

BILL NO. 3065

ORDINANCE NO. _____

AN ORDINANCE APPROVING A PIPELINE CROSSING AGREEMENT BETWEEN THE UNION PACIFIC RAILROAD COMPANY AND THE CITY OF BRANSON, AND AUTHORIZING THE MAYOR TO ENTER INTO THE AGREEMENT PERTAINING TO A WATER PIPELINE CROSSING AT COMMERCIAL STREET IN BRANSON, MISSOURI

WHEREAS, Union Pacific Railroad Company has tendered to the City of Branson an agreement (Folder No. 2298-07) covering a pipeline crossing at Branson, Taney County, Missouri; and

WHEREAS, the Board of Aldermen of the City of Branson has said proposed agreement before it and has given it careful review and consideration; and

WHEREAS, it is considered that the best interests of the City of Branson will be subserved by the acceptance of said agreement.

NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF ALDERMEN OF THE CITY OF BRANSON, MISSOURI, AS FOLLOWS:

Section 1: The terms of the agreement submitted by the Union Pacific Railroad Company as aforesaid be, and the same are hereby, accepted on behalf of the City of Branson.

Section 2: The Mayor of the City of Branson is hereby authorized, empowered and directed to execute said agreement on behalf of the City and that the Branson City Clerk is hereby authorized and directed to attest said agreement and to attach to each duplicate original of said agreement a certified copy of this ordinance.

Section 3: This ordinance shall be in full force and effect upon and after its passage and approval.

Read, this first time on this ____ day of _____, 2005.

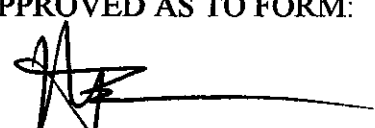
Read, this second time, passed and truly agreed to by the Board of Aldermen of City of Branson, Missouri this ____ day of _____, 2005.

Louis E. Schaefer, Mayor

ATTEST:

APPROVED AS TO FORM:

Lisa K Westfall
City Clerk



Matthew Thompson
Assistant City Attorney

PIPELINE CROSSING AGREEMENT

Mile Post: 447.58, Carthage Subdivision Leased to Missouri-Northern-Arkansas Railroad
Location: Branson, Taney County, Missouri

THIS AGREEMENT is made and entered into as of March 31, 2005, by and between **UNION PACIFIC RAILROAD COMPANY**, a Delaware corporation, (hereinafter the "Licensor") and **CITY OF BRANSON**, a Missouri corporation to be addressed at 110 Maddux, Branson, Missouri 65616 (hereinafter the "Licensee").

IT IS MUTUALLY AGREED BY AND BETWEEN THE PARTIES HERETO AS FOLLOWS:

Article I. LICENSE FEE

Upon execution of this Agreement, the Licensee shall pay to the Licensor a one-time License Fee of **Twelve Thousand One Hundred Ninety Three Dollars (\$12,193.00)**.

Article II. LICENSOR GRANTS RIGHT.

In consideration of the License Fee to be paid by the Licensee and in further consideration of the covenants and agreements herein contained to be by the Licensee kept, observed and performed, the Licensor hereby grants to the Licensee the right to construct and thereafter, during the term hereof, to maintain and operate only a

16" pipeline crossing (hereinafter the "Pipeline")

in the location shown and in conformity with the dimensions and specifications indicated on the attached print dated January 11, 2005, marked Exhibit A. Under no circumstances shall Licensee modify the use of the Pipeline for a purpose other than the above-mentioned, and said Pipeline shall not be used for any other use, whether such use is currently technologically possible, or whether such use may come into existence during the life of this Agreement.

Article III. CONSTRUCTION, MAINTENANCE AND OPERATION.

The grant of right herein made to the Licensee is subject to each and all of the terms, provisions, conditions, limitations and covenants set forth herein and in Exhibit B, hereto attached.

Article IV. IF WORK IS TO BE PERFORMED BY CONTRACTOR.

If a contractor is to do any of the work performed on the Pipeline (including initial construction and subsequent relocation or substantial maintenance and repair work), then the Licensee shall require its contractor to execute the Railroad's form Contractor's Right of Entry Agreement. Licensee acknowledges receipt of a copy of the Contractor's Right of Entry Agreement and understanding of its terms, provisions,

and requirements, and will inform its contractor of the need to execute the Agreement. Under no circumstances will Licensee's contractor be allowed onto Licensor's premises without first executing the Contractor's Right of Entry Agreement.

