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## VIA ELECTRONIC FILING

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W., Room 1034  
Washington, DC 20423-0001

Re: **Finance Docket No. 35731**  
**Ballard Terminal Railroad Company, L.L.C. -- Acquisition**  
**and Operation Exemption -- Woodinville Subdivision**

**Docket No. AB-6 (Sub-No. 465X)**  
**BNSF Railway Company -- Abandonment**  
**Exemption -- In King County, WA**

Dear Ms. Brown:

Attached for filing in the above-referenced proceedings is the Joint Reply of Ballard Terminal Railroad Company, LLC and Eastside Community Rail, LLC to City of Kirkland's, King County's and Central Puget Sound's Motion to Issue Subpoenas, Enter a Modified Procedural Schedule, and Request for Expedited Consideration.

As a part of this joint reply, is Ballard's and Eastside's Motion for Protective Order.

Very truly yours,



Myles L. Tobin  
Attorney for Ballard Terminal Railroad Company,  
L.L.C. and Eastside Community Rail, LLC

MLT/ekf  
Enclosure

cc: All Parties of Record (via electronic and First Class Mail)

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 35731

BALLARD TERMINAL RAILROAD COMPANY, L.L.C.  
-- ACQUISITION AND OPERATION EXEMPTION --  
WOODINVILLE SUBDIVISION

DOCKET NO. AB-6 (SUB-NO. 465X)  
BNSF RAILWAY COMPANY  
-- ABANDONMENT EXEMPTION --  
IN KING COUNTY, WA

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**JOINT REPLY OF BALLARD TERMINAL RAILROAD COMPANY, LLC AND  
EASTSIDE COMMUNITY RAIL, LLC TO CITY OF KIRKLAND, KING COUNTY  
AND CENTRAL PUGET SOUND'S MOTION TO ISSUE SUBPOENAS, ENTER A  
MODIFIED PROCEDURAL SCHEDULE, AND REQUEST FOR EXPEDITED  
CONSIDERATION**

**MOTION FOR PROTECTIVE ORDER OF BALLARD TERMINAL RAILROAD  
COMPANY LLC AND EASTSIDE COMMUNITY RAIL, LLC**

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**ATTORNEYS FOR BALLARD TERMINAL  
RAILROAD COMPANY, L.L.C. AND  
EASTSIDE COMMUNITY RAIL, LLC**

Dated: January 27, 2014

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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BEFORE THE  
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CONSIDERATION**

**MOTION FOR PROTECTIVE ORDER OF BALLARD TERMINAL RAILROAD  
COMPANY LLC AND EASTSIDE COMMUNITY RAIL, LLC**

Ballard Terminal Railroad Company, LLC (“Ballard”) and Eastside Community Rail, LLC (“Eastside”) hereby jointly reply to the motion of the City of Kirkland (“Kirkland”), King County (“King”), and Central Puget Sound Regional Transit Authority (“Sound Transit”) to issue subpoenas and enter a modified procedural schedule. As a part of this Joint Reply, Ballard and Eastside hereby move for a Protective Order, as will be detailed below.

Before addressing issues raised in the discovery motions of Kirkland, King and Sound Transit, it may be instructive to briefly recap a bit of the history of this matter.

In 2009, King was authorized by the Board to obtain the rail reactivation rights on this line segment from BNSF, even though King was not a rail carrier. The Board, in recognizing that King was never likely to reinstitute rail service, made it clear that a bona fide third party petitioner could seek reactivation of such service.

Events have since made it abundantly clear that King, and its cohorts Kirkland and Sound Transit, have no intention whatsoever of reinstating rail service, they have every intention of resisting the reinstatement of rail service by anybody else, and they will resist those attempts by whatever means possible, including, but not limited to, intimidation and bullying tactics, as well as removal of a 5.75 mile segment of trackage on the line in the hopes that would stymie Ballard's and Eastside's rail reactivation efforts.

All this, in spite of the fact that the rail reactivation would not impede King's, Kirkland's or Sound Transit's ability to construct a trail on the right-of-way. Rather, Ballard and Eastside have been clear that the freight rail line could operate in tandem with a desired trail by the three rail reactivation opponents.

