

RESOLUTION NO. 21 - 23

A RESOLUTION APPROVING A TRACKAGE AND DEVELOPMENT AGREEMENT FOR A RAIL SERVED INDUSTRIAL PARK PROJECT.

WHEREAS, the Edward C. Levy Company, doing business locally as the Schmidt Construction Company, owns property located to the West of Colorado Springs Utilities ("Utilities") Clear Springs Ranch site on which it desires to construct a rail served industrial park (the "Project"); and

WHEREAS, the Project has support from multiple community stakeholders, including, but not limited to, the City of Colorado Springs, the City of Fountain, El Paso County, and the Colorado Springs Chamber of Commerce and Economic Development Corporation and is expected to bring significant new economic development opportunities and jobs to the region and support the operations of the Fort Carson Military Reservation; and

WHEREAS, the Project requires use of Utilities' existing rail spur into Clear Springs Ranch and construction of an extension from that rail spur onto the property located to the west of Clear Springs Ranch if it is to develop; and

WHEREAS, with support of the Colorado Springs Utilities ("Utilities") Board of Directors, the Utilities Chief Executive Officer submitted a Letter of Conditional Support for a proposed Rail Served Industrial Park in October of 2017 (the "Letter of Support"); and

WHEREAS, the Letter of Support provided, in summary, that Utilities could support the development of the Project through use of Utilities' existing rail spur and construction of a rail spur extension within Clear Springs Ranch so long as Utilities' operations and ratepayers were not adversely impacted; and

WHEREAS; Utilities has negotiated a Trackage and Development Agreement, attached hereto and incorporated herein by reference as Exhibit A, which protects Utilities' operations and ensures Utilities' ratepayers are not adversely impacted; and

WHEREAS, the Trackage and Development Agreement grants and conveys certain easements and other interests subject to the Colorado Springs Charter; and

WHEREAS, the Trackage and Development Agreement is not contemplated under *The Colorado Springs Procedure Manual for the Acquisition and Disposition of Real Property* and, therefore, requires City Council approval; and

WHEREAS, the Mayor, or his designee, is responsible for executing documents involving the transfer or conveyance of interests in real property and the Utilities' Chief

Executive Officer and his designees have operational responsibility for activities at Utilities' Clear Springs Ranch site; and

WHEREAS, City Council finds that the approval of the Trackage and Development Agreement is in the best interests of the City of Colorado Springs and will promote economic development opportunities and job creation within the region.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF COLORADO SPRINGS:

Section 1. City Council, on behalf of the City of Colorado Springs and Colorado Springs Utilities, hereby approves the Trackage and Development Agreement attached hereto as Exhibit A.

Section 2. City Council authorizes the Mayor of the City of Colorado Springs and the Chief Executive Officer of Utilities or their designees to execute the Trackage and Development Agreement.

DATED at Colorado Springs, Colorado, this 14th day of February 2023.

ATTEST:



Council President


Sarah B. Johnson, City Clerk


EXHIBIT A

TRACKAGE AND DEVELOPMENT AGREEMENT

This Trackage and Development Agreement (this "Agreement") dated as of _____, 2023 (the "Effective Date"), is entered into among _____, a _____, which is an affiliate of **Edw. C. Levy Co.**, a Michigan corporation d/b/a Schmidt Construction Company ("Schmidt"), whose address is 9300 Dix Avenue, Detroit, MI 48120, and the **City of Colorado Springs**, a home rule city and Colorado municipal corporation ("City") for and on behalf of its enterprise **Colorado Springs Utilities**, whose address is 121 S. Tejon Street, MC 950, Colorado Springs, Colorado 80903 ("Utilities") (Schmidt, the City and Utilities are each hereinafter sometimes referred to as a "Party" and collectively as the "Parties").

RECITALS

A. The City, for and on behalf of Utilities, is the owner in fee simple of certain real property located at 14020 Ray Nixon Road, Fountain, Colorado 80817 known as Utilities' Clear Springs Ranch ("CSR"), which property is described on **Exhibit A** attached hereto (referred to hereinafter as "Utilities' Property").

B. Utilities' Property is currently served by a rail line and receives service from Union Pacific ("UP"), but also has the capability to receive dual rail service from both UP and from Burlington Northern Santa Fe Railroad ("BNSF") subject to appropriate agreements with UP and BNSF.

C. Schmidt represents that it owns approximately ___ acres of real property described on **Exhibit B** attached hereto ("Schmidt's Property") which is located adjacent to Utilities' Property and is also adjacent to the Fort Carson Military Reservation ("Fort Carson").

D. As a result of a Memorandum of Understanding Regarding Rail Served Economic Development Initiative dated May 3, 2018 (the "MOU"), among Schmidt, the City, the City of Fountain, El Paso County and the Colorado Springs Chamber of Commerce and Economic Development Corporation, by which the parties to the MOU sought to enhance job creation in the area and simultaneously assist Fort Carson with a much needed second rail access and service to Fort Carson, a feasibility study was completed by HDR Engineering, Inc. ("HDR") which determined that Schmidt's Property could be developed as an industrial rail park and also provide a needed second rail access and service to Fort Carson (the "Feasibility Study").

E. Utilities provided a Letter of Conditional Support for the Proposed Rail-Served Industrial Park dated October 23, 2017, to the MOU and the Parties are seeking to address the conditions articulated in the Letter in part through this Agreement.

F. Subject to the conditions and requirements of this Agreement, the Parties now desire to facilitate the development of Schmidt's Property as an industrial rail served business center and provide a second rail access and service to Fort Carson (collectively, the "Project") in furtherance of the MOU.

G. The Project contemplates that rail access be extended through Utilities' Property to Schmidt's Property, and thereafter to Fort Carson, with Schmidt sharing use of a portion of the

existing rail facilities located on Utilities' Property, and Schmidt extending a new rail line through a portion of Utilities' Property, all generally as contemplated by preliminary engineering studies and plans prepared by HDR and preliminarily reviewed by Utilities, but subject to final review and approval by Utilities in accordance with this Agreement prior to commencement of any construction activities.

H. In order to extend rail access through Utilities' Property to Schmidt's Property, the Project requires the right to use a portion of the Utilities' Property, which Utilities agrees to grant (and which such rights may be subject to relocation under certain circumstances as hereinafter set forth) over, under, upon, across or through Utilities' Property, as may be reasonably necessary to or desirable for the Project and for the construction and operation of the Project by Schmidt, as more specifically set forth herein.

I. Schmidt represents that the Project would not be economically feasible without this Agreement.

J. It is the desire of the Parties through the provisions of this Agreement to (i) grant to and establish easements and other rights for Schmidt for the conditional use of portions of Utilities' Property for the Project as described herein; (ii) apportion between Utilities and Schmidt, and subsequent grantees of part or all of the rights established under this Agreement, the costs of the maintenance, repair and operation of the easement areas and (iii) provide for certain other matters and things, all as set forth in this Agreement. It is also Schmidt's intent to commit to grant an easement to Utilities for a utility corridor through Schmidt's Property to the boundary of Fort Carson for utility purposes as needed or desired by Utilities.

AGREEMENTS

NOW THEREFORE, in consideration of the foregoing recitals, which are incorporated herein, the mutual covenants and agreements contained herein, and other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the Parties agree as follows:

ARTICLE I DEFINITIONS

For purposes of this Agreement, except where the context otherwise requires, the following capitalized terms have the following meanings:

"Benefitted Area" means the dominant real estate interest for and appurtenant to which, or for the Owners or Occupants of which, a particular easement over, under, upon, across or through a Burdened Area is granted or exists.

"Burdened Area" means the servient real estate interest over, under, upon, across or through which an easement in favor of a Benefitted Area runs.

"Casualty Damage" shall have the meaning ascribed to such term in Section 9.1.

"City" shall have the meaning ascribed to such term in the Recitals of this Agreement.

"City Charter" means the Charter of the City of Colorado Springs, Colorado.

"City Code" means the Code of the City of Colorado Springs 2001, as amended.

"Easements" means the portions of Burdened Areas, including the land areas thereof, over, under, upon, across or through which there exists an easement created by this Agreement.

