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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. FD 35905

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**CITY OF WOODINVILLE, WASHINGTON –
PETITION FOR DECLARATORY ORDER**

**REPLY OF CITY OF WOODINVILLE, WASHINGTON
TO PETITION OF EASTSIDE COMMUNITY RAIL, LLC
FOR CLARIFICATION AND RECONSIDERATION**

ERIC M. HOCKY
CLARK HILL, PLC
One Commerce Square
2005 Market Street, Suite 1000
Philadelphia, PA 19103
(215) 640-8500
ehocky@clarkhill.com

Dated: November 13, 2015

Attorneys for City of Woodinville, WA

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On October 7, 2015, the Board issued a decision (the “*October 7 Decision*”) granting the Amended Petition of the City of Woodinville, a municipal corporation of the State of Washington (the “City”), and found that the City’s proposed acquisition of the land and physical assets of a 2.58-mile line of railroad (the “Line”) from the Port of Seattle is not be subject to the Board’s jurisdiction, and that upon consummation, the City would not be subject to the Board’s regulatory authority as a carrier.¹ As part of the October 7 Decision, the Board confirmed that “nothing in the [Operations & Maintenance] Agreement (including Section 12.12) would give the Port [as owner] the ability to interfere unduly with [Eastside Community Rail’s] ability to carry out the common carrier obligations on the Line.” *October 7 Decision* at 5.

Eastside Community Rail, LLC (“ECR”) filed a Petition for Clarification and Reconsideration (the “Petition”) on October 26, 2015. ECR focuses almost exclusively on the transactions that were the subject of the City’s original petition for declaratory order which would have separately identified and transferred parcels which were believed to be ancillary, and not on the transaction that was the subject of the City’s amended petition that was ruled upon by

¹ Given the Board’s granting of the Amended Petition, and given that no stay was sought or issued, the City closed on the acquisition on November 6, 2015.

the Board.² The Petition seeks to clarify ECR's position on the scope of Section 12.12 of the O&M Agreement, and also seeks reconsideration of what ECR reads in the *October 7 Decision* as the application of an improper burden of proof. The City files this Reply as it believes there is nothing in the decision that needs clarification, and that the Board's decision does not contain material error justifying reconsideration.

ECR's Request for Clarification

ECR's position with respect to the meaning and scope of Section 12.12 of the O&M Agreement does not need clarification. While the City believes that ECR's June 18, 2015 Reply, p. 9, can fairly be read to acknowledge that the language of Section 12.12 allows the sale of parcels that are not necessary for railroad operations (ECR requested that the Board set limitations on what the plain language of Section 12.12 "purports to allow"), the *October 7 Decision*, p. 3, goes on in the following sentence to acknowledge that ECR does not agree with a broad reading of the Section 12.12. Moreover, the Board clearly did not rely on the complained about statement of ECR's position, and made clear that Section 12.12 does not grant the Port (or the City as the successor owner) unfettered rights to sell property noting that under Section 12.12 "only parcels *not used for rail operations or trail use*, and that *do not contain any facilities used in connection with rail operations*, would potentially be subject to transfer." *October 7 Decision*, at 5 (emphasis in original).³

² In the amended transaction that was the subject of the Board's decision, the City will acquire the entirety of the Line as a whole, including assumption of the existing Operations & Maintenance ("O&M") Agreement which governs the operation of the Line by ECR and its lessee-operator Ballard Terminal Railroad Company, LLC ("Ballard").

³ As noted in the *October 7 Decision*, the City acknowledges that only parcels that are unnecessary for current or reasonably foreseeable future freight rail service can be transferred as ancillary parcels. *Id.*

ECR's Request for Reconsideration

ECR has also asked for reconsideration of the Board's decision under 49 CFR § 1115.3(b)(2) alleging that the Board's decision is based on material error. The Board has made clear that a party seeking reconsideration based on material error must do more than make general allegations:

[The petitioner] must substantiate the claim of material error. *See Canadian Pac. Ry.—Control—Dakota, Minn. & E. R.R.*, FD 35081, slip op. at 4 (STB served May 7, 2009) (denying petition for reconsideration where petitioner did not substantiate its claim of material error, but instead restated arguments previously made and cited evidence previously submitted). The alleged grounds must be sufficient to convince the Board that its prior decision in the case would be materially affected. *See Montezuma Grain v. STB*, 339 F.3d 535, 541-42 (7th Cir. 2003); *DesertXpress Enters.—Pet. for Declaratory Order*, FD 34914, slip op. at 6-8 (STB served May 7, 2010).