Article V. INSURANCE

A. The Licensee, at its expense, shall obtain the insurance described in Exhibit B-1, hereto attached. The Licensee will also provide to the Licensor a Certificate of Insurance, **identifying Folder No. 02298-07**, issued by its insurance carrier confirming the existence of such insurance and that the policy or policies contain the following endorsement:

UNION PACIFIC RAILROAD COMPANY is named as an additional insured with respect to all liabilities arising out of the existence, use or any work performed on or associated with the 'Pipeline' located on Railroad right-of-way at Mile Post 447.58, on the Carthage Lsd To Mna Subdivision/Branch, at or near Branson, Taney County, Missouri.

B. If the Licensee named in this Agreement is a public entity subject to any applicable statutory tort laws, the limits of insurance described in Exhibit B-1 shall be the limits the Licensee then has in effect or which is required by applicable current or subsequent law, whichever is greater, a portion of which may be self-insured with the consent and approval of the Licensor

C. All insurance correspondence shall be directed to:

Constance R. Alvis
Folder No. 02298-07
Union Pacific Railroad Company
Real Estate Department
1400 Douglas Street STOP 1690
Omaha, NE 68179-1690

Article VI. TERM.

This Agreement shall take effect as of the date first herein written and shall continue in full force and effect until terminated as herein provided.

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

UNION PACIFIC RAILROAD COMPANY

CITY OF BRANSON

By: _____
Manager - Contracts

By: _____
Title: _____

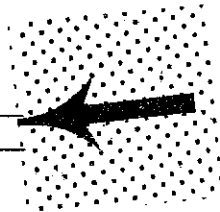


EXHIBIT B

Section 1. LIMITATION AND SUBORDINATION OF RIGHTS GRANTED.

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

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

Section 2. CONSTRUCTION, MAINTENANCE AND OPERATION.

(a) The Pipeline shall be constructed, operated, maintained, repaired, renewed, modified and/or reconstructed by the Licensee in strict conformity with Union Pacific Railroad Co. Common Standard Specification 1029 adopted November 1949, and all amendments thereof and supplements thereto, which by this reference is hereby made a part hereof, except as may be modified and approved by the Licensor's Vice President-Engineering Services. In the event such Specification conflicts in any respect with the requirements of any federal, state or municipal law or regulation, such requirements shall govern on all points of conflict, but in all other respects the Specification shall apply.

(b) All work performed on property of the Licensor in connection with the construction, maintenance, repair, renewal, modification or reconstruction of the Pipeline shall be done to the satisfaction of the Licensor.

(c) Prior to the commencement of any work in connection with the construction, maintenance, repair, renewal, modification, relocation, reconstruction or removal of the Pipeline where it passes underneath the roadbed and track or tracks of the Licensor, the Licensee shall submit to the Licensor plans setting out the method and manner of handling the work, including the shoring and cribbing, if any, required to protect the Licensor's operations, and shall not proceed with the work until such plans have been approved by the Vice President-Engineering Services of the Licensor and then the work shall be done to the satisfaction of the Vice President-Engineering Services or his authorized representative. The Licensor shall have the right, if it so elects, to provide such support as it may deem necessary for the safety of its track or tracks during the time of construction, maintenance, repair, renewal, modification, relocation, reconstruction or removal of the Pipeline, and, in the event the Licensor provides such support, the Licensee shall pay to the Licensor, within fifteen (15) days after bills shall have been rendered therefor, all expense incurred by the Licensor in connection therewith, which expense shall include all assignable costs.

(d) The Licensee shall keep and maintain the soil over the Pipeline thoroughly compacted and the grade even with the adjacent surface of the ground.

Section 3. NOTICE OF COMMENCEMENT OF WORK.

If an emergency should arise requiring immediate attention, the Licensee shall provide as much notice as practicable to Licensor before commencing any work. In all other situations, the Licensee shall notify the Licensor at least ten (10) days (or such other time as the Licensor may allow) in advance of the commencement of any work upon property of the Licensor in connection with the construction, maintenance, repair, renewal, modification, reconstruction, relocation or removal of the Pipeline. All such work shall be prosecuted diligently to completion.

Section 4. LICENSEE TO BEAR ENTIRE EXPENSE.

