

# FLETCHER & SIPPEL LLC

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June 18, 2015

238652

## 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

ENTERED  
Office of Proceedings  
June 18, 2015  
Part of  
Public Record

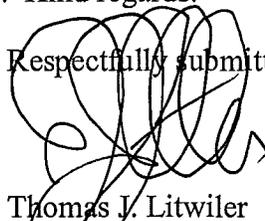
Re: **Docket No. FD 35905**  
**City of Woodinville, Washington --**  
**Petition for Declaratory Order**

Dear Ms. Brown:

Attached for filing in the above-captioned proceeding is the **Reply of Eastside Community Rail, LLC to Amended Petition for Declaratory Order**, dated June 18, 2015.

Should any questions arise regarding this filing, please feel free to contact me. Thank you for your assistance on this matter. Kind regards.

Respectfully submitted,



Thomas J. Litwiler  
Attorney for Eastside Community Rail, LLC

TJL:tl

Attachment

cc: Parties on Certificate of Service

BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

DOCKET NO. FD 35905

CITY OF WOODINVILLE, WASHINGTON --  
PETITION FOR DECLARATORY ORDER

---

**REPLY OF EASTSIDE COMMUNITY RAIL, LLC TO  
AMENDED PETITION FOR DECLARATORY ORDER**

Thomas J. Litwiler  
Thomas C. Paschalis  
Fletcher & Sippel LLC  
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(312) 252-1500

**ATTORNEYS FOR EASTSIDE  
COMMUNITY RAIL, LLC**

Dated: June 18, 2015

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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DOCKET NO. FD 35905

CITY OF WOODINVILLE, WASHINGTON --  
PETITION FOR DECLARATORY ORDER

---

**REPLY OF EASTSIDE COMMUNITY RAIL, LLC TO  
AMENDED PETITION FOR DECLARATORY ORDER**

Eastside Community Rail, LLC ("ECR") hereby submits this reply to the amended petition for declaratory order ("Amended Petition") filed by the City of Woodinville, Washington (the "City") seeking a State of Maine determination for the City's acquisition of a rail line from the Port of Seattle (the "Port") on which ECR holds the exclusive, permanent rail freight easement. As initially proposed, the City's transaction would have partitioned the right-of-way and unilaterally terminated nearly three-fourths of ECR's supposedly permanent freight easement over the existing 100-foot railroad corridor. The City has now revised its proposal to the Board to present a more conventional State of Maine transaction, but without any assurance that the desired dismemberment of ECR's railroad right-of-way would not be imposed at a later date. If the Board grants the relief sought by the City, it should make clear that any unilateral diminishment of ECR's rail freight easement is inconsistent with State of Maine and other Board precedent and is not permitted by the Board's decision.

**BACKGROUND**

The rail line which the City seeks to acquire (the "Line") is part of a longer rail corridor (the "Corridor") previously owned by BNSF Railway Company ("BNSF") and acquired in 2008 by the Port. The 2008 quitclaim deed from BNSF to the Port specifically excepted and

reserved to BNSF "an exclusive easement for freight rail purposes for Grantor [BNSF] and its successors and assigns."<sup>1</sup> BNSF transferred the easement to a short-line operator, and the easement is now held by ECR. See GNP Rly Inc. -- Acquisition and Operation Exemption -- BNSF Railway Company, Finance Docket No. 35213 (STB served February 13, 2009); Eastside Community Rail, LLC -- Acquisition and Operation Exemption -- GNP Rly, Inc., Docket No. FD 35692 (STB served November 23, 2012). Operations on the Corridor are currently conducted by Ballard Terminal Railroad Company, L.L.C. ("Ballard") pursuant to a lease with ECR. See Ballard Terminal Railroad Company, L.L.C. -- Lease Exemption -- Line of Eastside Community Rail, LLC, Docket No. FD 35730 (STB served April 18, 2013).

Relying specifically on the easement, the Port in 2008 sought an STB determination that it would not become a rail carrier as a result of acquiring the Corridor, under the holding of Maine DOT -- Acq. Exempt. -- Maine Central R. Co., 8 I.C.C.2d 835 (1991) ("State of Maine") and its progeny. It claimed to qualify under State of Maine because "if an acquisition of a rail line is subject to the existing operating interests of a common carrier and the acquiring entity does not have the ability to materially interfere with the carrier's operations, the acquiring company is not a common carrier subject to [STB] jurisdiction." STB Finance Docket No. 35128, Port of Seattle Motion to Dismiss Notice of Exemption, May 28, 2008, at 6-7.

The Port went on to explain that "BNSF will retain the exclusive right to provide or permit rail freight service on the Subject Line," that the railroad "will have general maintenance responsibilities on the Subject Line and the right to construct improvements to the Subject Line," and that "consistent with the Freight Easement," an Operations and Maintenance

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<sup>1</sup> The City's Amended Petition notably omits the quitclaim deed with the reserved easement, which is the essential property interest at issue in this proceeding. That deed, without its internal exhibits, is attached hereto as Exhibit A.

Agreement ("O&M Agreement") to be signed by the parties "provides that the [railroad] shall have exclusive authority to manage, direct and control all freight rail activities on the Subject Line." Port of Seattle Motion to Dismiss at 7-8.

The Board granted the relief sought by the Port. In doing so, it explained that:

[I]t appears that nothing in the draft quitclaim deeds or the O&M Agreement -- the only documents submitted to us -- gives the Port the ability to interfere unduly with the transferree's ability to carry out the common carrier obligation. . . . The Port does not indicate, nor does the draft quitclaim deed suggest, that the exclusive freight easement retained by BNSF is anything other than permanent.