"Facilities" means all equipment and facilities utilized in connection with the Easements.

"Financing Party" means any person (including any affiliate) providing debt or equity financing, or refinancing of any debt or equity financing obtained in connection with development, construction, ownership, leasing, operation or maintenance of the Project.

"Hazardous Substances" means any pollutant, contaminant, chemical, industrial, toxic, hazardous or noxious substance or waste that is now or hereafter regulated by any federal, state or local government, including but not limited to any "hazardous substance" as defined by the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. §§9601, et seq.) ("CERCLA"), as amended, and rules and regulations promulgated thereunder, and shall also include any materials which are prohibited from entering CSR under any applicable federal or State law, including under the applicable regulations of the Department of Homeland Security.

"Law" means all laws (whether statutory or otherwise), ordinances, rules, regulations and applicable orders and decrees of all governmental, judicial, legislative, executive, administrative or regulatory authorities (federal, state, municipal, departmental, foreign or otherwise), including without limitation the City Charter and the City Code.

"Loss" means any loss, damage, liability, payment, obligation or expense (including, without limitation, reasonable fees and expenses of legal counsel, but excluding any consequential or indirect loss or special or punitive damages).

"Occupants" means Owners and any lessees or sublessees of any portion of Schmidt's Property and all licensees, permittees, invitees, employees or agents thereof.

"Owners" means Schmidt, the City or Utilities, as applicable, and their respective successors and assigns.

"O&M Agreement" means the Operations and Maintenance Agreement between Utilities and Schmidt to be entered into pursuant to Article 3.3 below.

"Permanent Lender" means any lender making a loan which may be secured by a mortgage or deed of trust on all or a portion of Schmidt's Property.

"Person" means and includes an individual, a partnership, a corporation, a limited liability company, a joint stock company, a metropolitan district, an unincorporated association, a joint venture, a trust or other entity or any governmental entity.

"Project" is as defined in Recital F, above, including the rail line extensions, road extensions, and all associated utilities, facilities, fixtures, equipment, plant and machinery, structures and apparatus necessary, required or helpful for the operation and success of the Project, which is to be constructed on Utilities' Property or Schmidt's Property (as defined above) in accordance with BNSF and UP standards and guidelines for industry track projects.

"Project Financing" shall have the meaning ascribed to such term in Section 10.10.

"Release" shall have the meaning ascribed to such term in CERCLA, as amended, 42 U.S.C. §9601(22) and the regulations promulgated thereunder.

"Repair" means the restoring, replacing, repairing or rebuilding of a damaged or destroyed Easement or Facility as nearly as possible to the condition, quality and class such Easement or Facility was in immediately prior to such damage or destruction, including Casualty Damage, to the extent that doing so is reasonably necessary to allow the exercise of Easement rights therein created by this Agreement.

"Schmidt" is defined in the introductory paragraph of this Agreement and includes its successors and assigns.

"Schmidt's Property" is defined in Recital C.

"Survey" means the graphic representation of a portion of Utilities' Property and Schmidt's Property attached hereto as **Exhibit C**, which illustrates the general locations of the Benefitted Areas, Burdened Areas, Easements and Facilities.

"Utilities" is defined in the introductory paragraph of this Agreement.

"Utilities' Property" is defined in Recital A of this Agreement.

ARTICLE II EASEMENTS - GENERAL TERMS AND CONDITIONS

Section 2.1 Declaration. Upon and subject to the terms and conditions set forth herein, the City and Utilities do hereby declare and establish that the portions of Utilities' Property described herein as burdened by the Easements shall be held, transferred, sold, conveyed, encumbered, leased and occupied subject to the covenants, easements, restrictions and rights hereinafter set forth. With regard to the Shared and Reciprocal Railroad Access and Use Easement provided for in Article III below, that Shared Railroad Access Area will be used by both Schmidt and Utilities, and Utilities' rights to use the Shared Railroad Access Area for Utilities' operations will at all times be granted priority of use over Schmidt's use.

Section 2.2 Future Modification of Easements. The Parties are executing this Agreement prior to completion of the detailed engineering design for the Project, and, accordingly, it is anticipated that the descriptions of the various easements granted herein may be reasonably modified and refined as that detailed engineering for the Project is completed from time-to-time. The Parties agree to grant all easements contemplated by this Agreement, however, the Parties recognize that no easement shall materially alter the terms and conditions of this Agreement. Utilities has the exclusive right, in its sole discretion, to agree to any proposed relocation of an easement granted herein and to designate the locations of future easements or other rights to be granted on, under, over, through or across Utilities' Property under this Agreement to further support and enhance the Project.

Section 2.3 Duration of Easements. The Easements, restrictions, benefits and obligations hereunder are subject to the City Charter and shall be deemed to create mutual and reciprocal benefits and servitudes upon the Benefitted and Burdened Areas, which run with the land unless

terminated in accordance with the provisions of this Agreement or the City Charter, at which time such Easements will revert to the City and this Agreement shall terminate.

Section 2.4 Reservation. Except for the specific rights granted herein, Schmidt does not have any legal, beneficial, or equitable rights in Utilities' Property, and Utilities does not have any legal, beneficial or equitable rights in Schmidt's Property, and Utilities reserves all rights inherent in the City's ownership of the Utilities' Property that are not inconsistent with the rights expressly granted to Schmidt hereunder. Further, Schmidt shall respect Utilities' use and operation of Utilities' Property and the City or Utilities may at any time and from time to time, change or expand Utilities' Property, modify, remodel, or reconstruct the improvements on Utilities' Property and change or expand an existing use of Utilities' Property.

Section 2.5 Right of Relocation. The Owner of a Burdened Area may at any time and from time to time and at the Owner's expense, relocate, in whole or in part, any Easements and Facilities relating to any Easement created by this Agreement provided that such relocation does not materially diminish or unreasonably impair the rights or services of the Owner of the Benefitted Area with respect to such Easement or Facility or materially increase the costs to be incurred by such Owner of the Benefitted Area.

Section 2.6 No Dedication. Nothing contained herein shall be deemed to vest in any party other than the City, Utilities or Schmidt and their respective successors and assigns any legal rights in Utilities' Property or Schmidt's Property or any right to enforce the terms of this Agreement. Nothing herein is intended to dedicate or reserve to the general public or the public at large, or to permit any member of the public to acquire any right, by adverse possession, prescription, grant, dedication or otherwise, to possess, use or occupy Utilities' Property, or Schmidt's Property, or any portion thereof, said grant, dedication, reservation, or prescriptive rights being expressly denied.

Section 2.7 Use of Easements. Schmidt's (and Utilities') use of the Easements shall be in compliance with all applicable Laws. In addition, notwithstanding any provision in this Agreement to the contrary, it is expressly understood that all Easements may be used by either Party for the purposes provided herein as may be reasonably necessary to, or desirable for the ongoing use of, Utilities' Property or the ongoing use of Schmidt's Property for the Project and for the construction and operation of the Project.

Section 2.8 Compensation. Schmidt agrees to pay to the City compensation for each Easement equal to the fair market value of each such interest as determined by an independent appraisal conducted in accordance with the City's Real Estate Procedure Manual for the Acquisition and Disposition of Real Property Interests. Schmidt shall pay for all required appraisals. The value for all Easements shall be as of the date construction of the Project is initiated and payment shall be due and payable to the City within sixty (60) days of the initiation of such construction.

Section 2.9 Deadline for Project Initiation. If Schmidt fails to initiate substantial construction of the Project within ten (10) years from the date of this Agreement, Utilities shall be entitled to unilaterally terminate this Agreement at any time after that ten (10) year period. In the event of the termination of this Agreement pursuant to this Section 2.9, Utilities may record a written statement of termination in such form as Utilities shall determine. For purposes of this

Section 2.9, substantial construction will not be deemed initiated unless and until Schmidt actually takes possession of and makes substantial alterations in furtherance of the Project upon one or more of the Easements, in accordance with this Agreement.

