visibility of the WHS.

**3. The Railroad's Work.**

**a.** The Railroad, at the Public Authority's sole expense, shall provide the interconnect from the crossing signal control systems in the Railroad's signal cabin to activate the WHS at each installation, and all Work associated therewith, including preliminary design, engineering, and cost estimates relative to the interconnect. If modified, changed, or additional Railroad signal activation circuitry is required at a crossing to properly activate the WHS and the signalization at the crossing, in accordance with 49 CFR Part 222, the Railroad will install such circuitry, at the sole expense of the Public Authority.

**b.** The Railroad will install, own, and maintain, at the Public Authority's expense, all components within the Railroad's signal crossing cabin necessary for the interconnection, including without limitation relays, wiring, and terminal connections. The Railroad will not install, own, or maintain the interconnect cable provided by the Public Authority.

**c.** The Railroad shall have absolutely no obligation, nor any right whatsoever, to install, provide circuitry to, test, or maintain any of the WHS components other than the interconnect.

**d.** The Railroad has no duty to maintain the WHS or to monitor its function, safety, or state of repair.

**e.** In no event shall the Railroad be responsible for the monitoring of the Public Authority's duties or obligations under FRA or other rules or regulations or under this Agreement.

**4. Payments by the Public Authority to the Railroad.**

**a.** The Public Authority has agreed to pay the Railroad in accordance with the Preliminary Engineering Agreement attached hereto as Exhibit 4 for the Railroad's design services. The sum owed to Railroad thereunder is included in the Exhibit 5 Estimate described in Section 4.b, and this debt will be fully satisfied on the Public Authority's payment of the Estimate in full.

**b. (1)** Within thirty (30) days after receiving the fully executed Agreement, the Public Authority shall pay the Railroad \$\_\_\_\_\_, the amount set out in the Exhibit 5 Estimate. The Exhibit 5 Estimate is the estimated total cost for the Railroad's part of the Work, which includes the Cost Estimate Fee, engineering, design, construction and installation of the WHS interconnect or other circuitry or other facilities, or other Work as the Public Authority may have directed, in accordance with Section 3 above. If Railroad determines that the actual cost of the Work will likely exceed the Exhibit 5 Estimate, Railroad may submit supplemental invoices for the projected or actual additional costs. In such event, Public Authority within sixty (60) days shall notify the Railroad as to whether it agrees to pay the supplemental invoice amounts. If it does, then the writing evidencing that agreement shall become part of this Agreement, and all Work performed in connection with the supplemental invoice shall be performed pursuant to this Agreement.

**(2)** If the Public Authority fails to pay the Exhibit 5 Estimate as required above, or if the Public Authority fails to notify the Railroad within sixty (60) days that it agrees to pay the supplemental invoice amount, or notifies the Railroad that it



does not agree to pay the supplemental invoice, then this shall constitute a material breach under Section 9 hereof.

**(3)** If the Railroad has overestimated the cost for such Work, and the actual cost is less than what the Public Authority pays, then the Railroad shall, within one hundred and twenty (120) days of completion of the Project, refund overpayment.

**c.** The Public Authority agrees to each year pay the Railroad an annual maintenance fee of one hundred and twenty dollars (\$120.00) per crossing to cover the Railroad's cost of inspecting and testing the WHS interconnect equipment contemplated by this Agreement located within the Railroad's signal bungalows. The Railroad will invoice the Public Authority for such fee. If it becomes necessary to repair or replace any of the WHS interconnect equipment within the Railroad's signal bungalows or perform other Work in connection thereto, the Railroad will separately invoice the Public Authority for such cost.

**d.** Railroad will provide flagging services at Public Authority's sole expense, and invoice Public Authority for these services.

**e.** All payments other than those described in Subsection 4a, b to be made by the Public Authority to Railroad shall be made within forty-five (45) days after submittal of the Railroad's invoices. Interest on any overdue amounts shall be at prime plus two percent, unless a lesser rate is required by state law.

**f.** The Railroad, for the period of twelve (12) months after completion of the Work, will maintain all books, papers, accounting records and other documentation relating to costs incurred under this Agreement and will make such

materials available to the Public Authority or its duly authorized representatives for review and inspection at its offices, on reasonable prior notice and during regular business hours.