The Port of Seattle -- Acquisition Exemption -- Certain Assets of BNSF Railway Company, Finance Docket No. 35128 (STB served October 27, 2008) at 4. The Board found that, under the O&M Agreement, the railroad "will have sufficient power over the operation and maintenance of the Line to avoid any undue interference by the Port."

The Board indicated, however, that "it will hold the parties to their assurances to refrain from interfering materially with the [railroad's] right and obligation to provide rail freight service." And it warned that "any modification to the O&M Agreement, or any subsequent agreement, that expands the Port's power or control over the Line in a way that would hamper the third-party operator's ability to fulfill the common carrier obligation would trigger the need for the Port to obtain acquisition authority from the Board at that time." Port of Seattle at 5. Nowhere in the Port's motion to dismiss or the Board's decision is there discussion or consideration of any ability of the Port to unilaterally terminate portions of the retained freight easement. Indeed, as indicated above, the Board found nothing to indicate that the easement was "anything other than permanent."

On July 24, 2014, the Port and the City entered into an Ancillary Property Purchase and Sale Agreement (the "Ancillary Agreement") and a Real Estate Purchase and Sale

Agreement (the "Main Agreement") with respect to the Line.<sup>2</sup> The Ancillary Agreement referenced Section 12.12 of the O&M Agreement, asserting that it "contemplates the transfer to third parties of one or more parcels of the [corridor] for purposes other than rail operations or trail use, and provides that any such transfers be deemed removed from the 'Corridor' . . . ." Ancillary Agreement at 2, Recital G. The Ancillary Agreement purported to transfer significant portions of the Line's right-of-way from the Port to the City pursuant to Section 12.12, while the remainder of the Line was to be transferred pursuant to the Main Agreement. Effectively, the transactions would have unilaterally terminated up to three-fourths of the existing "permanent" rail freight easement, foreclosing rail operations on 72 feet of what is today a 100-foot wide railroad corridor. ECR did not consent to and indeed was not consulted regarding the proposed bifurcated sale prior to execution of the Ancillary and Main Agreements.

On September 8, 2014, counsel for ECR wrote to representatives of the City and the Port outlining ECR's objections to the proposed sale as structured. A copy of that letter is attached hereto as Exhibit B. The City and the Port did not respond to ECR's objections.

On September 9, 2014, ECR personnel and other interested parties met with representatives of the City to discuss the rail corridor through Woodinville. This was the only such discussion to occur. The City was informed of ECR's plans to construct a maintenance-of-way road on one side of the existing track and eventually a second track on the other side, and that the entire 100 feet of the right-of-way held under the freight easement was needed for present and future railroad operations. ECR made clear again that it objected to the dismemberment of the Line, and that such action did not serve the preservation and enhancement of rail service.

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<sup>2</sup> These agreements are included as Attachments 4 and 5, respectively, in the Appendix to the City's initial petition for declaratory order ("Original Petition") filed February 3, 2015.

On February 3, 2015, notwithstanding ECR's objections, the City filed its Original Petition seeking a State of Maine determination for the transactions contemplated by the Ancillary Agreement and the Main Agreement.

While unconcerned with the effects of the proposed transactions on ECR and railroad operations, the City was apparently more persuaded by the objections of King County, which holds a trail use easement on the Line. On February 18, 2015, King County sought to extend the time to respond to the Original Petition, indicating that it had "been made aware of issues concerning the ancillary properties to be sold to the City and would like to discuss those issues further with the City and the Port." Motion of King County, Washington to Extend Time to Respond, February 18, 2015, at 2. After that extension was granted, the City informed the Board that the City and the Port were "discussing a change in the structure of the transaction under consideration by not transferring 'ancillary parcels' separately from the rest of the property," and asked the Board to suspend consideration of the Original Petition. City Letter, March 6, 2015, at 1.

On May 29, 2015, the City filed the currently-pending Amended Petition, which replaces the Ancillary Agreement and the Main Agreement with an Amended and Restated Real Estate Purchase and Sale Agreement (the "Amended Agreement") that transfers the entirety of the Port's interest in the Line to the City in a single transaction. The Amended Petition provides no substantive explanation for the change in transactional structure, stating solely (in a footnote) that the City and the Port "decided to change the structure of the transaction so that the entire [Line] will be acquired altogether pursuant to the Amended Agreement." Amended Petition at 4, n.4. A staff memorandum to the Port of Seattle Commission, however, provided additional detail on the City's reasoning:

At the request of the City of Woodinville, the Port Commission previously authorized transfer of portions of the Eastside Corridor to the City in two separate transactions, including a segment of the Corridor the City intended to use solely for bridge and roadway expansion and other non-freight public purposes (including in the Ancillary Agreement). Most recently, the City has determined that bifurcation of the sale creates other complications related to ownership rights existing on the corridor and other regulatory approvals. As a result, the City is requesting termination of the Ancillary Agreement and inclusion in the PSA of the property currently in the Ancillary Agreement.

Port of Seattle Memorandum, April 28, 2015 Commission Agenda, Item No. 4e (attached hereto as Exhibit C and available at [https://www.portseattle.org/About/Commission/Meetings/2015/2015\\_04\\_28\\_RM\\_Agenda\\_Linked.pdf](https://www.portseattle.org/About/Commission/Meetings/2015/2015_04_28_RM_Agenda_Linked.pdf)).