ARTICLE III SHARED AND RECIPROCAL RAILROAD ACCESS AND USE EASEMENT

Section 3.1 Shared and Reciprocal Railroad Access and Use of Existing Railroad Bridge and Lines. The existing railroad access to CSR is over the portion of Utilities' Property on which the existing railroad tracks are currently located, including the railroad bridge, with that portion of Utilities' Property on which the railroad tracks currently exist being described and depicted on **Exhibit D** attached hereto (the "Shared Railroad Access Area"). Subject to any required consents of, and compliance with any lawful conditions imposed by, UP and BNSF, and to any restrictions on use imposed by this Agreement or any agreement arising hereunder, the City and Utilities, for the benefit of Schmidt, hereby grant and convey to Schmidt a non-exclusive, reciprocal easement and right to use the existing rail, located upon the Shared Railroad Access Area, for access to Schmidt's Property and potentially to Fort Carson for the Owners, employees, contractors, agents, representatives, invitees, successors and assigns of Schmidt and otherwise for ingress and egress to and from Schmidt's Property, Fort Carson, the Easements and Facilities. The right to use the Shared Railroad Access Area granted hereby shall be subordinate to Utilities' use of such Shared Railroad Access Area and the existing rail located therein. Schmidt's right to use the Shared Railroad Access Area includes the right to use the existing railroad tracks for access to and in support of the Project, including for granting a railroad access to Fort Carson. The City and Utilities hereby reserve, for the benefit of the City and Utilities, its paramount and priority ownership and rights in, to, on, across, through, under and over the Shared Railroad Access Area for the employees, contractors, agents, representatives, licensees (other than Schmidt), and invitees of the City and Utilities and any other person authorized by the City or Utilities for ingress and egress to and from Utilities' Property and to CSR. The right to use the Shared Railroad Access Area hereby reserved by the City and Utilities includes the paramount right of the City and Utilities to continue use of the existing railroad tracks to access and serve Utilities' Property and CSR and for any other existing or future use, and to receive priority when scheduling use of the Shared Railroad Access Area. The Parties acknowledge and agree that the City and Utilities' rights to the Shared Railroad Access Area may be subject to agreements between the City and UP and BNSF ("Railroad Agreements"). Such Railroad Agreements may require that the City obtain the consent of UP and BNSF, respectively, before the City may assign any of its interest in or allow third-party use of the rail in the Shared Railroad Access Area. As such, the City agrees to seek such approvals of UP and BNSF, at Schmidt's expense and with Schmidt's cooperation. Schmidt agrees that, if such consents are provided, the rights granted by this Section will be subject to any conditions imposed as part of the consents of UP and BNSF. In the event UP and/or BNSF refuses to provide the required consents and objects to the rights contemplated in this Section within forty-eight (48) months of the date of this Agreement and Utilities has made reasonable efforts to obtain such consents, Utilities shall have the right to terminate this Agreement by providing written notice to Schmidt.

Section 3.2 Coordination of Use. The rail and bridge in the Shared Railroad Access Area shall be for the shared use of the Parties, including Schmidt's use for the Project. The Parties agree that Schmidt's use of the rail line in this area shall be coordinated with Utilities to ensure

the smooth, efficient and safe operation of the railroad and industry traffic using the rail in the Shared Railroad Access Easement Area and to ensure that Utilities' use for its mission is protected and that Utilities' operations are not impaired or otherwise adversely impacted by Schmidt's use of the rail line. In that regard, Schmidt currently contemplates that it may be helpful to utilize a Class III railroad to coordinate the future train traffic for the Project, and the City and Utilities consent to such use provided that (i) the use of a Class III railroad is at no cost to the City or Utilities; (ii) first priority is given to scheduling any deliveries needed or desired by Utilities; (iii) Utilities has the right to impose reasonable rules and regulations on the coordination efforts; and (iv) Utilities has the right to approve Schmidt's selection of any Class III railroad in Utilities' reasonable discretion.

Section 3.3 Costs. The costs of maintenance, operation, replacement, servicing and repair of the rail, bridge and appurtenant facilities in the Shared Railroad Access Area described in Section 3.1 shall be shared between Utilities and Schmidt on a pro rata basis based on the number of train cars accessing Utilities' Property for service to Utilities compared to the number of train cars accessing Schmidt's Property for service to Schmidt' Property or Fort Carson on a monthly basis, provided that in the event any rail cars or loads transported by or on behalf of Schmidt create the need for special maintenance or operations, the same shall be at the expense of Schmidt and not the City or Utilities. The Parties agree to negotiate in good faith and execute an O&M Agreement to more completely address cost sharing and coordination of maintenance, provided, however, that all costs attributable to Schmidt's construction activities on Utilities' Property shall be borne exclusively by Schmidt or its successors or assigns. In March of each year, the Parties will agree on an annual update to the O&M Agreement and a budget for shared expenses for the following year. Utilities agrees to include its share of the proposed shared expenses in its proposed budget that is submitted to the City Council for approval. In the event Schmidt transfers ownership or responsibility of the Project to a governmental entity, Schmidt agrees to include as a condition or requirement of such transfer that the governmental entity will take all steps to include all proposed shared expenses in the entity's annual budget. For any shared maintenance costs which are actually incurred and which were part of the agreed-upon budget, such costs and expenses shall be paid pursuant to an invoice within thirty (30) days from the receipt of the invoice. Except in the case of an emergency, Schmidt will obtain Utilities' written consent prior to incurring any shared maintenance expenses that are not included in the agreed-upon budget.

ARTICLE IV RAILROAD SPUR EASEMENT

Section 4.1 Rail Spur. To support the Project and minimize interference with Utilities' operations at CSR, Schmidt will need to construct a new railroad line coming off the existing railroad line as shown on **Exhibit E**. The City and Utilities, for the benefit of Schmidt, Schmidt's Property and the Project, hereby grant and convey to Schmidt an easement in, to, on, across, through, under and over the railroad spur ("Railroad Spur Easement") located on Utilities' Property as more particularly depicted on **Exhibit E** attached hereto (the "Railroad Spur Easement Area"). The Railroad Spur Easement is granted for use by Schmidt in support of the Project to construct, operate, maintain, repair and replace from time-to-time a railroad spur extension from Utilities' existing railroad spur to Schmidt's Property and possibly on to Fort Carson. The City and Utilities will continue to have the right to use the Railroad Spur Easement Area as necessary in the operation of the Utilities' Property and CSR, provided that such use does not unreasonably interfere with

Schmidt's use of the Railroad Spur Easement and any railroad line constructed thereon. Schmidt agrees that any costs incurred by the City or Utilities related to creating crossings of the Railroad Spur Easement and/or any railroad lines constructed thereon shall be borne solely by Schmidt. The City and Utilities agree that they will not grant any other party the right to use the Railroad Spur Easement or any railroad line constructed thereon, except that the City and Utilities reserve the right to grant other parties the right to cross the Railroad Spur Easement or any railroad line constructed thereon as part of any development, use, or operation of the Utilities' Property provided that such rights do not unreasonably interfere with Schmidt's rights granted hereunder. Schmidt expressly acknowledges that there are certain pre-existing rights to cross the Railroad Spur Easement Area, including, but not limited to, those held by Fountain Valley Authority and the United States Bureau of Reclamation.

Section 4.2 Costs. The costs of construction, railroad permits and insurance, maintenance, operation, replacement, servicing and repair of the Facilities described in Section 4.1 shall be borne exclusively by Schmidt provided, however, that damages to the Railroad Spur Easement Area or Facilities located therein caused by Utilities' use of the Railroad Spur Easement, if any, shall be repaired or restored by Utilities.

ARTICLE V UTILITY EASEMENTS AND SHARED FACILITIES

Section 5.1 Grant. The City and Utilities, for the benefit of Schmidt and Schmidt's Property, hereby grant and convey to Schmidt a non-exclusive easement in, to, on, across, through, under and over Railroad Spur Easement Area, for the purposes of installation, maintenance, operation, replacement, servicing, repair, and use of facilities for extension of utilities to Schmidt's Property, including, but not limited to, the following utilities to serve Schmidt's Property and the Project:

- (a) Electric. Facilities for the transmission of electric power to and from the Schmidt Property, including customary electric lines, transmission lines, transformers, cables and related electric equipment and facilities.
- (b) Water and Sewer. Facilities for the transmission of water and sewer service to and from the Schmidt Property, including customary water and sewer lines, and any needed lift stations and related equipment and facilities.
- (c) Telephone and Cable. Facilities providing for telephone, cable, and fiber optic services to Schmidt's Property and for the benefit of Schmidt's Property and for the Project.
- (d) Natural Gas. Facilities for providing natural gas to Schmidt's Property and for the Project.
- (e) Signage. Temporary and permanent external identification and directional signs, all in locations, sizes and form to be mutually agreed upon by the Parties hereto, and, with regard to external signs, subject to the prior approval of such signs by all applicable jurisdictions having control thereof.