King, Kirkland and Sound Transit were permitted to take extensive discovery of the rail reactivation proponents. Ballard's General Manager, Byron Cole, was deposed for over 9 hours from 9:10 a.m. to 6:52 p.m. on May 24, 2013. Eastside's President, Doug Engle, was also deposed for over 9 hours, from 9:17 a.m. to 6:49 p.m. on May 22, 2013.

As a result of the 22 separate requests for production of documents submitted to Ballard as well as the document requests submitted to Eastside, both Ballard and Eastside produced upwards of 3,000 pages of documents and discovery.

Additionally, the three rail reactivation opponents were permitted to take the depositions of CalPortland on May 28, 2013, a deposition which lasted nearly 2 hours, as well as Woford Trucking and Demolition Services on May 16, 2013, a deposition which lasted nearly 6 hours.

As the Board is aware, it reopened the discovery time frame for a limited period of time, to allow the three reactivation opponents to seek limited discovery with respect to the

Reply Statement submitted by Ballard. If the Board anticipated that the three reactivation opponents would be limited in their discovery efforts, such is not the case. In addition to the four depositions already taken by the reactivation opponents, they are seeking an additional 10 depositions from many of the authors of support statements in this proceeding. In addition to the 22 document discovery requests submitted by the three reactivation opponents prior to the close of discovery, they are seeking an additional 23 document discovery requests, for a total of 45.

As this Reply is being drafted, counsel for Ballard and Eastside is looking at a stack of discovery requests submitted by the three reactivation opponents which is over 3 inches in height and 6.5 pounds in weight. Counsel for Eastside and Ballard has participated in a host of Interstate Commerce Commission and Surface Transportation Board proceedings throughout the last 30 years, including numerous merger and acquisition proceedings as well as rate cases. Never in his history has this counsel seen such a breadth of discovery requests, nor has he seen the Board be willing to authorize the breadth of these discovery requests.

In simplified rate cases, each party is limited to one deposition. It is inconceivable that the case at hand is somehow 14 times more complex than a rate case. In simplified rate cases, each party is limited to 10 document requests. Here, the three reactivation opponents are seeking a total of 45 document requests from Ballard alone, let alone the numerous other parties who have submitted support letters in this proceeding. Clearly, the three reactivation opponents are engaging in a pattern of intimidation and bullying tactics which have rarely, if ever, been seen in prior STB and ICC proceedings. That should not be permitted.

Moreover, the decision that the Board reaches here will have wide reaching ramifications. As the Board is well aware, in cases such as merger proceedings, often many hundreds of letters are filed in support or in opposition to a particular proceeding. It is

inconceivable that the Board would authorize the depositions and document production requests from all of these supporters and opponents. And, yet, an authorization of the scope of discovery being sought by the three reactivation opponents here would lead to exactly that result.

With the foregoing in mind, we'll address each of the deposition and document production requests submitted by the reactivation opponents.

1. Depositions of Byron Cole and Doug Engle. Although the three reactivation opponents have already deposed Messrs. Cole and Engle for approximately 18 hours, they now seek further depositions. Eastside and Ballard are agreeable to those depositions as long as they are limited to a total of 3 hours per deposition and are further limited to the subject matter contained in Ballard's Reply Statement – which was the sole purpose of the STB allowing additional discovery in this matter. Ballard and Eastside request a protective order which limits the depositions of Messrs. Cole and Engle in that regard.

2. Document Production Requests to Ballard. As indicated above, the three reactivation opponents have sought an additional 23 requests of documents from Ballard, thus more than doubling their previous document production requests. Ballard is agreeable to complying with these requests, but only to the extent that they relate to matters contained in Ballard's Reply Statement. So, for example, RFP Number 23 relates to various correspondence between counsel, Myles Tobin, his clients Ballard and Eastside, and certain other witnesses and potential witnesses in this matter. Ballard and Eastside have appropriately claimed attorney work-product privilege associated with these documents. Consequently, beyond the fact that these documents have nothing whatsoever to do with the Reply Statement, the three reactivation opponents had already sought production of these documents and Ballard objected on the basis of attorney work-product. In view of the fact that the three reactivation opponents did not seek

compulsion of these documents (which they were not entitled to do anyway due to privilege) before the close of prior discovery, they should not be allowed to use this new limited discovery to seek discovery of those documents.

