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April 5, 2016

Port of Vancouver USA
Board of Commissioners
3103 N.W. Lower River Rd.
Vancouver, WA 98660

Re: The Port of Vancouver Must Act Before August 1 to Opt Out of the Oil Terminal Lease

Dear Commissioners Wolfe, LaBrant, and Oliver:

Prior to August 1, 2016, the Port of Vancouver (“Port”) has a critical, time-sensitive opportunity—that it wisely negotiated for—to end the lease for the Vancouver Energy Distribution Terminal (“Tesoro Savage Project”). If the Port takes no action before August 1, the lease automatically becomes binding. The Port negotiated the ability to terminate the lease to prevent a non-productive project from tying up Port property. The Port has an opportunity to avoid Tesoro Savage’s project, **but the Port must act before August 1**. I’ve attached a Question and Answer document discussing the lease terms.

The lease gives Tesoro Savage until August 1, 2016,¹ to obtain “all necessary licenses, permits and approvals” for the proposed oil terminal.² Because EFSEC’s hearings about the oil terminal will last until July 29,³ Tesoro Savage cannot obtain EFSEC approval by August 1. Given that it is clear that Tesoro Savage will not have necessary permits by August 1, the lease gives the Port the ability to opt out now.⁴ But if the Port does nothing, the lease becomes fully binding on August 1.⁵

As a matter of public policy and economic savvy, it was smart for the Port to add an “early termination” clause in the lease with Tesoro Savage. Because Tesoro Savage failed to obtain needed permits within three years, the Port can now reconsider the future use of its property. A lot has changed since 2013 when the Port signed the lease. Community opposition to Tesoro Savage from businesses, labor, and elected officials has grown to unprecedented levels. Oil trains have exploded more than a

¹ August 1, 2016, is the “Conditions Precedent Outside Date” (*see* Lease Exhibit E)—the date by which Tesoro-Savage must meet all Conditions Precedent—because it is thirty-six months after the Lease’s “Effective Date” of August 1, 2013 (*see* Lease ¶ 1.A).

² Lease ¶ 2.D(1).

³ EFSEC Adjudication No. 15-001, *Order Summarizing Issues and Setting Hearing Dates*, p.11 (February 3, 2016).

⁴ Lease ¶ 1.C (“If . . . the Conditions Precedent set forth in Paragraph 2.D has not been satisfied or waived on or before [August 1, 2016], either Lessor or Lessee may terminate this lease . . . without further cost or obligation . . .”); *also cf.* Rush, *Freewill*, Permanent Waves (1980) (“If you choose not to decide, you still have made a choice.”).

⁵ Lease ¶ 2.D (“If neither Party provides the other Party with a termination notice on or before the Conditions Precedent Outside Date, the Conditions Precedent shall then be deemed satisfied.”).

dozen times, something the Port could not fully know in 2013. And, perhaps most importantly to the Port, the economic viability of an oil-by-rail terminal has decreased dramatically due to low oil prices. Global Partners, for example, shuttered an existing oil-by-rail terminal at Port Westward just months ago. Leading financial analysts see a weak future for oil-by-rail. RBN Energy stated:

The crude price differentials that once justified shipping inland crude to coastal destinations by rail have all but disappeared. In November 2015 pipeline shipments exceeded rail out of North Dakota for the first time since 2011 and by 2017 available pipeline capacity out of the region **should exceed producer's needs**. In the circumstances, rail shipments would appear to be living on borrowed time⁶

In addition, E & E's Energy Wire reported:

Global Partners LP, which runs a major crude-by-rail hub in Albany, N.Y., announced recently that it was trimming its workforce by 70 people, or about 8 percent, and would convert a crude-by-rail transfer facility in Oregon to handle ethanol instead. Global Partners President and CEO Eric Slifka cited "severe headwinds in the crude oil market" as reasons for the shakeups at his company. "We continue to be negatively impacted by fixed costs associated with our crude oil business, including railcar leases," he said in a Jan. 28 press release.⁷

Construction date

The Port's lease also states that the Port has until August 1, 2016⁸ to be "reasonably satisfied" that Tesoro Savage could and would begin building the oil terminal⁹ by December 1, 2016.¹⁰ If—on or before August 1—the Port is not "reasonably satisfied" that Tesoro Savage would begin construction by December 1, the Port may opt out of the project.¹¹ The lease reads:

"[I]f [the Port] is not reasonably satisfied on or before [August 1, 2016] that [Tesoro] is prepared to, and intends to, commence construction within four (4) months after [August 1, 2016], [the Port] may terminate this lease without any further obligations"¹²

⁶ RBN Energy, February 8, 2016, <https://rbnenergy.com/slow-train-coming-why-bakken-barrels-stay-on-the-tracks-as-crude-by-rail-volumes-decline> (emphasis added).

⁷ E&E Energy Wire, February 8, 2016, <http://www.eenews.net/stories/1060031956>.

