

THE NORTHWEST SEAPORT ALLIANCE
MEMORANDUM

MANAGING MEMBERS
ACTION ITEM

Item No.	<u>9B</u>
Date of Meeting	<u>December 6, 2022</u>

DATE: November 29, 2022

TO: Managing Members

FROM: Dana Henderson, NWSA General Counsel

CC: John Wolfe, NWSA CEO
Don Esterbrook NWSA Deputy CEO
Tong Zhu, NWSA Chief Commercial Officer
David Morrison, NWSA Chief Financial Officer
Thais Howard, NWSA Director of Engineering
Jennifer Maietta, NWSA Director of Real Estate

SUBJECT: Terminal 30 Central Substation Dispute Proposed Settlement Agreement

A. ACTION REQUESTED

Request Managing Members' of the Northwest Seaport Alliance (NWSA) authorization for the Chief Executive Officer to execute the proposed Settlement Agreement with SSAT regarding the Terminal 30 Central Substation Dispute in substantially the same form as presented.

B. SYNOPSIS

NWSA and SSA are parties to a lease agreement for Terminals 25, 28, and 30, under a lease originally dated July 8, 2005 ("Lease"). The Lease places maintenance responsibility on SSA. On November 29, 2020, the central substation for Terminal 30 ("the Substation") failed, causing a loss of electrical power to the terminal. At the time of the failure, the Substation had a remaining useful life of approximately 15 years, or 30% of its 50-year useful life.

Given the extensive damage to the Substation, NWSA made the decision as approved by the Managing Members on April 6, 2021, to replace the Substation, subject to a reservation of rights to seek contribution to all or part of the Substation from tenant SSA since experts concluded that the failure was due to lack of maintenance. After the failure, NWSA staff arranged for interim power, initially through portable generators and since then, through a longer-term temporary substation, which continues to serve Terminal 30. SSA covered fueling costs for the portable generators pending installation of the temporary substation. The new replacement substation construction is scheduled to be completed by Q2 2023.

Following the failure, staff at NWSA and SSA began discussions to find a resolution regarding the parties' roles and responsibilities with regard to the Substation. SSA sought reimbursement of the fueling costs necessitated by the generators, while NWSA sought SSA's payment for all temporary expenses needed to maintain power at the terminal and for SSA's contribution towards the replacement substation. The parties disputed the interpretation and application of the Lease and disagreed over their respective responsibilities for the Substation. SSA initiated dispute resolution proceedings in February of 2021, and ultimately, because the parties were unsuccessful in subsequent and repeated efforts to reach a resolution, NWSA escalated the dispute resolution to arbitration.

Over a number of months in 2022, both parties engaged in discovery and prepared the dispute for arbitration. The total value of NWSA's claim as presented to the arbitrator was \$7,174,334.72 comprised of approximately \$1,680,000 in temporary expenses such as the generator and temporary substation, and \$5,490,000 for replacement of the Substation. Given the risk that the arbitrator may not award the full cost of replacement of the Substation to NWSA, NWSA submitted to the arbitrator that a fair alternate outcome would be an award of \$3,257,834.72, which would pay for all temporary expenses and approximately 30% of the replacement Substation (corresponding to the lost useful life of the former Substation). SSA was also prepared to seek reimbursement for \$645,346.80 for fueling costs. The prevailing party in arbitration would have had a claim for attorneys' fees and legal costs per the terms of the Lease. On November 7, 2022, during the first day of the arbitration, the parties reached a proposed settlement of \$3M to be paid to NWSA, subject to approval of the Managing Members, and stayed the remainder of the arbitration.¹

The proposed settlement between NWSA and SSA resolves all issues that were or could have been brought between the parties in the Terminal 30 Substation dispute and provides that SSA will make a \$3M payment to NWSA in full and final settlement of such issues within 30 days of the Parties' agreement. SSA has signed the proposed settlement agreement, attached hereto.

This proposed settlement represents a fair compromise that fully compensates NWSA for its temporary expenses and pays for a portion of the cost of the replacement substation. Though the proposed settlement does not fully compensate NWSA for all damages and fees that could have been claimed in the arbitration, it avoids the risk of an adverse arbitration outcome which could have resulted in NWSA paying all or part of SSA's claim for fueling as well as an attorneys' fee award had SSA been deemed the prevailing party. NWSA also will own a new substation and in partnership with Port of Seattle's Marine Maintenance Department, is in the process of clarifying and re-setting expectations all North Harbor tenants, including SSA, regarding tenant maintenance obligations and the conditions by which Port of Seattle's Marine Maintenance will provide services to NWSA tenants.

¹ Should the Managing Members not approve this settlement, the parties' CR2A agreement which memorializes the general intended terms of the settlement (subject to a longer form formal settlement agreement) provides that SSA will carry the costs of re-setting the arbitration.

C. FINANCIAL IMPLICATIONS

The \$3M settlement payment would be recognized in 2022 as non-operating income. The cost for temporary expenses have been and will continue to be expensed until the new substation is completed. The cost of the new substation of \$5.49M will be depreciated over 50 years, resulting in an annual depreciation expense of approximately \$110,000.

D. ATTACHMENTS TO THIS REQUEST

- Computer slide presentation.
- Draft and Proposed Settlement Agreement between NWSA and SSA (signed by SSA) subject to MM approval.

E. PREVIOUS ACTIONS OR BRIEFINGS

Date	Action
December 8, 2020	Declaration of Emergency
February 2, 2021	Project Status Briefing
April 6, 2021	Managing Member Design Authorization
December 7, 2021	Managing Member Construction Authorization
March 15, 2022	Managing Member Construction Increase