**5. Effect of Lapse of Public Authority's Fiscal Year.** If the Public Authority's governing body does not on or before [**specify the date of the end**] of each fiscal year appropriate funds by approving a budget for the next succeeding fiscal year for payment of the insurance premiums that will be due for the insurance policies referred to in Section 7c, and that funds the payment of all Railroad invoices that have been submitted but that become due the next succeeding fiscal year, this Agreement immediately and automatically shall terminate at 12:00 midnight on [**specify the date of the end**] of the current fiscal year. However, all obligations of the Public Authority which accrued prior to termination for this reason shall continue to be due and payable and the Public Authority shall not be relieved from its obligations with respect thereto. All obligations of the Railroad with respect to this Agreement shall terminate effective as of the date of termination under this Section.

**6. Sounding of Locomotive Horns.**

The Railroad's rights and duties regarding the sounding of the locomotive horns at the subject WHS crossings shall be as set out in 49 CFR Part 222, and by other applicable law. Nothing contained in this Agreement shall be construed to alter such rights and duties.

**7. Liability, Insurance, and Indemnity.**

**a. Cooperation in Defense.**

Public Authority and Railroad agree that they will cooperate as necessary in defense of any claim, demand, investigation or litigation arising out of or related to this Agreement, the Work, the Project, or the WHS.

**b. Definition of Losses.**

The term “Losses” shall include all damages, costs, expenses, attorneys fees, other fees, or liabilities of any nature whatsoever, in any way related to or arising out of, any actual or alleged violation of law, order, or regulation; damage to any property, the environment or to natural resources; bodily injury or death of any person; or the breach of any contract.

**c. Insurance.**

(1) Subject to the conditions stated below and in Exhibit 6 hereto, with the assistance of Railroad the Public Authority has procured, and will pay for and will maintain in force insurance protection acceptable to the Railroad, and issued by insurers acceptable to the Railroad, which is adequate to insure against risks and Losses associated with or arising out of the Work, the Project, or the WHS, and any liabilities associated therewith. The insurance shall be of the type and amount and shall conform to the conditions and specifications set out more fully in Exhibit 6 hereto. Railroad is the Named Insured under such policy (hereinafter, “the Policy”).

(2) To facilitate the availability of the required insurance Policy to the Public Authority, the Railroad has paid certain funds to the carrier for the initial policy year. The Public Authority shall pay for its portion of the premiums for the

Policy required in Exhibit 6, its payment for the first year not to exceed approximately \$1,700.00 per crossing. The Public Authority shall continue to pay for its portion of the Policy premiums for subsequent years for the term of this Agreement unless (a) Railroad elects at its sole discretion not to continue with the insurance required under this Section 7c or (b) the Public Authority's payment for premiums on a per crossing basis for any Policy year is more than ten percent greater than the prior year's payment and Railroad elects not to be responsible for the incremental difference above the ten percent increase in the payment for that year. In the case of alternative (a) Railroad timely will notify Public Authority if it has elected not to continue with the insurance requirements of this Section 7c, in which case Public Authority will have no further obligation to provide insurance under this Section 7c. In the case of alternative (b) Railroad may elect to pay the incremental difference for that year, or, if it elects not to, then the Public Authority will have no further obligation to provide insurance under this Section 7c.

(3) Railroad will be responsible for payment of the \$1,000,000 per occurrence self insured retention identified in Exhibit 6, paragraph B. The parties acknowledge this obligation includes not only liability costs but also defense costs for the Railroad and expenses, up to the \$1,000,000 limit.

(4) The Public Authority, no later than **[specify the last day]** of each fiscal year, shall notify the Railroad if it fails to approve a budget for the payment of insurance premiums for the policies to be in force for the next succeeding fiscal year, as required by Section 5. The Public Authority, on or before the date Work is undertaken under this Agreement, and on or before thirty (30) days in advance of each renewal date

of such insurance policies required hereunder, shall provide to the Railroad proof of the payment for the premiums.