### DISCUSSION

ECR's obvious concern is that the City has simply postponed its plan to unilaterally dismember the ECR railroad right-of-way until after Board proceedings on its declaratory order petition are concluded. The City's belief, outlined in detail in its Original Petition, is that Section 12.12 of the O&M Agreement will allow the City to terminate the "permanent" rail freight easement on any part of the corridor that does not currently have a railroad track on it, thus excising in most places 72 feet of the 100-foot right-of-way. Original Petition at 4-5, 7-9. And the City is certain to again assert that, because Section 12.12 has been "previously reviewed and approved by the Board," Original Petition at 5, the wholesale partitioning of railroad rights-of-way held pursuant to reserved, exclusive freight easements is permissible under State of Maine.<sup>3</sup> The Board must make clear that it is not.

ECR's rail freight easement on the Line is permanent. The Port obtained a State of Maine determination from the Board by relying on that permanent easement and the Port's

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<sup>3</sup> This same motivation may explain the fairly odd request in the current petition that the Board "reiterate its findings" in the Port of Seattle proceeding. Amended Petition at 7.

inability to interfere with ECR's exercise of the easement. The idea that Section 12.12 of the O&M Agreement -- a provision not even mentioned in the Port's 2008 pleadings at the Board or in the Board's 2008 decision, and which itself makes no reference to the permanent easement -- legitimately empowers a non-carrier landlord to unilaterally eliminate wide and long swaths of such easements is unsupportable and inconsistent with fundamental State of Maine principles. Those landlords cannot and should not have the ability to dictate what parts of rail common carrier rights-of-way remain available for railroad purposes and what parts are converted for other uses.

The City seems to believe that it is free to dispose of railroad right-of-way not presently occupied by a railroad track. But as the Board has explained:

Many railroad lines have a wider ROW than might appear to be used, but that does not mean that all of the property is not needed for rail operations. [E]xtra width on the sides of the track allows room to maintain or upgrade the track, to provide access to the line, to serve as a safety buffer, and to ensure that sufficient space is left available for more track and other rail facilities to be added, as needed, as rail traffic changes and grows, among other uses. Thus, it cannot be said that property at the edge of a railroad's ROW is "not needed for railroad transportation" just because tracks or facilities are not physically located there now. See Midland Valley R.R. v. Jarvis, 29 F.2d 539, 541 (8<sup>th</sup> Cir. 1928).

City of Creede, CO -- Petition for Declaratory Order, Finance Docket No. 34376 (STB served May 3, 2005) at 6. Where a railroad owns the physical assets that comprise its rail line, a municipality's effort to condemn longitudinal portions of the railroad's right-of-way would be subject to federal preemption arising from the STB's exclusive jurisdiction over rail facilities. See City of Lincoln -- Petition for Declaratory Order, Finance Docket No. 34425 (STB served August 12, 2004), aff'd sub nom. City of Lincoln v. STB, 414 F.3d 858 (8<sup>th</sup> Cir. 2005). It would be anomalous to allow rail lines to lose such protection simply because they had been subjected

to a State of Maine transaction that -- supposedly -- had no adverse impact on the rail carrier's ability to fully continue its common carrier operations.

In the Creede and Lincoln situations, the burden of proof is plainly on the party seeking to expropriate currently unused right-of-way, rather than on the railroad:

[W]here, as here, the railroad opposes a plan to take part of a ROW and claims that the property is or will be needed for the conduct of rail operations, the burden is on the party seeking to take property away from the national transportation system to show that the entire ROW is not and will not be needed for rail purposes.

Creede at 6. Here, ECR has explained to the City its plans for maintenance-of-way access and additional tracks on its right-of-way. That corridor is 100 feet wide -- a standard width for rights-of-way across the country and not excessive for the conduct of normal railroad operations. Should the City seek to extract "ancillary" parcels from ECR's permanent freight easement in the future, it would, at the least, need to make a particularized showing under the relevant burden of proof that no interstate transportation interest would be harmed.

In its Original Petition, the City claimed that Section 12.12 of the O&M Agreement is consistent with the Board's decision in Wisconsin Department of Transportation -- Petition for Declaratory Order -- Rail Line in Sheboygan County, WI, Finance Docket No. 35195 (STB served April 22, 2009) ("WisDOT/Sheboygan"). Original Petition at 8 (asserting that Board approved agreements providing "that WisDOT can sell or lease certain sections of land not needed for continuation of freight rail service"). But the Board was careful to point out in that proceeding that "the exercise of these rights and other actions under Section 2.2 of the respective agreements require that WSOR [the rail carrier] be informed and involved." WisDOT/Sheboygan at 4. Indeed, the actual agreement at issue in WisDOT/Sheboygan prohibited any landlord sales within a minimum corridor of 66 feet, required "consultation" with

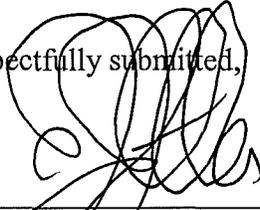
the railroad for any sales outside of that corridor, and provided the railroad with the opportunity to purchase any such parcels. STB Finance Docket No. 35195, WisDOT Petition for Declaratory Order, February 13, 2009, Attachment 3 at 5 (relevant excerpts attached hereto as Exhibit D). None of those protections are present in Section 12.12 of the O&M Agreement, and neither ECR nor its lessee operator Ballard was consulted regarding the City's 2014 plans to radically partition the right-of-way of the Line.