- (f) Other Services. Nothing herein contained shall be construed to prohibit Schmidt from contracting with any utility, telephone, cable, or fiber optic provider, whether or not such provider is servicing Utilities' Property.
- (g) Utility and Signage Plan Approval. Prior to the installation of any of the utilities or the signage contemplated by this Section 5.1, Utilities must have a reasonable opportunity to review and approve the utility plans and signage plans for Schmidt's Property, and any amendments thereto. All utilities and signage must be installed consistent with the utility plans and signage plans approved by Utilities. In the event, Utilities approves utility plans that include utilities in areas of the Utilities' Property other than the Railroad Spur Easement, Schmidt is hereby granted a non-exclusive easement through, under, over, in and to the other areas of Utilities' Property consistent with the Utilities-approved utility plans in order to connect to existing utility connections on or off Utilities' Property, for the purpose of installation, maintenance, operation, replacement, servicing, repair and use of facilities providing for utility service, including for water, sanitary sewer, telephone cable, or fiber optic service to Schmidt's Property from any such provider as is reasonably necessary therefor, provided, however, that those connections and the easements contemplated hereby do not unreasonably interfere with Utilities' existing operations or other easements previously granted to or by Utilities. The locations of any such easements will be documented by an amendment to this Agreement in accordance with Article XIII of this Agreement. Any work in such easements must be approved by and coordinated with Utilities prior to the commencement of any such work.

Section 5.2 Costs. The cost of construction, rail permits and insurance, maintenance, operation, replacement, servicing, and repair of the facilities described in Section 5.1 above shall be borne by Schmidt.

Section 5.3 Drainage Easement. If Schmidt should require any easements to address drainage for the Project or for Utilities' Property, Utilities agrees to cooperate in good faith with Schmidt to identify and grant, consistent with the City Charter, such drainage easements as may reasonably be required to address the drainage issues related to the Project or Utilities' Property; provided that (i) Utilities must have a reasonable opportunity to review and approve drainage plans for Schmidt's Property, and any amendments thereto, (ii) all drainage improvements must be installed consistent with the drainage plans approved by Utilities, (iii) Utilities shall have no obligation to grant any drainage easement that impairs or interferes with Utilities' use of or the use of any third party conducting activity on Utilities' Property at the time of execution of this Agreement, and (iv) Schmidt agrees to be responsible for all costs associated with any maintenance required for such drainage improvements to be operated in accordance with stormwater best management practices and/or Schmidt's proportionate share of any costs associated with operation and maintenance of any shared drainage improvements. Schmidt agrees to cooperate and work in good faith with Utilities to ensure that the drainage plans for Schmidt's Property improve the drainage of both Utilities' Property and Schmidt's Property.

ARTICLE VI VEHICULAR ACCESS EASEMENT

Section 6.1 Grant. To support the Project and the manufacturing and other businesses to be located within the Project, Schmidt would like to construct a second road access to the Project, with the location of that second access currently contemplated to be north of the northern boundary of the Fountain Valley Authority property in a location to be determined by and acceptable to Utilities. The City and Utilities, for the benefit of Schmidt, Schmidt's Property and the Project, upon a more specific written request from Schmidt, hereby agree to work in good faith to identify and thereafter grant and convey to Schmidt an easement in, to, on, across, through, under and over a portion of Utilities' Property, in the location ultimately determined by Utilities (the "Road Easement Area"). The Road Easement Area will be subject to review and final approval by Utilities in its discretion, but is intended to be sufficient to house a four-lane major collector road of adequate size to carry the contemplated traffic and meet land use requirements. This access road will be used by Schmidt for the location, construction, maintenance, repair and replacement of road and related improvements needed to provide for the ingress and egress of vehicular traffic to access the Project (the "Road Access Easement"). The Road Access Easement Area may also be used by Schmidt for the location and support of utility infrastructure as is customary. The City and Utilities will be entitled to use the Road Access Area to provide additional access to Utilities' Property. Utilities retains the right to use the Road Access Area as necessary or desired in the operation of Utilities' Property and CSR. Schmidt agrees that any costs incurred by the City or Utilities related to creating crossings of the Road Access Easement and/or any road constructed thereon shall be borne solely by Schmidt.

Section 6.2 Costs. The costs of construction, permits, insurance, maintenance, operation, replacement, servicing and repair of the Road Access Easement described in Section 6.1 shall be borne exclusively by Schmidt provided, however, that damages to the Road Access Easement or Facilities located therein caused by Utilities' use of the Road Access Easement, if any, shall be repaired or restored by Utilities.

Section 6.3 Security. For security purposes, Schmidt will be required to fence off the Road Access Area from the remainder of Utilities' Property, with such fencing to be subject to the review and approval of Utilities in its reasonable discretion, including satisfying any regulatory requirements imposed on Utilities by governmental authorities.

ARTICLE VII OPERATIONS AND SECURITY EASEMENT

Section 7.1 Grant. Maintaining adequate security of Utilities' Property, including measures that may be needed to comply with federal requirements, such as standards that may be imposed by the Department of Homeland Security, NERC, FERC or other applicable federal or state agencies, is a priority of the Project. As such, the Parties agree that prior to any trains (other than trains which are serving Utilities) being permitted to traverse any of the Easements granted herein or in any way enter the Utilities' Property for the benefit of Schmidt or Schmidt's Property, the Parties will negotiate in good faith and execute a Security and Access Agreement. At a minimum, the Security and Access Agreement will require that all security measures will comply with all of Utilities' security rules, procedures and protocols, as those may change from time to time to comply with all state and federal regulations applicable to the site and other security measures reasonably adopted by Utilities. The Parties agree that Utilities Security Department shall have oversight over the security measures to be implemented and shall have the right in good faith to

modify or terminate any security procedures or practices that are inconsistent with the procedures, protocols, rules or regulations related to the Utilities' Property and CSR. There exists an approximately two-mile length of railroad track on Utilities' Property which lies east of I-25 as shown on **Exhibit F** (the "Security Area"). The Parties currently contemplate that they will identify a specific location within this Security Area that will be used for a security scanning area for trains to ensure that the trains are safe and do not contain items which might be prohibited from entering the restricted CSR area. Subject to this Section and the Security and Access Agreement, the City and Utilities, for the benefit of Schmidt and Schmidt's Property, hereby grant and convey to Schmidt an easement for the purpose of locating, using, securing, maintaining, replacing and repairing temporary and permanent security systems within the Security Area to provide additional security measures for trains intending to enter Utilities' Property or Schmidt's Property (the "Security Easement"). The Security Easement shall include the right of Schmidt to control train traffic (other than Utilities' trains) through the Security Area and entering into the Nixon Power Plant, including using the Security Area for staging of train traffic and installation of such improvements, such as scanners, and shall also include the installation and use of identification, directional and operational signs on and within the Security Area, all in locations, sizes and form as may be helpful to provide security to Utilities' Property, Schmidt's Property or the Project. The Security Easement shall be subject to the terms and conditions of the Security and Access Agreement.

Section 7.2 Costs. The initial cost to install any equipment or facilities within the Security Area shall be a cost borne solely by the Project. The costs of installing, maintaining and operating any such security measures that are in excess of those that Utilities would otherwise institute had it not entered into this Agreement shall be borne solely by Schmidt; all other costs of installing, maintaining and operating any such security measures shall be equitably apportioned between Utilities and Schmidt in accordance with Section 3.3, above, unless otherwise agreed between Utilities and Schmidt.