By the same token, document production requests 25 and 26 relate to matters which the three reactivation opponents could have sought in prior discovery, but did not do so. They should not be allowed to bootstrap the current limited discovery to ask questions that they could have asked previously.

3. Deposition and document requests of Paul Nerdrum. Mr. Nerdrum is a principal of Ballard. The three reactivation opponents have already deposed Mr. Cole, and seek a second deposition of Mr. Cole now. It is inconceivable that the three reactivation opponents should be allowed to depose multiple Ballard representatives.

4. Deposition and document production request of Kathy Cox. Ms. Cox is a witness that the three reactivation opponents were aware of prior to the close of the original time frame for discovery. They are now utilizing the STB's extension of that discovery to pick and choose additional persons whom they would like to depose, even though they were aware of those persons and could have sought that discovery during the original discovery time frame. Ballard urges that the STB not allow this flaunting of the new discovery timeframe to allow the three reactivation opponents to conduct fishing expeditions of persons that they could have deposed or sought documents from prior to the original close of discovery. Ballard objects to the discovery requests and depositions from Ms. Cox.

It should also be pointed out that although the three reactivation opponents have served Ms. Cox with a deposition and document production request, they have failed to request

an order from the Board requiring that a subpoena be issued. For that additional reason, they have waived their right to seek that subpoena.

5. Depositions and Document Production Requests of American West Bank and Coastal Community Bank. The three reactivation opponents are seeking depositions and documents related to Ballard's potential financing from each of Ballard's and Eastside's banks. Ballard strongly objects to this request. To the extent those banks have supplied documents to Ballard or Eastside, or exchanged documents between those two parties, Ballard and Eastside will produce them. Nothing more should be required. This pattern of intimidation is unprecedented and should not be condoned by this Board.

6. Depositions and Document Production Requests from Aggregates West, CT Sales, Daniel Behr, RJB Wholesale, and Watco Companies. The three reactivation opponents are seeking depositions and document production requests from most of Ballard's major supporters in this proceeding. As discussed above, this is unprecedented and will open the door for literally hundreds of depositions in future STB proceedings. The letters which these supporters have filed with the STB speak for themselves. To the extent there have been additional documents exchanged between these supporters and Ballard or Eastside, Ballard and Eastside will produce those documents. Nothing more should be required.

### **CONCLUSION**

To the extent that the STB authorizes depositions in this matter, Ballard seeks a protective order that those depositions each be limited to three hours and that the subject matter of those depositions be limited to Ballard's Reply Statement, consistent with the STB's Order in that regard. However, for all of the reasons listed above, Ballard urges the Board to bar the depositions of all supporters and to limit the depositions to 3 hour depositions of Messrs. Engle

and Cole with document production requests pertaining only to the Reply Statements. Anything more will facilitate the three reactivation opponents' pattern of intimidation and bullying in this proceeding which has already gone much too far.

Respectfully submitted,

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**ATTORNEYS FOR BALLARD TERMINAL  
RAILROAD COMPANY, L.L.C. AND  
EASTSIDE COMMUNITY RAIL, LLC**

Dated: January 27, 2014

**CERTIFICATE OF SERVICE**

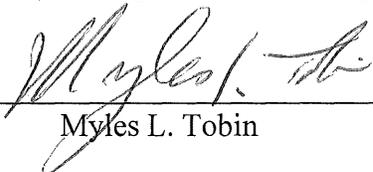
I hereby certify that on this 27th day of January, 2013, a copy of the foregoing **Joint Reply of Ballard Terminal Railroad Company, LLC and Eastside Community Rail, LLC to City of Kirkland's, King County's and Central Puget Sound's Motion to Issue Subpoenas, Enter a Modified Procedural Schedule, and Request for Expedited Consideration** was served by electronic and First Class Mail upon:

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