The City has expressly conceded that the Port of Seattle decision "did not specifically refer to the sale rights under paragraph 12.12" of the O&M Agreement. Original Petition at 8. To the extent that Section 12.12 purports to allow the Port -- and, in the future, the City -- to unilaterally terminate large portions of the permanent freight easement held by ECR, it is inconsistent with the State of Maine principles that govern acquisitions of rail lines by public entities wishing to remain non-carriers. While the City has abandoned its bifurcated approach to acquiring the Line for present purposes, the Board cannot allow its granting of the City's petition to be construed as a blessing of the unfettered power that Section 12.12 purports to convey.

WHEREFORE, ECR respectfully requests that any grant of the Amended Petition be subject to the condition that the City may not terminate any part of ECR's permanent rail freight easement on the Line without the consent of ECR or further order of the Board.

Respectfully submitted,

By: \_\_\_\_\_

  
Thomas J. Litwiler  
Thomas C. Paschalis  
Fletcher & Sippel LLC  
29 North Wacker Drive  
Suite 920  
Chicago, Illinois 60606-2832  
(312) 252-1500

**ATTORNEYS FOR EASTSIDE  
COMMUNITY RAIL, LLC**

Dated: June 18, 2015

# **EXHIBIT A**

After Recording Return To:  
Port of Seattle, Legal Department  
P. O. Box 1209  
Seattle, WA 98111  
Attn: Isabel R. Safora



**20091218001536**  
 PACIFIC NW TIT QCD 74.00  
 PAGE-001 OF 013  
 12/18/2009 15:30  
 KING COUNTY, WA

**E2422287**

12/18/2009 15:22  
KING COUNTY, WA  
TAX \$167,944.73  
SALE \$9,434,816.29

PAGE-001 OF 001

**QUIT CLAIM DEED**

Woodinville North  
Freight Portion

Grantor: BNSF RAILWAY COMPANY ("BNSF")

Grantee: PORT OF SEATTLE ("Port")  
Parcel # 022005-1111, 092005-1111

*FILED BY P1444 12-14  
DHWJW 5741-4*

Legal Description: See Exhibit A attached hereto and incorporated herein (the "Property").

*Port Sec 10, 26, 52 W1M, Port. 9-26, 5, 2 W1M, for*

Grantor, for and in consideration of TEN AND NO/100 DOLLARS (\$10.00) conveys and quit claims to Grantee, the Property, situated in the County of King, State of Washington, together with all after acquired title of the Grantor therein;

EXCEPTING AND RESERVING THEREFROM, an exclusive easement for freight rail purposes for Grantor and its successors and assigns, subject to the covenant for Railbanking Requirements in the Event of Abandonment set forth herein.

Port and BNSF are parties to that certain Purchase and Sale Agreement dated as of May 12, 2008, as amended, concerning the Property. Port and BNSF for themselves and their respective successors and assigns hereby covenant and agree that the provisions of Sections 6 and 7 of said Agreement attached hereto in Exhibit B, are incorporated herein by reference (with all references to Port and/or County together therein deemed to be references to Port only) and that all these provisions shall be covenants running with the land that are enforceable by Port, BNSF and their respective successors and assigns. Port and BNSF for themselves and their respective successors and assigns hereby further covenant and agree that the provisions of the Railbanking Requirements in Event of Abandonment, also required by the Purchase and Sale Agreement and attached hereto in Exhibit B are incorporated herein by reference and shall be covenants running with the land that are enforceable by the parties identified therein, and their respective successors and assigns, and are for the benefit of the Property and the other portions of the Washington Branch Line and Redmond Spur Right of Ways being acquired by Port from BNSF by deeds dated as of the date set forth herein.

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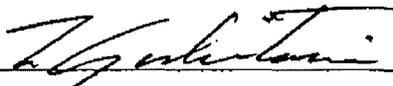
*Said document(s) were filed for  
recording by Pacific Northwest Title Co.  
on 12/18/2009 at 15:22:22. The recording fee  
of \$167,944.73 was paid by BNSF.*

IN WITNESS WHEREOF, BNSF and Port have executed this Deed as of the 18 day of  
December, 2009.

BNSF RAILWAY COMPANY

By   
Its: Senior General Attorney

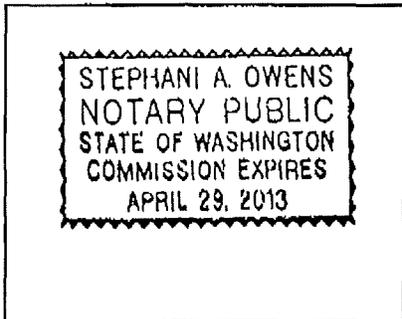
PORT OF SEATTLE

By   
Its

STATE OF Washington )  
 ) ss.  
COUNTY OF King )

I certify that I know or have satisfactory evidence that David T. Rankin is the person who appeared before me, and said person acknowledged that he/she signed this instrument, on oath stated that he/she was authorized to execute the instrument and acknowledged it as the Senior General Attorney of BNSF Railway Company to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

Dated: 12-17-09



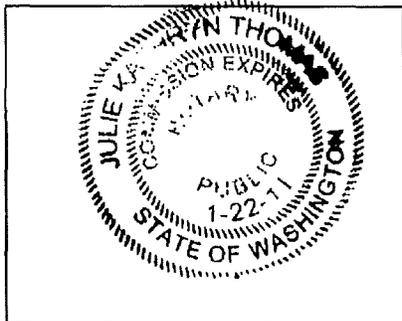
Stephani A Owens  
Notary Public  
Print Name Stephani A Owens  
My commission expires 4-29-2013