Section 7.3 Physical Security. As part of the planning and design of the Project, Schmidt agrees, as an expense of the Project, to provide fencing or other boundary security along its common border with Utilities' Property to mitigate threats and provide reasonable security to CSR from operations on Schmidt's Property. In addition, Schmidt shall establish a protective berm in the Railroad Spur Easement on both sides of the railroad track constructed thereon. The design of the protective berm must be approved by Utilities in its reasonable judgment prior to construction.

ARTICLE VIII CONSTRUCTION ACTIVITIES EASEMENT

Section 8.1 Grant. The City and Utilities, for the benefit of Schmidt and Schmidt's Property, hereby grant and convey to Schmidt a non-exclusive easement for ingress and egress for all construction employees or contractors of Schmidt to enter upon, cross over and access so much of and those portions of Utilities' Property as is consistent with the approved construction plans to complete the construction of the rail spur and any other Facilities that will be installed on the Utilities' Property (the "Construction Easement"). Utilities shall have a reasonable opportunity to review and approve the construction plans, including the work plans and safety plans, for all proposed construction within the Easements on Utilities' Property, and all such construction must be consistent with plans approved by Utilities. Utilities reserves the right to monitor all

construction activities on Utilities' Property and to modify or terminate any such construction activities that are not consistent with the approved plans. All construction activities must comply with Utilities' contractor minimum safety and security requirements and Utilities' contractor access policy. All construction activities will be coordinated with Utilities so as not to unreasonably interfere with Utilities operations on the Utilities' Property. The Construction Easement shall expire within thirty-six (36) months of the initiation of construction.

Section 8.2 Standards of Conduct. During construction, Schmidt covenants and agrees at Schmidt's expense (a) to maintain its construction site on Utilities' Property in an orderly fashion consistent with the construction plans, including the approved work plans and safety plan, and the prevailing best practices of the construction industry, (b) to repair any damage to Utilities' Property which is caused by such construction, (c) to use all efforts to minimize interference to the operations on, and users of, Utilities' Property resulting from construction noise or other construction activities, and, in connection therewith, to regularly coordinate with Utilities designated representative. All of Schmidt's construction activities must adhere to the construction plans, including the safety plan; Utilities' standards, policies and procedures; any standards imposed by UP and/or BNSF and the railroad industry generally; and the prevailing best practices of the construction industry. Schmidt represents and warrants that all of its construction activities will be performed with the same degree of care, skill and diligence as is ordinarily possessed and exercised in similar construction projects under similar circumstances and Schmidt shall ensure that its contractors and subcontractors, if any, have the level of skill in the area commensurate with the requirements of the work to be performed.

Section 8.3 Consultation. Prior to commencement of and during any construction activities, Schmidt agrees to coordinate and consult with Utilities in order to avoid any unnecessary disruption of Utilities' operations and to consider how the construction activities will affect Utilities' operations and other activities on Utilities' Property and how other matters provided in this Agreement will or may be affected. Schmidt will have regular, scheduled meetings with Utilities during the construction process at intervals acceptable to Utilities in order to provide Utilities updates as to the status of Schmidt's construction activities on Utilities' Property.

ARTICLE IX CASUALTY DAMAGE - MAINTENANCE

Section 9.1 Casualty Damage and Repairs. In case of damage to or destruction of any or all of the Easements and or Facilities by fire or any other cause similar or dissimilar, insured or uninsured ("Casualty Damage"), it shall be the obligation of Schmidt or the current Owner of those Facilities, although located on Utilities' Property, to promptly, and in a prudent manner, repair the portion of the Easements and Facilities so damaged or destroyed, provided, however, that if the improvements located within the Shared Railroad Access Area are damaged or destroyed, the costs for the repair or replacement of those improvements shall be shared between Schmidt and Utilities in accordance with the manner that maintenance costs have been shared in the year immediately prior to the year of the damage or destruction. Any such Repair work to be completed on Utilities' Property or within an Easement on Utilities' Property must follow the same procedures as in Article VIII.

Section 9.2 Maintenance and Repairs. Unless otherwise specified in this Agreement, it shall be the responsibility of Schmidt to maintain, operate, repair and keep the Easements and Facilities provided for herein so that they are suitable for utilization as contemplated by this Agreement;

provided that any such maintenance that would require Schmidt to enter the Utilities' Property, outside of the Easements, must be completed in accordance with the procedures in Article VIII. All reasonable and documented costs and expenses associated with the services provided in the preceding sentence shall be borne by Schmidt or the then Owner of the Easements granted in this Agreement. Notwithstanding the foregoing, the Parties agree that maintenance of the Shared Railroad Access Area shall be shared in accordance with the cost sharing allocation established under Section 3.3 of this Agreement, and the costs related to the Security Easement shall be shared in accordance with Section 7.2 of this Agreement.

ARTICLE X CONSTRUCTION AND OTHER COVENANTS

A. Schmidt's Covenant's and Obligations. The following are specific obligations of Schmidt which Schmidt agrees to perform as a condition to Utilities' obligations under this Agreement, subject, however, to Section 10.10 below:

Section 10.1 Utilities Rail Loop Extension. The existing rail loop that services Utilities' Property and accommodates the delivery of trains to CSR is not long enough to accommodate a unit train and requires the train to extend outside the gate and over the bridge during unloading operations. This blocks other train access during unloading operations because a portion of the train remains outside the gate of CSR. Schmidt has designed a solution to that deficiency which involves extending a new spur from the loop and constructing new track as shown on **Exhibit G** attached hereto (the "Spur Extension"). Utilities has approved the concept and general design for the Spur Extension and Schmidt has determined the Spur Extension is needed if the Project is to go forward. Subject to the conditions in Section 10.10 below, Schmidt agrees to construct the Spur Extension, at Schmidt's expense, as an initial component of the Project. Schmidt agrees that no trains other than trains servicing CSR may be allowed to enter CSR until the Spur Extension is completed, unless otherwise agreed to by Utilities.

Section 10.2 Relocation of Bad Order Track and Maintenance Building. It may be advantageous to the Project to relocate the existing bad order track and the related maintenance building at the end thereof to the location shown on **Exhibit H**. Utilities hereby agrees that upon receipt of Utilities' express written approval of the design and construction, Schmidt may, and solely at Schmidt's expense, relocate the existing maintenance building and the bad order track in accordance with the conceptual plans shown on **Exhibit H**.

Section 10.3 Road and Water Line Crossings. The Railroad Spur Easement provided for in Article IV will cross existing roads and water lines used by Utilities and other entities. Schmidt, at Schmidt's expense, will provide for at-grade crossings of the Railroad Spur Easement, and culverts, steel protective casing and other needed improvements acceptable to Utilities to accommodate the existing roads and water line crossings, including needed drainage improvements. In addition, Schmidt acknowledges that the Easements granted hereunder bisect the Utilities' Property and impair Utilities' ability to change or modify its use of the Utilities' Property in the future. As such, Schmidt agrees to provide, at Schmidt's expense, for all at-grade crossings of the Railroad Spur Easement resulting from any changes or modifications to the use of Utilities' Property, including any costs associated with obtaining approvals of such crossings. Furthermore, Schmidt expressly acknowledges and agrees that in the event any approvals for such at-grade crossings are required by the Colorado Public Utilities Commission, Schmidt shall be solely responsible for any and all costs associated with obtaining such approvals, and unless

otherwise required by law, shall also be responsible for all applications or other written materials prepared for purposes of obtaining such approvals, subject to Utilities' approval of any such applications or other written materials.

Section 10.4 Security. Maintaining adequate security for CSR and Utilities' Property generally is a major priority and is an objective of the Project. Schmidt, as part of the Project, agrees to plan and fund the additional security improvements needed for CSR and Utilities' Property, with those additional security improvements to be subject to Utilities' review and approval in its reasonable discretion. As provided for in Article VI, above, it is currently contemplated that security will be provided by scanning trains within the Security Easement. Utilities conceptually agrees to the use of those Scanning Facilities and to the use of that Security Easement for the installation, maintenance, repair and replacement of that portion of the track and those future Scanning Facilities and for security operations. The cost of the Scanning Facilities shall initially be the sole expense of Schmidt. Responsibility for the future operational and maintenance costs for the Scanning Facilities and Security Easement shall be as set forth in Article VII of this Agreement.