**d. INDEMNITY OBLIGATIONS OF THE PUBLIC  
AUTHORITY.**

**(1) TO THE EXTENT PERMITTED BY LAW, AND SUBJECT TO SECTION 7(d)(2) BELOW, THE PUBLIC AUTHORITY SHALL FULLY INDEMNIFY AND HOLD THE RAILROAD HARMLESS, AND DEFEND THE RAILROAD AGAINST ANY AND ALL LIABILITY, CLAIMS, SUITS, DEMANDS, AND LOSSES ARISING FROM THE PUBLIC AUTHORITY'S OWN ACTS OR OMISSIONS OR FAULT RELATING TO OR ARISING OUT OF THIS AGREEMENT, THE WORK, THE PROJECT, OR THE WHS.**

**(2) NOTHING CONTAINED IN THIS SECTION OR ANY OTHER PART OF THIS AGREEMENT SHALL BE CONSTRUED TO CONSTITUTE AN AGREEMENT OR OBLIGATION OF THE PUBLIC AUTHORITY TO INDEMNIFY THE RAILROAD AGAINST LIABILITY OR LOSSES ARISING FROM THE RAILROAD'S OWN ACTS OR OMISSIONS OR FAULT.**

**(3) [State law regarding indemnification to be addressed here].**

**(4) If the Railroad notifies the Public Authority of a claim for indemnification, the Public Authority shall respond in writing within thirty (30) days, unequivocally accepting the Railroad's demand and undertaking to indemnify the**

Railroad, or, if the Public Authority rejects the demand, the Public Authority shall state specifically the grounds for rejection.

**8. ENFORCEABILITY AND CHOICE OF LAW.**

**THIS AGREEMENT SHALL BE GOVERNED, CONSTRUED AND ENFORCED IN ACCORDANCE WITH THE LAWS OF THE STATE OF \_\_\_\_\_ . LITIGATION TO ENFORCE, OR ARISING OUT OF, OR RELATED TO OR CONNECTED WITH THIS AGREEMENT SHALL BE INSTITUTED AND MAINTAINED SOLELY BEFORE THE STATE OF \_\_\_\_\_ DISTRICT COURT FOR \_\_\_\_\_ COUNTY, \_\_\_\_\_ .**

**9. Term of Agreement and Termination.**

This Agreement shall be in force and effect until terminated pursuant to this Section 9 or until it otherwise is terminated in accordance with law.

**a.** This Agreement immediately and automatically shall terminate on the date of the occurrence of any of the following events:

(1) The Public Authority's governing body does not act in accordance with Section 5.

(2) The FRA rescinds or materially amends the regulations pertaining to wayside horns, currently promulgated at 49 CFR Part 222.

(3) The FRA issues an order or regulation which prohibits or imposes significant restrictions on the use of the WHS or the FRA issues any ruling which requires the use of locomotive horns at a crossing where a WHS is located

**b.** This Agreement immediately and automatically shall terminate if the Public Authority is in material breach of any express or implied term of or obligation

of Sections 7c or 7d of this Agreement or Exhibit 6 to this Agreement, the Railroad notifies the Public Authority of the breach, and the Public Authority fails to fully cure such breach within thirty (30) days after notice is given. Such termination shall be effective at 12:01 a.m. of the 31<sup>st</sup> day after notice. A “material breach” under this Section 9. b. exists, without limitation, if the following occurs:

(1) The Public Authority fails or refuses to provide the notices required under, or to procure, pay for, or maintain insurance, or to provide certificates of insurance and proof of payment of premiums in accordance with Section 7c or Exhibit 6 hereto, or the Public Authority otherwise is in breach of any provision of Section 7c or Exhibit 6, or is in breach of any obligation the Public Authority owes under the policies of insurance required hereunder.

(2) The Public Authority fails or refuses to undertake the defense of or to indemnify the Railroad upon written demand by the Railroad or to fully defend and indemnify the Railroad, when it is required to do so under Section 7d.

c. This Agreement immediately and automatically shall terminate if either party is in material breach of any express or implied term or obligation of this Agreement other than those described in Section 9b, the other party notifies the breaching party of the breach, and the breaching party fails to fully cure such breach within sixty (60) days after notice is given. The termination shall be effective at 12:01 a.m. of the 61<sup>st</sup> day after notice. A “material breach” under this Section 9c also exists, without limitation, if the following occurs:

(1) The Public Authority fails or refuses to comply with FRA regulations, including, but not limited to, 49 CFR Part 222 or any amendments thereto.