(Use this space for notarial stamp/seal)

STATE OF WASHINGTON )  
 ) ss.  
COUNTY OF King )

I certify that I know or have satisfactory evidence that Jay Yoshitani is the person who appeared before me, and said person acknowledged that he/she signed this instrument, on oath stated that he/she was authorized to execute the instrument and acknowledged it as the CEO of the Port of Seattle to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

Dated: Dec. 17th, 2009



Julie Kathryn Thomas  
Notary Public  
Print Name Julie Kathryn Thomas  
My commission expires 1-22-11

(Use this space for notarial stamp/seal)

# **EXHIBIT B**

# FLETCHER & SIPPEL LLC

ATTORNEYS AT LAW

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THOMAS J. LITWILER  
(312) 252-1508  
tlitwiler@fletcher-sippel.com

September 8, 2014

## VIA ELECTRONIC AND U.S. MAIL

Greg A. Rubstello, Esq.  
Ogden Murphy Wallace, P.L.L.C.  
901 5<sup>th</sup> Avenue, Suite 3500  
Seattle, WA 98164

Mr. Tay Yoshitani  
Chief Executive Officer  
Port of Seattle  
2711 Alaskan Way  
P.O. Box 1209  
Seattle, WA 98111

Re: **Proposed Sale of Eastside Rail Corridor**

Dear Messrs. Rubstello and Yoshitani:

We have reviewed, on behalf of Eastside Community Rail, LLC (“ECR”), the Real Estate Purchase and Sale Agreement (the “Main Agreement”) and the Ancillary Property Purchase and Sale Agreement (the “Ancillary Agreement”), both dated July 24, 2014, between the Port of Seattle and the City of Woodinville. Those agreements contemplate the conveyance of the physical assets comprising the King County portion of the Eastside rail corridor, on which ECR holds an exclusive and permanent easement for rail freight purposes, from the Port to the City. As structured, however, the transactions purport to unilaterally terminate up to three-fourths of the existing easement, foreclosing rail operations on 72 feet of what is today a 100-foot wide railroad corridor. This dismemberment of ECR’s railroad right-of-way is flatly inconsistent with the permanent ECR freight easement, with the Port’s representations to the Surface Transportation Board (“STB”) in 2008 when it acquired the corridor, and with the so-called “*State of Maine*” principles that govern an owner’s ability to control or restrict rail operations in this situation. ECR objects to the proposed transactions, and will oppose the City’s request for a further *State of Maine* determination from the STB.

When the Port acquired the Eastside rail line from BNSF Railway Company (“BNSF”) in 2008, BNSF specifically excepted and reserved in the conveying quitclaim deed “an exclusive easement for freight rail purposes for Grantor and its successors and assigns.” That easement is now held by ECR. Relying specifically on the easement, the Port in 2008 sought an STB determination that it would not become a rail carrier as a result of acquiring the

# FLETCHER & SIPPEL LLC

Greg A. Rubstello, Esq.  
Mr. Tay Yoshitani  
September 8, 2014  
Page 2

Eastside line, under the holding of *Maine DOT -- Acq. Exempt. -- Maine Central R. Co.*, 8 I.C.C.2d 835 (1991) ("*State of Maine*") and its progeny. It claimed to qualify under *State of Maine* "provided that another entity retains sufficient interest to operate as a rail carrier on the line and has autonomy to conduct common carrier freight operations. Stated somewhat differently, if an acquisition of a rail line is subject to the existing operating interests of a common carrier and the acquiring entity does not have the ability to materially interfere with the carrier's operations, the acquiring company is not a common carrier subject to [STB] jurisdiction." STB Finance Docket No. 35128, Port of Seattle Motion to Dismiss Notice of Exemption, May 28, 2008, at 6-7.

The Port went on to explain that "BNSF will retain the exclusive right to provide or permit rail freight service on the Subject Line," that the railroad "will have general maintenance responsibilities on the Subject Line and the right to construct improvements to the Subject Line," and that "consistent with the Freight Easement," the Operations and Maintenance Agreement to be signed by the parties "provides that the [railroad] shall have exclusive authority to manage, direct and control all freight rail activities on the Subject Line." Port of Seattle Motion to Dismiss at 7-8.

The STB granted the relief sought the Port. In doing so, it explained that:

[I]t appears that nothing in the draft quitclaim deeds or the O&M Agreement -- the only documents submitted to us -- gives the Port the ability to interfere unduly with the transferee's ability to carry out the common carrier obligation. . . . The Port does not indicate, nor does the draft quitclaim deed suggest, that the exclusive freight easement retained by BNSF is anything other than permanent.

*The Port of Seattle -- Acquisition Exemption -- Certain Assets of BNSF Railway Company*, Finance Docket No. 35128 (STB served October 27, 2008) at 4. The STB found that, under the O&M Agreement, the railroad "will have sufficient power over the operation and maintenance of the Line to avoid any undue interference by the Port."

The STB indicated, however, that "it will hold the parties to their assurances to refrain from interfering materially with the [railroad's] right and obligation to provide rail freight service." And it warned that "any modification to the O&M Agreement, or any subsequent agreement, that expands the Port's power or control over the Line in a way that would hamper the third-party operator's ability to fulfill the common carrier obligation would trigger the need for the Port to obtain acquisition authority from the Board at that time." *Port of Seattle* at 5.