Canadian National Railway Company and Grand Trunk Corporation – Control – EJ&E West Company, STB Docket No. FD 35087 (Sub-No. 8) (served November 4, 2015), slip op. at 3-4. As discussed below, there was no material error that would support reconsideration of the *October 7 Decision*.

ECR complains that the *October 7 Decision* improperly places the burden on ECR to seek relief if ECR believes that a proposed transfer of an ancillary parcel will unduly interfere with ECR's ability to perform its common carrier duties with respect to the Line. This is not a shifting of any burden of proof, but is a corollary to the Board's finding that the O&M Agreement does not give the owner of the property the ability to interfere unduly with the ability of ECR (or its operator) to carry out its common carrier freight obligations.

A claim that a transfer of an ancillary parcel would interfere with the operator's use of the Line would in the first instance be asserting a violation of the O&M Agreement. In general, questions of contract interpretation are outside of the jurisdiction of Board, and are left to the

dispute resolution provisions of the contract, and state law. *See generally, Pyco Indus., Inc.—Feeder Line Application—Lines of S. Plains Switching, Ltd.*, STB Docket No. FD 34890 (served Sept. 8, 2008), slip op. at 10 (finding that interpretation of the terms of a purchase and sale agreement was a matter for a court applying state contract law); *City of Peoria—Adverse Discontinuance—Pioneer Indus. Ry.*, STB Docket No. AB 878 (served Aug. 10, 2005), slip op. at 6 (the Board does not undertake to enforce contracts). Under the O&M Agreement, there are negotiated procedures for resolving disputes through a coordination committee and through arbitration. The Board in indicating that ECR could also come back to the Board, was not limiting ECR's ability to challenge a proposed transfer of a parcel under Section 12.12, but was in fact providing ECR with an additional forum in which ECR could challenge a proposed transfer.

This is all that the Board was noting in the *October 7 Decision*. The question of the burden of proof in that proceeding is not addressed in the Board's decision, and is an issue that can be addressed in a proceeding if and when there is one – there first would need to be a proposed transfer of an ancillary parcel, and ECR would need to determine that the transfer would unduly interfere with its current or reasonably foreseeable use of the property.⁴ The Board correctly assumes that the City made the changes to the transaction in good faith and that it does not intend to use Section 12.12 to interfere unreasonably with ECR's ability to carry out its common carrier obligation. *October 7 Decision*, at 5. The Board should, in inviting ECR to petition the Board in the future, remind ECR that it should only petition the Board when it can

⁴ As noted in the City's July 1, 2015 Reply, p. 4, n.1, ECR's broad claims that it needs all of the property should be viewed with a degree of skepticism. Additionally, ECR's operator Ballard noticeably did not participate in the proceeding. Thus, there is nothing in the record from the operating railroad indicating what actual future needs it might have for the Line beyond the existing tracks.

demonstrate that a proposed transfer will interfere with its current or reasonably foreseeable use of the Line, and not when it is merely seeking to be obstructionist or to gain leverage over the owner.

ECR relies primarily on the Board's decisions in *City of Lincoln – Petition for Declaratory Order*, STB Finance Docket No. 34425 (served August 12, 2004), *aff'd City of Lincoln v. STB*, 414 F.3d 858, 862 (8th Cir. 2005), and *City of Creede, CO – Petition for Declaratory Order*, STB Finance Docket No. 34376 (served May 3, 2005), for the proposition that the entities seeking to take or restrict the use of railroad property have the burden of establishing that the proposed action will not unduly interfere with current or future railroad operations. ECR goes on to extrapolate that it should not be required to challenge a proposed transfer of an ancillary parcel because that would shift the burden of proof onto ECR as the moving party. However, ECR ignores that in both *City of Lincoln* and *Creede*, the Board found that the carrier had first demonstrated that there was a current or future railroad need for the property, before holding that the moving parties' actions were preempted because the moving parties could not overcome the showings by the carriers. While the cases relied upon by ECR were brought by cities seeking to take or regulate railroad property, ECR ignores that there are at least as many proceedings at the STB where the railroad has been the petitioner seeking to stop a threatened action that it asserts is preempted because it will unduly interfere with current or future railroad operations. *See, e.g., Wichita Terminal Association, BNSF Railway Company & Union Pacific Railroad company – Petition for Declaratory Order*, STB Docket No. FD 35765 (served June 23, 2015) (finding Kansas court order requiring railroad crossing at a specified location would unreasonably interfere with rail operations and was preempted); *Tri-City Railroad Company – Petition for Declaratory Order*, STB Docket No. FD 35915 (served May