10.5 Bridge Inspections. Utilities agrees to obtain and provide to Schmidt periodic inspections of the railroad bridge that serves Utilities' Property prepared by a qualified structural engineer in such intervals as may be customary and prudent in the industry. The cost for the inspections shall be shared in accordance with Section 3.3 of this Agreement. Any future maintenance, repair or replacement expenses for the railroad bridge will be shared in accordance with Section 3.3 of this Agreement.

10.6 Reciprocal Utility Corridor. If it may be advantageous in the future for Utilities to obtain an easement across Schmidt's Property to extend utilities to the Project or Fort Carson, Schmidt agrees that it will provide the reasonably needed or desired right-of-way over, under, along, across and through Schmidt's Property connecting to the boundary of Fort Carson, without any cost to Utilities. Should Utilities desire such an easement, it agrees to notify Schmidt thereof in writing. Schmidt and Utilities agree to work together to find a mutually acceptable location on the Schmidt Property for such Easement. The costs for installation, maintenance, repair and replacement of any utility lines and improvements installed by Utilities within that easement would be at Utilities' or Utilities' customer's expense, and the easement therefor would be subject to the general terms and conditions of this Agreement.

B. Utilities' Covenants and Obligations. The following are specific covenants of Utilities:

10.7 Obligations Upon Any Sale or Transfer. Should Utilities transfer any portion of Utilities' Property upon which any of the Facilities are located which are the subject of any of the Easements granted to Schmidt in this Agreement, Utilities agrees to (1) use good faith efforts to provide Schmidt with the opportunity to acquire those Facilities and the land thereunder, if feasible, subject to the City's then-current ordinances, rules, regulations, policies, and procedures, and (2) in any event, make any transfer of that property subject to the then-existing obligations of Utilities under this Agreement, including each of the Easements granted to Schmidt pursuant to this Agreement.

10.8 Cooperation with Railroads. The Parties contemplate that the Project may need to have trackage agreements with UP and BNSF. City and Utilities currently hold a trackage agreement with UP and may hold a trackage agreement with BNSF. The City and Utilities agree,

provided that there is no resulting cost to the City or Utilities, to cooperate with Schmidt in efforts to obtain trackage agreements with UP and BNSF. Additionally, the City and Utilities agree, upon request from Schmidt and the consent of UP and BNSF, to partially assign to Schmidt (or allow Schmidt to exercise) appropriate rights that Utilities has under its trackage agreements with UP and BNSF (if any), provided, however that such assignments or permissions are either permitted under those trackage agreements or UP and BNSF, respectively, consent to those assignments. It is possible that Utilities may in the future discontinue rail service to CSR and no longer desire to maintain the trackage agreements with UP and BNSF. Should that occur, Utilities will first give notice to Schmidt of that decision and agree thereafter to cooperate in good faith with Schmidt to allow Schmidt to assume and perform those trackage agreements (or otherwise allow Schmidt to exercise Utilities' rights) with UP and BNSF should Schmidt request to do so and should UP and BNSF allow Schmidt to do so. Upon any assignment of rights under the trackage agreements from Utilities to Schmidt, Schmidt agrees to assume and be responsible for, and hold the City and Utilities harmless from, any resulting costs or obligations under those trackage agreements resulting from the exercise or continuation of those rights by Schmidt.

C. Mutual Obligations. The following covenants are undertaken by both Schmidt and Utilities:

10.9 Cooperation in Good Faith. The Parties are executing this Agreement prior to completion of all engineering that will be needed to construct the Project. Additionally, Utilities' future use of Utilities' Property may change. Accordingly, the Parties agree that they will each work in good faith with the other as that planning continues and circumstances change to insure that (i) the Project does not unreasonably interfere with Utilities' use and operation of Utilities' Property and the potential expansion of operations of Utilities thereon and (ii) that the Project can be completed and operated in a commercially reasonable manner to achieve the anticipated benefits. In that regard, the Parties agree to work cooperatively and execute such other and further documents, including, but not limited to, refinements of the Easements herein granted, as may be reasonably requested by a Party to further the Project and the intent of this Agreement.

10.10 Diligence and Financing Contingency. The Parties acknowledge that Schmidt is in the process of completing its due diligence regarding the Project and whether it can be constructed and operated successfully ("Schmidt's Due Diligence"). The Parties also acknowledge that the Project (i) will require Schmidt to obtain other governmental permits and approvals, and (ii) will require, and Schmidt intends to obtain, periodic financing for construction of the Project, which may come from one or more sources, including grants, conventional financing, and financing provided by one or more special districts or authorities established in accordance with Colorado Law ("Project Financing"). The Parties acknowledge that Schmidt may form one or more special metropolitan districts or authorities to assist with the financing of the Project and Schmidt's obligations hereunder. The City and Utilities agree that Schmidt's obligations under this Agreement are contingent on Schmidt (i) completing its Due Diligence and concluding, in its sole discretion, that the Project can be successfully constructed and operated, and (ii) obtaining Project Financing on terms and conditions acceptable to Schmidt in its sole discretion. Schmidt will provide Utilities with written notice once the two conditions above have been satisfied. If Schmidt does not provide such notice within seven (7) years of the Effective Date of this Agreement, Utilities may unilaterally terminate this Agreement and record a notice of termination in the records of the El Paso County Clerk and Recorder. The City and Utilities acknowledge that Project Financing for the initial construction of the Improved Loop and the rail spur through Utilities' Property and to the boundary with Fort Carson (the "Initial Phase") will likely

require a collateral assignment of Schmidt's rights under this Agreement and the right to exercise the Easements granted herein following any uncured default under Project Financing.

ARTICLE XI TAXES

At the date of this Agreement, there are no ad valorem taxes and assessments separately assessed or attributable to the Easements and Facilities because the City and Utilities are currently exempt from ad valorem taxes and assessments. If at any time in the future taxes and assessments for the Easements are assessed, Schmidt or the Owner of Schmidt's Property shall be responsible for those new taxes and assessments, unless the increase in taxes is due to the change of ownership of Utilities' Property from a tax-exempt to a taxable entity or due to other activities by Utilities on Utilities' Property. In the event Utilities' Property should be transferred to a taxable entity in the future, the Parties agree to allocate such taxes and assessments among themselves in a manner which will reasonably and fairly apportion such costs. Schmidt shall be authorized to contest in any manner it sees fit any Notice of Assessed Valuation or ad valorem tax bill submitted which includes any of the Easements, but to the extent that the particular statement or bill includes any part of Utilities' Property, Schmidt shall first notify Utilities of its intention to contest the statement or bill and shall take all efforts to prevent a tax lien from attaching to the Utilities' Property up to and including the amount in dispute under protest. Any costs and expenses incurred by Schmidt in pursuing any such contest shall be Schmidt's sole expense.

ARTICLE XII CONDEMNATION

Section 12.1 Damage Awards. If any portion of one or more Easements and Facilities is taken in condemnation proceedings or by any right of eminent domain (including a deed or other transfer in lieu of eminent domain), that portion of the total aggregate award for said taking, including severance damages, attributable to the value of the Easement and Facilities so taken shall be payable to the then Owners in proportion to their ownership interests.

Section 12.2 Collateral Claims. The provisions of Section 12.1 above shall not prohibit the Owners of a Benefitted Area which benefitted from the Easements and Facilities so taken from filing collateral claims with the condemning authority, for recovery over and above the value of the Easement and Facilities so taken, to the extent of any damage suffered by the Owners of such Benefitted Area resulting from the taking of the Easement and Facilities; provided that such claim or recovery does not reduce or diminish the amount of the award which the Owners of the condemned parcel would otherwise receive.