The Licensee shall bear the entire cost and expense incurred in connection with the construction, maintenance, repair and renewal and any and all modification, revision, relocation, removal or reconstruction of the Pipeline, including any and all expense which may be incurred by the Licensor in connection therewith for supervision, inspection, flagging, or otherwise.

Section 5. REINFORCEMENT, RELOCATION OR REMOVAL OF PIPELINE.

(a) The license herein granted is subject to the needs and requirements of the Licensor in the operation of its railroad and in the improvement and use of its property, and the Licensee shall, at the sole expense of the Licensee, reinforce the Pipeline, or move all or any portion of the Pipeline to such new location as the Licensor may designate, whenever, in the furtherance of its needs and requirements, the Licensor shall find such action necessary or desirable.

(b) All the terms, conditions and stipulations herein expressed with reference to the Pipeline on property of the Licensor in the location hereinbefore described shall, so far as the Pipeline remains on the property, apply to the Pipeline as modified, changed or relocated within the contemplation of this section.

Section 6. NO INTERFERENCE WITH LICENSOR'S OPERATION.

The Pipeline and all parts thereof within and outside of the limits of the property of the Licensor shall be constructed and, at all times, maintained, repaired, renewed and operated in such manner as to cause no interference whatsoever with the constant, continuous and uninterrupted use of the tracks, property and facilities of the Licensor, and nothing shall be done or suffered to be done by the Licensee at any time that would in any manner impair the safety thereof.

Section 7. PROTECTION OF FIBER OPTIC CABLE SYSTEMS.

(a) Fiber optic cable systems may be buried on the Licensor's property. Protection of the fiber optic cable systems is of extreme importance since any break could disrupt service to users resulting in business interruption and loss of revenue and profits. Licensee shall telephone the Licensor at 1-800-336-9193 (a 24-hour number) to determine if fiber optic cable is buried anywhere on the Licensor's premises to be used by the Licensee. If it is, Licensee will telephone the telecommunications company(ies) involved, arrange for a cable locator, make arrangements for relocation or other protection of the fiber optic cable, all at Licensee's expense, and will commence no work on the right of way until all such protection or relocation has been accomplished. Licensee shall indemnify and hold the Licensor harmless from and against all costs, liability and expense whatsoever (including, without limitation, attorneys' fees, court costs and expenses) arising out of or caused in any way by Licensee's failure to comply with the provisions of this paragraph.

(b) In addition to other indemnity provisions in this Agreement, the Licensee shall indemnify and hold the Licensor harmless from and against all costs, liability and expense whatsoever (including, without limitation, attorneys' fees, court costs and expenses) caused by the negligence of the Licensee, its contractor, agents and/or employees, resulting in (1) any damage to or destruction of any telecommunications system on Licensor's property, and/or (2) any injury to or death of any person employed by or on behalf of any telecommunications company, and/or its contractor, agents and/or employees, on Licensor's property, except if such costs, liability or expenses are caused solely by the direct active negligence of the Licensor. Licensee further agrees that it shall not have or seek recourse against Licensor for any claim or cause of action for alleged loss of profits or revenue or loss of service or other consequential damage to a telecommunication company using Licensor's property or a customer or user of services of the fiber optic cable on Licensor's property.

Section 8. CLAIMS AND LIENS FOR LABOR AND MATERIAL; TAXES.

(a) The Licensee shall fully pay for all materials joined or affixed to and labor performed upon property of the Licensor in connection with the construction, maintenance, repair, renewal, modification or reconstruction of the Pipeline, and shall not permit or suffer any mechanic's or materialman's lien of any kind or nature to be enforced against the property for any work done or materials furnished thereon at the instance or request or on behalf of the Licensee. The Licensee shall indemnify and hold harmless the Licensor against and from any and all liens, claims, demands, costs and expenses of whatsoever nature in any way connected with or growing out of such work done, labor performed, or materials furnished.

(b) The Licensee shall promptly pay or discharge all taxes, charges and assessments levied upon, in respect to, or on account of the Pipeline, to prevent the same from becoming a charge or lien upon property of the Licensor, and so that the taxes, charges and assessments levied upon or in respect to such property shall not be increased because of the location, construction or maintenance of the Pipeline or any improvement, appliance or fixture connected therewith placed upon such property, or on account of the Licensee's interest therein. Where such tax, charge or assessment may not be separately made or assessed to the Licensee but shall be included in the assessment of the property of the Licensor, then the Licensee shall pay to the Licensor an equitable proportion of such taxes determined by the value of the Licensee's property upon property of the Licensor as compared

with the entire value of such property.