21, 2015) (instituting proceeding challenging proposed crossings sought by two communities in Washington State based on claim that crossings would unreasonably interfere with current and planned railroad operations); *Eastern Alabama Railway LLC – Petition for Declaratory Order*, STB Docket No. FD 35583 (served March 19, 2012) (finding condemnation for routine underground water and sewer lines would not unreasonably interfere with railroad operations and therefore not preempted); *Norfolk Southern Railway Company and The Alabama Great Southern Railroad Company – Petition for Declaratory Order*, STB Finance Docket No. 35196 (served March 1, 2010) (finding proposed taking of property necessary for an embankment and maintenance of rail lines would unreasonably interfere with railroad operations); *Lincoln Lumber Company – Petition for Declaratory Order – Condemnation of Railroad Right-of-Way for a Storm Sewer*, STB Finance Docket No. 34915 (served August 13, 2007) (same parties as in *City of Lincoln*; denying request for declaratory order proceeding finding routine non-exclusive easements are not preempted as a rule provided they do not impede rail operations or pose a safety risk). The Board has held that regardless of whether preemption is sought affirmatively or as a defense to a planned action, the burden is on the railroad to establish that preemption applies. *Eastern Alabama, supra*, at 4. Thus, the Board’s suggestion that ECR can in the future bring its concerns to the Board is not inconsistent with Board practice or precedent, and does not constitute material error.

Moreover, the question of what will be the burden of proof in a potential future proceeding is not material to the decision in this proceeding granting the petition and finding that the proposed transaction would not be the acquisition of a railroad line that requires Board authorization, or an exemption, and would not cause the City to become a rail carrier subject to the jurisdiction of the Board. The granting of the petition, and the supporting findings, are fully

consistent with Board's prior decisions regarding the same underlying documents in *Port of Seattle – Acquisition Exemption – Certain Assets of BNSF Railway*, STB Docket No. FD 35128 (served October 27, 2008), and *Snohomish County, Washington – Petition for Declaratory Order*, STB Docket No. FD 35830 (served March 5, 2015). Thus, there was no material error in the order or findings of the Board in the *October 7 Decision*.

Conclusion

For the foregoing reasons, the City requests that the Board deny ECR's Petition for Clarification and for Reconsideration.

Respectfully submitted,



ERIC M. HOCKY
CLARK HILL LLP
One Commerce Square
2005 Market Street, Suite 1000
Philadelphia, PA 19103
(215) 640-8500
ehocky@clarkhill.com

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Attorneys for City of Woodinville, WA

CERTIFICATE OF SERVICE

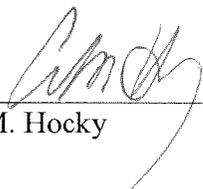
I hereby certify that on the date set forth below, I caused a copy of the foregoing Reply to Petition for Clarification and Reconsideration to be served email upon:

Thomas J. Litwiler
Fletcher & Sippel LLC
29 North Wacker Drive
Suite 920
Chicago, IL 60606-2832
Counsel for Eastside Community Rail, LLC
tlitwiler@fletcher-sippel.com

Isabel Safora
Deputy General Counsel
Port of Seattle
Law Department
2711 Alaskan Way
PO Box 1209
Seattle, WA 98111
Counsel for Port of Seattle
Safora.I@portseattle.org

Charles A. Spitulnik
Kaplan Kirsch & Rockwell LLP
1001 Connecticut Avenue, NW, Suite 800
Washington, DC 20036
Counsel for King County, WA
cspitulnik@kaplankirsch.com

Dated: November 13, 2015



Eric M. Hocky