Section 12.3 Substitute Easements. To the extent that doing so is reasonably necessary following such taking to allow the exercise of Easement rights created by this Agreement, the City or Utilities, as applicable, shall, if reasonably feasible without interfering with the existing or future anticipated uses of Utilities' Property, provide a substitute Easement to Schmidt or to the then Owner of Schmidt's Property, as applicable, in which case Schmidt or the then Owner of Schmidt's Property shall be entitled to rebuild and restore the Facilities on the replaced Easement, to the extent that the award from such taking is sufficient to pay for such repairs and restoration, or Schmidt or such Owner of Schmidt's Property elects to fund the balance of the costs of such repairs in excess of the award. If the taking is such that only a portion of the Easement and

Facilities thereon are taken, Schmidt, or the then Owner of Schmidt's Property, as applicable, shall be entitled, at its sole expense, to repair and restore the then remaining portion thereof as nearly as practicable to the condition it was in immediately prior to such condemnation.

ARTICLE XIII AMENDMENT OR TERMINATION

Section 13.1 Amendment. Subject to Section 10.9 above, and except as otherwise provided in this Agreement, the provisions of this Agreement may be abrogated, modified, amended, rescinded or terminated in whole or in part only with the consent of Utilities and Schmidt, or their successors or assignees respectively and each of the Permanent Lenders, by a writing executed and acknowledged by all of said parties, and duly recorded in the office of the Clerk and Recorder of El Paso County, State of Colorado.

Section 13.2 Clarifications. This Agreement may be amended or supplemented by Utilities with the written consent of Schmidt, in its reasonable discretion, if such amendment is for the purpose of adding an additional easement right for the benefit of Schmidt, clarifying an existing Easement, or relocating an existing Easement pursuant to Section 2.5 or more specifically locating an easement at such time as the precise location of the Easements created hereby, or some of them, become known, or for such other similar purpose as may reasonably be required.

ARTICLE XIV REMEDIES ON DEFAULT

Section 14.1 Notice and Cure. In the event of the failure of Utilities or Schmidt to perform its obligations under this Agreement, including, without limitation, the obligations to maintain Easements or access, or its obligations to pay or share costs or expenses, after notice of such failure from Schmidt to Utilities or from Utilities to Schmidt, and if that breach is not cured within thirty (30) days from the date of written notice of that breach from the then non-breaching Party, or if the nature of the breach is such that it cannot reasonably be cured within such thirty (30) days, then within such additional time as may be reasonably required to cure the breach provided that the Party in breach commences the cure within that thirty (30) day period and diligently prosecutes the cure to completion thereafter, then the non-defaulting Party shall be entitled to any and all remedies, legal or equitable, which may be available for a breach of this contract.

Section 14.2 Interference with Utilities' Operations. The Parties acknowledge and agree that the Utilities' Property and all facilities located on the Utilities' Property are critical to Utilities' operations and that any material interference therewith by Schmidt, including without limitation any activities that may result in an enforcement action by a state or federal regulatory agency against Utilities or a slowdown or shut down of Utilities ability to operate CSR, would be a material breach of this Agreement and that money damages would not be a sufficient remedy for such a material breach. If at any time, Schmidt or the Owner of the Schmidt's Property materially breaches this Agreement, fails to comply with an applicable Law, rule or regulation, or in any way jeopardizes Utilities' Property, Utilities' operations, or any of the facilities located on the Utilities' Property, and that breach is not cured within ten (10) days from the date of written notice of that breach from Utilities, or if the nature of the breach is such that it cannot reasonably be cured within such ten (10) days, then within such additional time as may be reasonably required to cure the breach provided that Schmidt commences the cure within that ten (10) day period and diligently prosecutes the cure to completion thereafter, then Utilities may, in its sole discretion, terminate this Agreement, including the Easements and other rights granted Schmidt in this Agreement, and seek

and obtain damages to compensate Utilities for its losses, provided however, that in the event of a breach by Schmidt causing an emergency situation, Utilities may (i) immediately and temporarily block, modify, or suspend Schmidt's access to the Easements; and (ii) seek and obtain immediate and sustained equitable relief from a Court of competent jurisdiction.

Section 14.3 Colorado Governmental Immunity Act. In no event shall the obligations of the City and/or Utilities hereunder be construed or determined to waive otherwise applicable provisions of the Colorado Constitution, Colorado Governmental Immunity Act or the City Charter, including without limitation Sections 7-50 and 7-60 thereof.

ARTICLE XV ASSIGNMENT

Section 15.1 General. No assignment or transfer by the City, Utilities or Schmidt of this Agreement or either Party's rights or obligations hereunder shall be effective without the prior written consent of the other Parties, which consent shall not be unreasonably withheld, conditioned or delayed; provided that the City and Utilities may assign their rights and obligations hereunder as part of a transfer or conveyance of the Utilities' Property without the consent of Schmidt. The City and Utilities also agree that Schmidt can assign its rights and interests in this Agreement without the City's prior consent to any subsidiary or affiliate of Schmidt or special metropolitan district or authority or public-private partnership entity created to own or operate the Project, provided that Schmidt executes and delivers to City and Utilities an unconditional written guaranty of the performance of this Agreement by any such assignee. No assignment of this Agreement by Schmidt will relieve Schmidt of its obligations under this Agreement without the City's and Utilities' written consent.

Section 15.2 Assignment as Security. Notwithstanding the provisions of Section 15.1, for the purpose of Project Financing of the Initial Phase, Schmidt may assign to, or create a security interest in favor of, any Financing Party, in Schmidt's rights and interests in, under or pursuant to this Agreement, and the Financing Party for the Initial Phase may further assign this Agreement in the exercise of its remedies under documents governing the Project Financing.

ARTICLE XVI INDEMNIFICATION

Section 16.1 Limitation on Liability. Except as required in Section 16.2 and to the extent permitted by applicable Law, Utilities shall not be liable to Schmidt for any indirect, consequential, incidental, special or punitive damages. This provision is not intended to constitute a waiver of any rights of Schmidt against Utilities with regard to matters unrelated to this Agreement or any activity not contemplated by this Agreement.

Section 16.2 Indemnification.

(a) Schmidt. Schmidt hereby agrees to indemnify and defend the City, Utilities, the City Council of the City of Colorado Springs, the Utilities Board of Directors and their respective officers, enterprises, employees, contractors, attorneys, agents and representatives (the "Affiliated Persons") against, and hold the City and Utilities and their Affiliated Persons harmless from, at all times after the date hereof, any and all Losses incurred, suffered, sustained or required to be paid,

directly or indirectly by, or sought to be imposed upon, the City, Utilities or their Affiliated Persons: (i) for personal injury or death to Persons or damage to property arising solely out of or resulting solely from the construction, operation, maintenance or repair of the Project or arising from any negligent or intentional act or omission by Schmidt in connection with the performance of its obligations under this Agreement; (ii) for any liability or alleged liability which may at any time be imposed upon, incurred by or asserted or awarded against the City or Utilities or their respective Affiliated Persons relating to, resulting from or arising out of any Release of any Hazardous Substances by Schmidt on, at, under or from Schmidt's Property or from the Easements or Facilities granted to Schmidt hereunder, or any environmental condition or contamination caused by Schmidt; (iii) on account of a breach by Schmidt of its obligations under this Agreement; or (iv) on account of a breach by Schmidt of any representation, warranty or covenant made by Schmidt under this Agreement.

(b) Survival. Except for indemnification with respect to third-party claims (which shall survive for the period prescribed by the applicable statute of limitations), the indemnification obligations contained in this Section 16.2 shall apply to any Losses incurred, suffered, sustained or required to be paid and of which the indemnifying Party receives notice from the indemnified Party within two (2) years following the expiration of this Agreement.

Section 16.3 Indemnification for Fines and Penalties. Any fines or other penalties incurred by the City and/or Utilities for a violation, alleged violation or non-compliance with applicable Laws shall be reimbursed by Schmidt to the extent such violation, alleged violation or non-compliance was a result of the acts or omissions of Schmidt or any of its Affiliated Persons.

Section 16.4 Notice of Claims. The City and/or Utilities shall promptly notify Schmidt in writing of any Loss, claim or proceeding in respect of which it is or may be entitled to indemnification under Section 16.2. Such notice shall be given as soon as reasonably practicable after the City and/or Utilities becomes aware of any Loss, claim or proceeding.

Section 16.5 Defense of Third-Party Claims.