Section 9. RESTORATION OF LICENSOR'S PROPERTY.

In the event the Licensor authorizes the Licensee to take down any fence of the Licensor or in any manner move or disturb any of the other property of the Licensor in connection with the construction, maintenance, repair, renewal, modification, reconstruction, relocation or removal of the Pipeline, then in that event the Licensee shall, as soon as possible and at Licensee's sole expense, restore such fence and other property to the same condition as the same were in before such fence was taken down or such other property was moved or disturbed, and the Licensee shall indemnify and hold harmless the Licensor, its officers, agents and employees, against and from any and all liability, loss, damages, claims, demands, costs and expenses of whatsoever nature, including court costs and attorneys' fees, which may result from injury to or death of persons whomsoever, or damage to or loss or destruction of property whatsoever, when such injury, death, damage, loss or destruction grows out of or arises from the taking down of any fence or the moving or disturbance of any other property of the Licensor.

Section 10. INDEMNITY.

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

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

1. The prosecution of any work contemplated by this Agreement including the installation, construction, maintenance, repair, renewal, modification, reconstruction, relocation, or removal of the Pipeline or any part thereof; or
2. The presence, operation, or use of the Pipeline or contents escaping therefrom,

except to the extent that the Loss is caused by the sole and direct negligence of the Licensor.

Section 11. REMOVAL OF PIPE LINE UPON TERMINATION OF AGREEMENT.

Prior to the termination of this Agreement howsoever, the Licensee shall, at Licensee's sole expense, remove the Pipeline from those portions of the property not occupied by the roadbed and track or tracks of the Licensor and shall restore, to the satisfaction of the Licensor, such portions of such property to as good a condition as they were in at the time of the construction of the Pipeline. If the Licensee fails to do the foregoing, the Licensor may do such work of removal and restoration at the cost and expense of the Licensee. The Licensor may, at its option, upon such termination, at the entire cost and expense of the Licensee, remove the portions of the Pipeline located underneath its roadbed and track or tracks and restore such roadbed to as good a condition as it was in at the time of the construction of the Pipeline, or it may permit the Licensee to do such work of removal and restoration to the satisfaction of the Licensor. In the event of the removal by the Licensor of the property of the Licensee and of the restoration of the roadbed and property as herein provided, the Licensor shall in no manner be liable to the Licensee for any damage sustained by the Licensee for or on account thereof, and such removal and restoration shall in no manner prejudice or impair any right of action for damages, or otherwise, that the Licensor may have against the Licensee.

Section 12. WAIVER OF BREACH.

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

Section 13. TERMINATION.

(a) If the Licensee does not use the right herein granted or the Pipeline for one (1) year, or if the Licensee continues in default in the performance of any covenant or agreement herein contained for a period of thirty (30) days after written notice from the Licensor to the Licensee specifying such default, the Licensor may, at its option, forthwith immediately terminate this Agreement by written notice.

(b) In addition to the provisions of subparagraph (a) above, this Agreement may be terminated by written notice given by either party hereto to the other on any date in such notice stated, not less, however, than thirty (30) days subsequent to the date upon which such notice shall be given.

(c) Notice of default and notice of termination may be served personally upon the Licensee or by mailing to the last known address of the Licensee. Termination of this Agreement for any reason shall not affect any of the rights or obligations of the parties hereto which may have accrued, or liabilities, accrued or otherwise, which may have arisen prior thereto.

Section 14. AGREEMENT NOT TO BE ASSIGNED.

The Licensee shall not assign this Agreement, in whole or in part, or any rights herein granted, without the written consent of the Licensor, and it is agreed that any transfer or assignment or attempted transfer or assignment of this Agreement or any of the rights herein granted, whether voluntary, by operation of law, or otherwise, without such consent in writing, shall be absolutely void and, at the option of the Licensor, shall terminate this Agreement.

Section 15. SUCCESSORS AND ASSIGNS.

Subject to the provisions of Section 14 hereof, this Agreement shall be binding upon and inure to the benefit of the parties hereto, their heirs, executors, administrators, successors and assigns.