⁸ August 1, 2016, is the "Conditions Precedent Outside Date." See Lease Exhibit E.

⁹ Lease ¶ 2.D.

¹⁰ December 1, 2016, is four months after the presumptive Conditions Precedent Expiration Date of August 1. Under the current circumstances, the "Conditions Precedent Expiration Date" will be August 1, 2016. See Lease, Exhibit E. The "Conditions Precedent Expiration Date" is the earlier of the date Tesoro notifies the Port that the Conditions Precedent have been satisfied or waived or the Conditions Precedent Outside Date." *Id.* Because, as explained above, the Conditions Precedent (Tesoro receiving all necessary permits and approvals) will not occur before the Condition Precedent Outside Date of August 1, the Conditions Precedent Expiration Date will be August 1. *Id.*

¹¹ Lease ¶ 2.D.

¹² Lease ¶ 2.D.

However, this provision gives the Port *no* authority to opt out *after* August 1, regardless of Tesoro Savage's construction schedule. EFSEC's hearings about the oil terminal will last until July 29,¹³ and EFSEC and the Governor's decision-making processes will most likely take several additional months, so it is unlikely that Tesoro will be "prepared to"¹⁴ commence construction by December 1.

For the foregoing reasons, the Port must make a decision about Tesoro Savage before August 1, 2016. Failure to act by August 1 will shackle the Port to a languishing, controversial project. We urge the Port Commission to begin the public process to move beyond an oil-by-rail terminal. The Port will receive broad, overwhelming support for steering Vancouver towards better and cleaner economic opportunities. But the Port must act by August 1.

Sincerely,



Brett VandenHeuvel
Executive Director

cc:

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¹³ EFSEC Adjudication No. 15-001, *Order Summarizing Issues and Setting Hearing Dates*, p.11 (February 3, 2016).

¹⁴ Lease ¶ 2.D.

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Attachment A: Tesoro-Savage Lease Questions and Answers

- 1) *If all necessary licenses, permits, and approvals cannot be or have not been obtained by July 31, 2016, can either the Port or Vancouver Energy terminate the lease?*

Yes. If the licenses, permits, and approvals are not obtained by the required date or if it is clearly impossible for those permits to be obtained by the required date, the Lease permits either the Port or Vancouver Energy to terminate the lease on or before July 31, 2016.

Effective Date: Aug. 1, 2013 (Basic Lease Provisions, Section 1.A).

Conditions Precedent: those conditions set forth in Paragraph 2.D, including (1) all necessary licenses, permits and approvals have been obtained for the Permitted Use; (Exhibit E, Glossary of Terms).

Conditions Precedent Expiration Date: the earlier of (a) the date on which Lessee provides written notice to Lessor, pursuant to the terms of Paragraph 2.E, that the Conditions Precedent have been satisfied or waived, and (b) the Conditions Precedent Outside Date (Exhibit E, Glossary of Terms).

Conditions Precedent Outside Date: the date that is thirty-six (36) months after the Effective Date (Exhibit E, Glossary of Terms), specifically Aug. 1, 2016.

Right of Early Termination: If any or all of the conditions precedent set forth in Paragraph 2.D has not been satisfied or waived on or before the Conditions Precedent Outside Date, either Lessor or Lessee may terminate this Lease on or before the Conditions Precedent Outside Date by written notice of termination to the other Party, without further cost or obligation, except as set forth expressly herein. (Section 1.C).

- 2) *Can either party wait and terminate the Lease after July 31, 2016?*

No. If neither party provides a notice of termination on or before July 31, 2016, then the conditions are deemed satisfied and the early termination option expires.

The Condition Precedent in Paragraph 2.D(1) is for the benefit of both Lessor and Lessee. ... If the Conditions Precedent are satisfied or waived by the Party or Parties to whose benefit they run on or before the Conditions Precedent Outside Date, the Lessee shall promptly commence construction of the Facility. If neither Party provides the other Party with a terminal notice on or before the Conditions Precedent Outside Date, the Conditions Precedent shall then be deemed satisfied. (Section 2.D).

3) *What must the Port or Vancouver Energy do to terminate the lease?*

Either party must provide written notice of termination on or before July 31, 2016, and the Lease spells out addresses and other details for how such notice must be provided. (Section 1.C)

4) *What about the lease language concerning commencing construction within four months?*

This provision provides the Port an additional option for lease termination if it is not satisfied that Vancouver Energy will be able to begin construction by Dec. 1, 2016 (four months after Conditions Precedent Expiration Date). It does not supersede the right of early termination. (Section 2.D).

5) *If either the Port or Vancouver Energy terminates the lease, are there any termination fees?*

No, the Lease provides no early termination penalties.

6) *Can Vancouver Energy claim the Port breached the lease by exercising its right of early termination?*

The Port and Vancouver Energy made an agreement, in writing, that either party could terminate the lease on August 1, without penalties. Because the plain language of the lease expressly allows early termination, it is unlikely that Vancouver Energy could prevail in a breach of contract suit.