(a) Schmidt shall be entitled, at its option and expense and with counsel of its selection, in its reasonable judgment, to assume and control the defense of any third-party claim, action, suit or proceeding that is subject to the indemnity provided in Section 16.2, provided that (i) Schmidt gives prompt notice of its intention to do so to the City and/or Utilities, (ii) reimburses them for the reasonable costs and expenses they incurred prior to the assumption by Schmidt of such defense and (iii) Schmidt shall not have authority to agree to any settlement or compromise that agrees to any acceptance of fault or responsibility on the part of the City and/or Utilities without the City's and/or Utilities' express consent in writing.

(b) Notwithstanding the provisions of Section 16.5(a), unless and until Schmidt acknowledges in writing its obligation (with a reservation of rights if necessary) to indemnify the City and/or Utilities and assumes control of the defense of a claim, suit, action or proceeding in accordance with Section 16.5(a), the City and/or Utilities shall have the right, but not the obligation, to contest, defend and litigate, with counsel of its own selection, any claim, action, suit or proceeding by any third party alleged or asserted against the City and/or Utilities in respect of, resulting from, related to or arising out of any matter for which it is entitled to be indemnified hereunder, and the reasonable costs and expense thereof shall be subject to the indemnification

obligations, if any, of the indemnifying Party hereunder.

(c) Upon assumption by Schmidt of the control of the defense of a claim, suit, action or proceeding, Schmidt shall reimburse the City and/or Utilities for the reasonable out-of-pocket costs and expenses it incurred in the defense of the claim, suit, action or proceeding prior to Schmidt's acknowledgment of the indemnification and assumption of the defense, unless the indemnifying Party's acknowledgement is with a reservation of rights.

ARTICLE XVII MISCELLANEOUS

Section 17.1 Notice. Any notice or demand to be given or to be served upon the City, Utilities or Schmidt in connection with this Agreement shall be deemed to have been sufficiently given and served for all purposes by being in writing and being personally served on such Party or sent by Registered U.S. Mail, postage prepaid, return receipt requested, addressed to such Party at its address hereinafter specified or at such other address as such Party may from time to time designate by notice to such other Party and any such notice or demand shall be deemed conclusively to have been given or served on the date of such personal service or on the fifth day following the date of such mailing. Until further notice, notice to Utilities shall be addressed as follows:

If intended for Utilities:
Colorado Springs Utilities
Ray Nixon Power Plant
14020 Ray Nixon Road
Fountain, CO 80817
Attn. Plant Manager
Telephone: (719) 668-8982

With a copy to:
Colorado Springs Utilities
121 S. Tejon Street
P.O. Box 1103, MC 950
Colorado Springs, CO 80903
Attn. Land Resource Manager
Telephone: (719) 668-7581

And a copy to:
Office of the City Attorney, Utilities Division Chief
City of Colorado Springs
30 S. Nevada Avenue
5th Floor, Mail Code 510
Colorado Springs, CO 80903
Attn: Division Chief
Telephone: (719) 385-5909

If intended for Schmidt:

L. Steven Weiner
Vice President
Edw. C. Levy Co.
8800 Dix Avenue
Detroit, MI 48209
Phone: 313-429-2600
Email: sweiner@edwclevy.net

with a copy to:

Patrick Duerr, Esq.
Vice President and General Counsel
Edw. C. Levy Co.
9300 Dix Avenue
Detroit, MI 48120
Phone: 313-429-2423
Email: pduerr@edwclevy.net

and with a copy to:

Steven K. Mulliken, Esq.
Mulliken Weiner Berg & Jolivet, P.C.
102 South Tejon Street, Suite 900
Colorado Springs, CO 80903
Phone: 719-635-8750 x 216
Email: mulliken@mullikenlaw.com

Section 17.2 Counterparts. This Agreement may be executed in any number of counterparts, each of which shall constitute an original as against the Party whose signature appears thereon, and all of which taken together shall constitute one and the same instrument. This Agreement shall become binding when one or more counterparts, individually or taken together, shall bear the signature of all Parties to this Agreement.

Section 17.3 Section Headings. The Section headings herein are inserted only for convenience and reference and shall in no way define, limit, or prescribe the scope or intent of any provisions of this Agreement.

Section 17.4 Unenforceable Terms. If any term or provision of this Agreement or the application thereof to any person or circumstance shall, to any extent, be invalid or unenforceable, the remainder of this Agreement or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and each term and provision of this Agreement shall be valid and be enforced to the fullest extent permitted by law.

Section 17.5 Relationship of Parties. This Agreement is not intended to create a joint venture, partnership or agency relationship between the City, Utilities and Schmidt with respect to

Utilities' Property or the Project.

Section 17.6 Applicable Law and Venue. This Agreement shall be governed by and construed in accordance with the laws of the State of Colorado. In the event of litigation arising out of this Agreement exclusive venue and jurisdiction shall be in the District Court for the Fourth Judicial District in El Paso County, Colorado.

Section 17.7 Waiver. No failure to exercise any power given by this Agreement or to insist upon strict compliance with obligations required hereunder, and no custom or practice at variance with the terms of this Agreement shall constitute a waiver of the right to demand exact compliance with the terms hereof.

Section 17.8 Delegation. The performance of any obligation or requirement imposed by this Agreement upon the City, Utilities or Schmidt may be delegated by the City, Utilities or Schmidt to a project manager (or a successor or assign to Schmidt in accordance with Article XV, above) and the enjoyment of any right or benefit granted by this Agreement to the City, Utilities or Schmidt may be transferred to licensees, permittees, invitees, employees and agents of such Party.

Section 17.9 Successors and Assigns. The covenants, agreements and conditions herein contained shall bind and inure to the benefit of the Parties hereto, and their respective legal representatives, and permitted successors and assigns, except as otherwise provided herein.

Section 17.10 Appropriation of Funds. This Agreement is expressly made subject to the limitations of the Charter of the City of Colorado Springs. Nothing herein shall constitute, nor be deemed to constitute, the creation of a debt or multi-year fiscal obligation or an obligation of future appropriations by the City Council of Colorado Springs or any other constitutional, statutory, or charter debt limitation. Notwithstanding any other provision of this Agreement, with respect to any financial obligations of Utilities which may arise under this Agreement in any fiscal year after the year of execution, in the event the budget or other means of appropriation for any such year fails to provide funds in sufficient amounts to discharge such obligation, such failure (i) shall act to terminate the City's and Utilities' obligations to provide any funding or expend any monies otherwise required by this Agreement at such time as the then-existing and available appropriations are depleted and until there is a new appropriation for such expenses, and (ii) neither such failure nor termination shall constitute a default or breach of this Agreement, including any sub-agreement, attachment, schedule, or exhibit thereto, by Colorado Springs Utilities, provided that such failure of appropriation will not alter, reduce or terminate Schmidt's rights to the Easements granted herein.

[SIGNATURES ON FOLLOWING PAGE]

The City of Colorado Springs

By: _____

Its: _____

STATE OF COLORADO)
) ss.
COUNTY OF EL PASO)

The foregoing instrument was acknowledged before me this ____ day of _____ 2023, by _____, as _____ of the City of Colorado Springs, a Colorado home rule city and municipal corporation.

Witness my hand and official seal.

My Commission Expires: _____

(SEAL)

Notary Public

Colorado Springs Utilities

By: _____

Its: _____

STATE OF COLORADO)
) ss.
COUNTY OF EL PASO)

The foregoing instrument was acknowledged before me this ____ day of _____ 2023, by _____, as _____, Colorado Springs Utilities.

Witness my hand and official seal.

My Commission Expires: _____

(SEAL)

Notary Public

Approved as to form:

By: _____ Date: _____
City Attorney's Office – Utilities Division

DRAFT

LISTING OF EXHIBITS

EXHIBIT A – UTILITIES’ PROPERTY

EXHIBIT B – SCHMIDT’S PROPERTY

EXHIBIT C – SURVEY

EXHIBIT D – SHARED RAILROAD ACCESS EASEMENT AREA

EXHIBIT E – RAILROAD SPUR EASEMENT AREA

EXHIBIT F – SECURITY AREA

EXHIBIT G – REVISED LOOP AND SPUR EXTENSION

EXHIBIT H – BUILDING AND BAD ORDER TRACK RELOCATION