EXHIBIT B-1

**Union Pacific Railroad Company
Insurance Provisions For
Pipeline / Wireline / Drainage License Agreements**

Licensee shall, at its sole cost and expense, procure and maintain during the life of this Agreement the following insurance coverage:

A. **Commercial General Liability** insurance. This insurance shall contain broad form contractual liability with a single limit of at least \$2,000,000 each occurrence or claim and an aggregate limit of at least \$4,000,000. Coverage must be purchased on a post 1998 ISO or equivalent form, including but not limited to coverage for the following:

- Bodily injury including death and personal injury
- Property damage
- Fire legal liability (Not less than the replacement value of the portion of the premises occupied)
- Products and completed operations

The policy shall also contain the following endorsements which shall be indicated on the certificate of insurance:

- The employee and worker's compensation related exclusions in the above policy apply only to Licensee's employees
- The exclusions for railroads (except where the Job site is more than fifty feet (50') from any railroad including but not limited to tracks, bridges, trestles, roadbeds, terminals, underpasses or crossings), and explosion, collapse and underground hazard shall be removed
- Waiver of subrogation

B. **Business Automobile Coverage** insurance. This insurance shall contain a combined single limit of at least \$2,000,000 per occurrence or claim, including but not limited to coverage for the following:

- Bodily injury and property damage
- Any and all motor vehicles including owned, hired and non-owned

The policy shall also contain the following endorsements which shall be indicated on the certificate of insurance:

- The employee and worker's compensation related exclusions in the above policy apply only to Licensee's employees
- The exclusions for railroads (except where the Job site is more than fifty feet (50') from any railroad including but not limited to tracks, bridges, trestles, roadbeds, terminals, underpasses or crossings), and explosion, collapse and underground hazard shall be removed
- Motor Carrier Act Endorsement- Hazardous materials clean up (MCS-90) if required by law.

C. **Workers Compensation and Employers Liability** insurance including but not limited to:

- Licensee's statutory liability under the workers' compensation laws of the state(s) affected by this Agreement
- Employers' Liability (Part B) with limits of at least
\$500,000 each accident, \$500,000 disease policy limit
\$500,000 each employee

If Workers Compensation insurance will not cover the liability of Licensee in states that require participation in state workers' compensation fund, Licensee shall comply with the laws of such states. If Licensee is self-insured, evidence of state approval must be provided along with evidence of excess workers compensation coverage. Coverage shall include liability arising out of the U. S. Longshoremen's and Harbor Workers' Act, the Jones Act, and the Outer Continental Shelf Land Act, if applicable.

The policy shall also contain the following endorsement which shall be indicated on the certificate of insurance:

- Alternate Employer Endorsement

D. **Umbrella or Excess Policies** In the event Licensee utilizes Umbrella or excess policies, these policies shall "follow form" and afford no less coverage than the primary policy.

Other Requirements

- E. Punitive damage exclusion must be deleted, which deletion shall be indicated on the certificate of insurance.
- F. Licensee agrees to waive its right of recovery, and its insurers, through policy endorsement, agree to waive their right of subrogation against Licensor. Licensee further waives its right of recovery, and its insurers also waive their right of subrogation against Licensor for loss of its owned or leased property or property under its care, custody and control. Licensee's insurance shall be primary with respect to any insurance carried by Licensor. All waivers of subrogation shall be indicated on the certificate of insurance.
- G. All policy(ies) required above (excluding Workers Compensation) shall provide severability of interests and shall name Licensor as an additional insured. Severability of interest and naming Licensor as additional insured shall be indicated on the certificate of insurance.
- H. Prior to commencing the Work, Licensee shall furnish to Licensor original certificate(s) of insurance evidencing the required coverage, endorsements, and amendments. The certificate(s) shall contain a provision that obligates the insurance company(ies) issuing such policy(ies) to notify Licensor in writing of any cancellation or material alteration. Upon request from Licensor, a certified duplicate original of any required policy shall be furnished.
- I. Any insurance policy shall be written by a reputable insurance company acceptable to Licensor or with a current Best's Insurance Guide Rating of A- and Class VII or better, and authorized to do business in the state(s) in which the service is to be provided.
- J. Licensee **WARRANTS** that this Agreement has been thoroughly reviewed by Licensee's insurance agent(s)/broker(s), who have been instructed by Licensee to procure the insurance coverage required by this Agreement and acknowledges that Licensee's insurance coverage will be primary.
- K. The fact that insurance is obtained by Licensee or Licensor on behalf of Licensee shall not be deemed to release or diminish the liability of Licensee, including, without limitation, liability under the indemnity provisions of this Agreement. Damages recoverable by Licensor shall not be limited by the amount of the required insurance coverage.