# FLETCHER & SIPPEN LLC

Greg A. Rubstello, Esq.  
Mr. Tay Yoshitani  
September 8, 2014  
Page 3

ECR's rail freight easement on the Eastside corridor is permanent. The apparent belief of the Port and the City that they may contractually agree among themselves to eliminate wide and long swaths of that easement has no legitimate basis. The idea that such drastic and harmful action is authorized by Section 12.12 of the O&M Agreement -- a provision not even mentioned in the Port's pleadings at the STB or in the STB's decision, and which itself makes no reference to the permanent easement -- is equally unsupportable. The Port obtained a *State of Maine* determination from the STB by relying on what is now ECR's exclusive, permanent rail freight easement and the Port's inability to interfere with ECR's exercise of that easement. That determination cannot and does not tolerate the unilateral dismemberment of the very same easement.

The Port and the City seem to believe that they are free to dispose of railroad right-of-way not presently occupied by a railroad track. But as the STB has explained:

Many railroad lines have a wider ROW than might appear to be used, but that does not mean that all of the property is not needed for rail operations. [E]xtra width on the sides of the track allows room to maintain or upgrade the track, to provide access to the line, to serve as a safety buffer, and to ensure that sufficient space is left available for more track and other rail facilities to be added, as needed, as rail traffic changes and grows, among other uses. Thus, it cannot be said that property at the edge of a railroad's ROW is "not needed for railroad transportation" just because tracks or facilities are not physically located there now. *See Midland Valley R.R. v. Jarvis*, 29 F.2d 539, 541 (8<sup>th</sup> Cir. 1928).

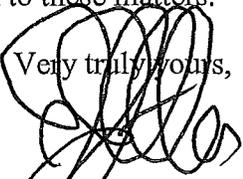
*City of Creede, CO -- Petition for Declaratory Order*, Finance Docket No. 34376 (STB served May 3, 2005) at 6. ECR, through its operator Ballard Terminal Railroad Company, is an operating railroad, and has current and future service plans under which the railroad right-of-way subject to its exclusive, permanent freight easement will be needed for the conduct of rail operations. ECR did not consent to the wholesale partitioning of its right-of-way, and indeed was not even consulted. The Port and the City do not have the ability to dictate what part of ECR's right-of-way remains available for railroad purposes and what part may be disposed of.

Section 10 of both the Main Agreement and the Ancillary Agreement indicate that the City will be seeking an STB decision or determination before proceeding with the proposed transactions. ECR intends to oppose such request for relief, and requests to be included on the service list for all pleadings filed by the City or the Port in such proceeding.

# FLETCHER & SIPPEL LLC

Greg A. Rubstello, Esq.  
Mr. Tay Yoshitani  
September 8, 2014  
Page 4

Thank you for your attention to these matters.

Very truly yours,  
  
Thomas J. Litwiler

TJL:tl

cc: Mr. Richard A. Leahy, Woodinville City Manager  
Mr. Douglas Engle, ECR  
Vicki E. Orrico, Esq.  
Thomas C. Paschalis, Esq.

# **EXHIBIT C**

**PORT OF SEATTLE**  
**MEMORANDUM**

**COMMISSION AGENDA**  
**ACTION ITEM**

<b>Item No.</b>	<u>4e</u>
<b>Date of Meeting</b>	<u>April 28, 2015</u>

**DATE:** April 8, 2015  
**TO:** Ted Fick, Chief Executive Officer  
**FROM:** Joe McWilliams, Interim Managing Director, Economic Development Division  
**SUBJECT:** Restate and amend one of two Eastside Rail Corridor purchase and sale agreements with the City of Woodinville and terminate the other.

**ACTION REQUESTED**

Request Commission authorization for the Chief Executive Officer to restate and amend the Real Estate Purchase and Sale Agreement (PSA) with the City of Woodinville to incorporate the portion of the Eastside Rail Corridor previously included as a separate transaction in the Ancillary Property Purchase and Sale Agreement (Ancillary PSA).

**SYNOPSIS**

Commission authorization is requested to revise the transaction for the transfer of portions of the Eastside Rail Corridor to the City of Woodinville from two separate agreements to one by including all the property being transferred in the PSA and terminating the Ancillary PSA.

The net proceeds to the Port would not change. Commission authorized the PSA and the Ancillary PSA on July 22, 2014.

**BACKGROUND**

The Port acquired the Eastside Corridor on December 18, 2009, from BNSF Railway. Prior to finalizing the acquisition, the Port, the City of Redmond, King County, Sound Transit, Cascade Water Alliance, and Puget Sound Energy (“Regional Partners”) agreed that they all had an interest in obtaining rights to use the Eastside Corridor and share in the cost of acquiring it for public ownership. This agreement was memorialized in a Memorandum of Understanding dated November 11, 2009. On February 23, 2010, the Commission authorized a Memorandum of Understanding between the Regional Partners regarding the appraisal of the Eastside Corridor. On June 30, 2010, the Port finalized the sale of the Redmond city limits portion of the Eastside Corridor to the City of Redmond. On December 21, 2010, Puget Sound Energy acquired an easement over both the freight and railbanked portions of the Eastside Corridor. On April 11, 2012, the Port sold to Sound Transit (i) a portion of the Eastside Corridor located within the City of Bellevue and (ii) a permanent high capacity transportation easement over the railbanked portion of the Eastside Corridor. On April 13, 2012, the Port sold to the City of Kirkland that portion of the Eastside Corridor within the City of Kirkland and a portion within the City of Bellevue for trail and transportation uses. On February 12, 2013, the Port sold to King County

## **COMMISSION AGENDA**

Ted Fick, Chief Executive Officer

April 8, 2015

Page 2 of 3

(i) the remaining railbanked portion of the Eastside Corridor located within King County and (ii) a trail easement over portions of the freight segment of the Eastside Corridor located partially in King County and partially in Snohomish County. On January 14, 2014, the Port Commission authorized the sale to Snohomish County of those portions of the Eastside Corridor located in Snohomish County. Snohomish County recently notified the Port that it was not proceeding with the purchase.

