



FOSTER PEPPER PLLC

Direct Phone (206) 447-8971
Direct Facsimile (206) 749-1927
E-Mail dijup@foster.com

June 30, 2015

238726

VIA E-FILING

Rachel Campbell
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

ENTERED
Office of Proceedings
June 30, 2015
Part of
Public Record

RE: **STB Docket No. FD 35915-0**
*Tri-City Railroad Company, LLC v. The City of Kennewick; and
The City of Richland*

Dear Ms. Campbell:

The City of Kennewick and the City of Richland (the “Cities”) respectfully request an opportunity to file a substantive response to the statements from the new witnesses and the new facts submitted by Tri-City Railroad Company, LLC (“TCRY”) in TCRY’s rebuttal, dated June 24, 2015.

TCRY’s rebuttal injects new material outside the scope of rebuttal for which the Cities cannot respond without the STB’s permission. In particular, TCRY submits the verified statements of three new witnesses: Foster Peterson (37 pages with three exhibits), Lisa Anderson (7 pages with three exhibits), and Randolph Peterson (4 pages). TCRY couches these new witness statements as rebuttal to the Cities’ verified statements, but it is evident that these submissions contain new arguments and material. For example, the verified statements from the new witnesses and the new rebuttal verified statements of John Miller and Rhett Peterson contain new assertions of fact regarding events that took place after May 26, 2015 and June 1, 2015 and new assertions about 2015 rail traffic projections, which were not contained in TCRY’s Petition and to which the Cities did not have an opportunity to respond.

The Cities firmly believe that the extensive record in this case, including the UTC record, establishes that TCRY’s Petition should be appropriately denied. But in the interest of a full and balanced record, the Cities respectfully request the opportunity to submit a response to TCRY’s new material and assertions. Alternatively, the Cities request that the STB strike the verified statements of TCRY’s new witnesses Foster Peterson, Randolph Peterson, and Lisa Anderson, and all references to post-May 26, 2015 facts contained in the rebuttal verified statements of John Miller and Rhett Peterson to which the Cities have not had an opportunity to respond. The Cities understand the STB has the discretion to accept such supplemental materials in the interests of creating a balanced record. *See, e.g., BNSF Railway Co. – Discontinuance of*

June 30, 2015
Rachel Campbell
Surface Transportation Board
Page 2

Trackage Rights Exemption – in Peoria and Tazewell Counties, Ill., Docket No. AB-6-470-X n. 9. (Served April 26, 2011) (“Although our rules prohibit a ‘reply to a reply,’ 49 C.F.R. § 1104.13(c), it is within the Board’s discretion to permit late-filed or otherwise impermissible filings, and it is appropriate to do so here.... [the] filings provide a more complete record, clarify the arguments, will not prejudice any party, and do not unduly prolong the proceeding.”).

In addition, TCRY incorrectly asserts that the Cities did not challenge all material allegations of fact contained in TCRY’s Petition For Declaratory Order and accompanying verified statements. The Cities’ reply rebutted all of TCRY’s principal arguments, supported by the verified statements of Pete Rogalsky, Kevin Jeffers, and Susan Grabler, and the full UTC record that was submitted to the STB with the Cities’ reply. The reply materials submitted by the Cities are consistent with the STB’s modified procedures and standard of review. *See, e.g., The TJX Companies, Inc.--Petition For Declaratory Order--Certain Rates And Practices Of Sweeney Transportation, Inc., And Knickerbocker East-West, Inc.* STB Docket No. 41192, slip op. at 7 (Served September 20, 2002) (“Petitioner bases its argument that we must accept its factual assertions unless rebutted by [respondent] on our rule of procedure at 49 CFR 1112.6.... But this rule does not help [petitioner]. A fair reading of [respondent]’s reply shows that it controverts all of [petitioner]’s key arguments. The fact that the reply may not recite a specific rejection of all of the petitioner’s factual allegations would not and could not justify our accepting [petitioner]’s claims as uncontroverted when they are, in fact, being vigorously disputed.”).

However, to the extent TCRY is now relying on new facts and events that occurred in May and June 2015 that had not been previously raised and the STB will be considering these new allegations, the Cities should have a reasonable opportunity to address those new facts and issues. There is no prejudice to the parties in allowing the Cities do so.

Very truly yours,

FOSTER PEPPER PLLC



P. Stephen DiJulio

PSD:das

cc: Counsel for Parties of Record

June 30, 2015
Rachel Campbell
Surface Transportation Board
Page 3

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document, in STB FD 35915-0, was served on the Parties of Record below in this proceeding, this 30th day of June, 2015, by e-mail.

William J. Schroeder
Gregory C. Hesler
William C. Schroeder
Paine Hamblen LLP
717 West Sprague Avenue, Suite 1200
Spokane, WA 99201
william.schroeder@painehamblen.com
greg.hesler@painehamblen.com
will.schroeder@painehamblen.com

Lisa M. Beaton
City Attorney
City of Kennewick
210 West Sixth Avenue
P. O. Box 6108
Kennewick, WA 99336
Email: lisa-beaton@ci.kennewick.wa.us

Heather Kintzley
City Attorney
City of Richland
975 George Washington Way
Richland, WA 99352
Email: hkintzley@ci.richland.wa.us



Debra Samuelson