(2) The Public Authority fails or refuses to pay any design fees or maintenance costs or other fees or other charges or other payments due Railroad under this Agreement, or fails to provide notice, including as set out in Section 4b.

(3) The Public Authority fails or refuses to comply with the terms or conditions of Section 2 or Exhibits 2 or 3 to this Agreement (or the appendices thereto).

d. Upon termination, the Public Authority shall promptly deactivate the WHS and the Railroad shall instruct its engineers to resume sounding the locomotive horns at the crossings in accordance with the Railroad's operating rules. If the reason for termination is associated with an FRA ruling, the Public Authority may retain the deactivated WHS and its components in place for a period not to exceed two (2) years pending efforts by the Public Authority to obtain regulatory approval from the FRA. If the Public Authority fails to obtain such regulatory approval or reversal of an FRA decision within said period, the Public Authority promptly shall remove the WHS and its components from all crossings at its sole cost and expense.

e. Termination shall not excuse the Public Authority from fully complying with all obligations and satisfying all liabilities and making all payments that have accrued prior to the termination date.

**10. Binding Effect.**

The covenants hereof shall inure to and bind each party's successors and assigns; provided no right of the Public Authority shall be transferred or assigned, either voluntarily or involuntarily, except by express written agreement acceptable to the Railroad.



**11. Evidence of Authority.**

The Public Authority, when returning this executed Agreement to the Railroad, shall cause it to be accompanied by such Order, Resolution or Ordinance of the governing body of the Public Authority, passed and approved as by law prescribed, and duly certified, evidencing the authority of the person executing this Agreement on behalf of the Public Authority with the power so to do.

**12. Entire Agreement, Rules of Construction, and Severability.**

This Agreement shall be construed without regard to who drafted or initiated the drafting of all or any provisions of this Agreement. Each of the parties is sophisticated in the matters at issue here, and each relies on its own expertise and its own officers', managers' and attorneys' advice. Neither relies on any representations by the other party or on the other party's expertise or advice in entering into this Agreement. This Agreement includes all Exhibits hereto, and is the entire agreement between the parties. It supersedes all prior communications, understandings, and agreements, whether oral or written. Amendments to this Agreement must be in writing and signed by both parties. In the event any portion of this Agreement is deemed void or unenforceable, this will not void or render unenforceable any other provision hereof, and the voided or unenforceable portion shall be deemed severed from the rest of this Agreement and the remaining Agreement shall continue to be enforceable.

**13. Notices.**

Any notice due hereunder, and each communication concerning matters within the scope of Sections 4, 5, 7 and 9 and Exhibits 2, 3, and 6 hereto (together with their appendices), shall be made in writing and shall be effective when and on the date and

time served on or received by the receiving party personally or by express delivery or certified U.S. mail (return receipt requested). Such notices and communications shall be addressed to the following persons, at the following addresses, or at such other address as the parties may from time to time direct in writing:

Railroad:                    Union Pacific Railroad Company  
                                  ATTN: Assistant Vice President Engineering – Design  
                                  1400 Douglas Street, Mail Stop 0910  
                                  Omaha, Nebraska 68179-0910  
                                  Facsimile: (402) 501-0324

With copies to:            Union Pacific Railroad Company  
                                  ATTN: Vice President – Real Estate  
                                  1400 Douglas Street, Mail Stop 1690  
                                  Omaha, Nebraska 68179-1690

Public Authority:        \_\_\_\_\_  
                                  ATTN: **[identify individual or officer]**  
                                  **[address]**

Personal service and notice will be deemed to have occurred or been given upon receipt.

Notices and communications only sent by U.S. Mail will be deemed to have occurred and been given not later than five (5) days after deposit with the United States Postal Service, unless actual receipt occurs before then.

IN WITNESS WHEREOF, the parties hereto have duly executed this Agreement  
as of the date and year first hereinabove written above.

UNION PACIFIC RAILROAD  
COMPANY,

\_\_\_\_\_, a  
a Delaware corporation

\_\_\_\_\_, a  
\_\_\_\_\_ of the State  
of \_\_\_\_\_

By \_\_\_\_\_

By \_\_\_\_\_

Title: Assistant Vice President  
Engineering

Title: \_\_\_\_\_

APPROVED AS TO FORM:

ATTEST:

\_\_\_\_\_

\_\_\_\_\_