### **REQUESTED CHANGES TO TRANSACTION**

At the request of the City of Woodinville, the Port Commission previously authorized transfer of portions of the Eastside Corridor to the City in two separate transactions, including a segment of the Corridor the City intended to use solely for bridge and roadway expansion and other non-freight public purposes (included in the Ancillary Agreement). Most recently, the City has determined that bifurcation of the sale creates other complications related to ownership rights existing on the corridor and other regulatory approvals. As a result, the City is requesting termination of the Ancillary Agreement and inclusion in the PSA of the property currently in the Ancillary Agreement.

- The purchase price will not change. The Port will receive a total of \$1,100,000 for the portions of the Eastside Rail Corridor being transferred to the City of Woodinville.
- All other provisions of the PSA remain the same as originally approved by the Port Commission.

### **ATTACHMENTS TO THIS REQUEST**

Amended and Restated Purchase and Sale Agreement

### **PREVIOUS COMMISSION ACTIONS OR BRIEFINGS**

- July 22, 2014, Second Reading and Public Hearing of Resolution No. 3692, surplusing and sale of a portion of the Eastside Rail Corridor to the City of Woodinville.
- June 24, 2014, First Reading and Public Hearing of Resolution No. 3692, surplusing and sale of a portion of the Eastside Rail Corridor to the City of Woodinville.
- January 14, 2014, Second Reading and Final Passage of Resolution No. 3688, relating to surplusing and sale of certain real property (also known as the Eastside Rail Corridor) to Snohomish County.
- January 7, 2014, First Reading and Public Hearing of Resolution No. 3688, relating to surplusing and sale of certain real property (also known as the Eastside Rail Corridor) to Snohomish County.
- April 3, 2012, Second Reading and Final Passage of Resolution No. 3659, relating to surplusing and sale of certain real property (also known as the Eastside Rail Corridor) to the City of Kirkland (a portion of the Woodinville Subdivision).

## **COMMISSION AGENDA**

Ted Fick, Chief Executive Officer

April 8, 2015

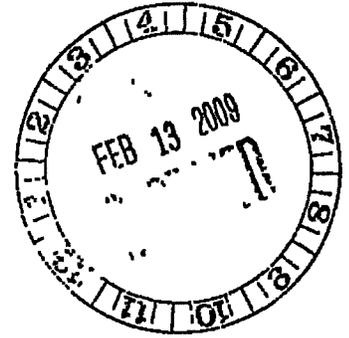
Page 3 of 3

- February 28, 2012, First Reading and Public Hearing of Resolution No. 3659, relating to surplus and sale of certain real property (also known as the Eastside Rail Corridor) to the City of Kirkland (a portion of the Woodinville Subdivision).
- December 13, 2011, Port Commission authorized the Chief Executive Office to execute a Purchase and Sale Agreement between the Port of Seattle and City of Kirkland for a portion of the Woodinville Subdivision.
- May 24, 2011, Port Commission authorized the sale of approximately one mile of the Woodinville Subdivision within the City of Bellevue to Sound Transit and further authorized the grant of a permanent easement to Sound Transit over the Port's railbanked portion of the Woodinville Subdivision.
- December 7, 2010, Port Commission authorized the sale of easement rights on the freight and railbanked portions of the Woodinville Subdivision to Puget Sound Energy.
- June 22, 2010, Port Commission authorized the sale of the Redmond city portion of the Woodinville Subdivision to the City of Redmond.
- February 23, 2010, Port Commission authorized a Memorandum of Understanding between the Regional Partners Regarding Joint Appraisal of the Woodinville Subdivision.
- November 5, 2009, Port Commission authorized execution of a Memorandum of Understanding between the Port and the Regional Partners Regarding Acquisition of the Woodinville Subdivision.

# **EXHIBIT D**

LAW OFFICES  
**JOHN D. HEFFNER, PLLC**  
1750 K STREET, N W  
SUITE 200  
WASHINGTON, D.C 20006  
PH (202) 296-3333  
FAX: (202) 296-3939

ENTERED  
Office of Proceedings  
FEB 13 2009  
Part of  
Public Record



224530

February 13, 2009

BY HAND

Hon. Anna K. Quinlan,  
Acting Secretary  
Surface Transportation Board  
395 E Street, S.W.  
Washington, D.C. 20423

**FEE RECEIVED**  
FEB 13 2009  
SURFACE  
TRANSPORTATION BOARD

RE: **STB Finance Docket No. 35195**  
**Wisconsin Department of Transportation-Petition for**  
**Declaratory Order- Rail Line in Sheboygan County, WI**

Dear Ms. Quinlan.

On behalf of Wisconsin Department of Transportation ("WisDOT") I am submitting an original and ten copies of a petition for declaratory order together with attachments. In addition, I am enclosing a check for \$1,400 to cover the filing fee pursuant to 49 CFR 1002.2 (f)(58)(11). A petition for fee waiver was filed under separate cover in this matter on November 18, 2008.

Please date stamp and return one copy of this letter.

Sincerely yours,

  
John D. Heffner  
Counsel

Enclosures

cc Mack H. Shumate, Jr., Esq  
Kathleen Chung, Esq

**FILED**  
FEB 13 2009  
SURFACE  
TRANSPORTATION BOARD

224530

**FILED**

FEB 13 2009

**SURFACE  
TRANSPORTATION BOARD**

BEFORE THE  
SURFACE TRANSPORTATION BOARD  
WASHINGTON, DC 20423

STB FINANCE DOCKET NO 35195

WISCONSIN DEPARTMENT OF TRANSPORTATION  
—PETITION FOR DECLARATORY ORDER--  
RAIL LINE IN SHEBOYGAN COUNTY, WI

Kathleen Chung, State Bar no 1032802  
Assistant General Counsel  
Wisconsin Department of Transportation  
4802 Sheboygan Avenue, Room 115B  
P O Box 7910  
Madison, Wisconsin 53707-7910  
Tel (608) 266-8810  
Attorney for Petitioner

**ENTERED**  
Office of Proceedings  
FEB 13 2009  
Part of  
Public Record

**FEE RECEIVED**  
FEB 13 2009  
**SURFACE  
TRANSPORTATION BOARD**

Dated November 12, 2008

## **ATTACHMENT 3**

### **COMMISSION OPERATING AGREEMENT**

**OPERATING AGREEMENT**

**FOR RAIL SERVICE CONTINUATION**

**BY AND BETWEEN**

**EAST WISCONSIN COUNTIES RAILROAD CONSORTIUM**

**AND**

**WISCONSIN DEPARTMENT OF TRANSPORTATION**

**AGREEMENT NO 0490-40-50(B-2)**

**MARCH 28, 2008**

where Operator cannot justify and is unable to provide a desired level of freight rail service This provision does not apply to the Principal Line Segments between Saukville, Milepost 114.8 to Kiel, Milepost 151.8 identified in subsection 1(r)(8) and between Kohler, Milepost 4.0 to Plymouth, Milepost 14.95 identified in subsection 1(r)(9)

(b) This Agreement is to be executed upon authorization of the Board of Directors of the Commission, and the authorization of the Chief of WisDOT's Railroad and Harbors Section This Agreement shall commence upon execution of this Agreement and shall be perpetual; provided, however, that either party may terminate this Agreement under Article 7.0

## **Section 2.2 - Reservation.**

The Land and Improved Property involved in this Agreement are the Land and Improved Property defined in Section 1.0(k) and (l), herein Future operations may show WisDOT that portions of the Land or Improved Property are not needed for railroad use or are of sufficient width to allow other uses as co-uses

Land and Improved Property used predominantly in generating income not included within Gross Operating Revenues shall be deemed not used for railroad purposes Partial use of the line by Commission and Operator for future Commuter Passenger Service is possible if first authorized under a separate operating agreement in the manner set forth in Section 2.2(g) During the term of this Agreement some consolidation of yards, interchanges and terminal facilities of the various railroads serving the particular area may require relocation of Improved Property and other facilities which could affect portions of the Rail Line WisDOT may, upon request from Commission, Operator or others, determine that the use of the Rail Line for railroad purposes is such that the width of the Land at particular points also permits recreational or scenic uses WisDOT hereby makes this grant of use subject to the following conditions

(a) Subject to Section 2.2(b) below, the right is retained for WisDOT to sell or lease Land, Improved Property or both that WisDOT determines is not needed for the continuation of freight rail service Such determination shall be made after consultation with Commission and Operator When notified of a pending sale by WisDOT, Commission shall forthwith notify Operator

(b) In the event WisDOT determines certain parcels of Land or Improved Property are not reasonably required for the preservation of railroad services, WisDOT may, upon its own initiative, sell, permit, or lease such Land or Improved Property located outside 33 feet of the center line of the main track to any party Before a sale, WisDOT must first offer the Land or Improved Property to Commission and to other state and local government units under the provisions of Section 85.09, Wis Stats Commission shall promptly notify Operator in writing whether it intends to exercise any right to purchase Land and Improved Property offered by WisDOT If Commission does not elect to exercise such right, Operator may, within thirty (30) days following receipt of the foregoing notice, supply Commission with the purchase funds, and Commission shall purchase the Land and Improved Property to the extent that it may be accomplished under Section 85.09, Wis Stats, and convey same to Operator, provided that Commission shall not be required to purchase such Land and Improved Property on behalf of Operator if in its reasonable judgment Commission determines

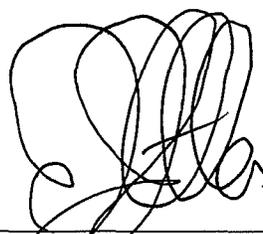
**CERTIFICATE OF SERVICE**

I hereby certify that on this 18<sup>th</sup> day of June, 2015, a copy of the foregoing **Reply of Eastside Community Rail, LLC to Amended Petition for Declaratory Order** was served by electronic mail and first class mail, postage prepaid, upon:

Eric M. Hocky, Esq.  
Clark Hill, PLC  
One Commerce Square  
2005 Market Street, Suite 1000  
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1001 Connecticut Avenue, N.W.  
Suite 800  
Washington, DC 20036

Isabel R. Safora, Esq.  
Deputy General Counsel  
Port of Seattle  
P.O. Box 1209  
Seattle, WA 98111



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Thomas J. Litwiler