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May 19, 2015

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VIA ELECTRONIC FILING

The Honorable Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20024

ENTERED
Office of Proceedings
May 19, 2015
Part of
Public Record

Re: STB Docket No. AB-33 (Sub-No. 156), *Union Pacific Railroad Company--
Abandonment--in Harris, Fort Bend, Austin, Wharton, and Colorado Counties, Tx*

STB Docket No. AB-33 (Sub-No. 253X), *Union Pacific Railroad Company--
Abandonment Exemption--in Colorado and Wharton Counties, Tx*

Dear Ms. Brown:

Enclosed please find a combined response from Metropolitan Transit Authority of Harris County, Houston, Texas and Fort Bend County Toll Road Authority to the Board's Decision Dated September 19, 2014 in the above-referenced proceedings.

Very truly yours,

Thompson Coburn LLP

By 
Thomas Sean McGowan

Enclosure

cc: Union Pacific Railroad Company
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**BEFORE THE
SURFACE TRANSPORTATION BOARD
Washington, D.C.**

UNION PACIFIC RAILROAD COMPANY--)	
ABANDONMENT--IN HARRIS, FORT BEND,)	AB-33 (Sub-No. 156)
AUSTIN, WHARTON, AND COLORADO)	
COUNTIES, TX)	

UNION PACIFIC RAILROAD COMPANY--)	
ABANDONMENT EXEMPTION--IN)	AB-33 (Sub-No. 253X)
COLORADO AND WHARTON COUNTIES,)	
TX)	

**RESPONSE OF METROPOLITAN TRANSIT AUTHORITY OF HARRIS COUNTY,
HOUSTON, TEXAS AND FORT BEND COUNTY TOLL ROAD AUTHORITY TO THE
BOARD'S DECISION DATED SEPTEMBER 19, 2014**

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Attorneys for Metropolitan Transit
Authority of Harris County,
Houston, Texas and Fort Bend
County Toll Road Authority

Dated: May 19, 2015

**BEFORE THE
SURFACE TRANSPORTATION BOARD
Washington, D.C.**

UNION PACIFIC RAILROAD COMPANY--)	
ABANDONMENT--IN HARRIS, FORT BEND,)	
AUSTIN, WHARTON, AND COLORADO)	AB-33 (Sub-No. 156)
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**RESPONSE OF METROPOLITAN TRANSIT AUTHORITY OF HARRIS COUNTY,
HOUSTON, TEXAS AND FORT BEND COUNTY TOLL ROAD AUTHORITY TO THE
BOARD'S DECISION DATED SEPTEMBER 19, 2014**

The Metropolitan Transit Authority of Harris County, Texas (METRO)¹ and the Fort Bend County Toll Road Authority (FBCTRA)² hereby respectfully submit the following Response as directed by the Surface Transportation Board (Board) in its September 19, 2014 decision in the above-referenced matters.

Background

On July 29, 2014, METRO and FBCTRA filed their Joint Petition to Vacate and Reissue the Certificate of Interim Trail Use (CITU) originally issued in *Union Pacific Railroad Company—Abandonment—in Harris, Fort Bend, Austin, Wharton, and Colorado Counties, Tex.*, AB-33 (Sub-No. 156), and the Notice of Interim Trail Use (NITU) originally issued in *Union Pacific Railroad Company—Abandonment Exemption—in Colorado and Wharton Counties,*

¹ METRO, a non-carrier, is a metropolitan transit authority created under the laws of Texas as a public body corporate and politic.

² FBCTRA, a non-carrier, is a Texas local government corporation created by and acting on behalf of Fort Bend County, Texas.

Tex., AB-33 (Sub-No. 253X) (together, the Abandonment Dockets). The Joint Petition concerns a portion of a 57.72-mile line of railroad known as the Bellaire Subdivision, extending from milepost 3.48 near Bellaire Junction in Houston, Harris County, Texas, to milepost 61.2, near Eagle Lake, Colorado County, Texas in Harris, Fort Bend, Austin, Wharton, and Colorado Counties (the Westpark Line).³ METRO and FBCTRA requested that the Board (1) reopen the Abandonment Dockets, (2) vacate the CITU issued on November 8, 2000, as modified on December 1, 2006, in AB-33 (Sub-No. 156), with respect to a portion of the subject right-of-way (milepost 20.42⁴ to milepost 52.9), under which METRO has been operating as trail user, (3) vacate the NITU issued on March 24, 2008 in AB-33 (Sub-No. 253X) (milepost 52.9 to milepost 61.2), under which METRO also has been operating as trail user, (4) reissue a CITU in AB-33 (Sub-No. 156) to FBCTRA with respect to a portion of the subject right-of-way (milepost 20.42 to milepost 52.9), and (5) reissue a NITU in AB-33 (Sub-No. 253X) to FBCTRA with respect to milepost 52.9 to milepost 61.2.⁵

³ The entire line of railroad—from milepost 3.48 at Dunlavy Street in Houston along Westpark Boulevard to milepost 61.2 at Eagle Lake—has been referred to as the “Westport Line,” the “Bellaire Branch,” and the “Bellaire Subdivision” in prior filings for AB-33 (Sub-No. 156). In AB-33 (Sub-No. 253X), a portion of the line of railroad at issue was referred to as the Chesterville Industrial Lead, extending from milepost 52.9 near Chesterville, to milepost 61.2 near Eagle Lake, in Colorado and Wharton Counties, Texas.

⁴ This beginning point, milepost 20.42, is a more accurate description than was previously provided as “milepost 20, approximately 2,020 feet east of the Harris-Fort Bend County Line” and, in fact, is located at the Harris-Fort Bend County Line. See Joint Petition to Vacate and Reissue CITU and NITU, dated July 29, 2014 at p. 4 filed in STB Dockets AB-33 (Sub-No. 156) and AB-33 (Sub-No. 253X); and Clarification, dated November 10, 2014 at p. 4 filed in STB Dockets AB-33 (Sub-No. 156), AB-33 (Sub-No. 253X), FD 35846, and FD 35847.

⁵ METRO will remain the interim trail user with respect to milepost 3.48 to milepost 20.42 (the Harris County ROW).

In their filings,⁶ METRO and FBCTRA notified the Board that upon transfer of the Subject ROW (defined as milepost 20.42 to milepost 61.2) from METRO to FBCTRA, FBCTRA intends to construct an extension of the Westpark Tollway, a limited-access toll road serving western Houston and Harris County and northeastern Fort Bend County, in a westerly direction to approximately milepost 34. Pursuant to an interlocal agreement with METRO to preserve a corridor for rail transit within the Subject ROW (Interlocal Agreement), FBCTRA intends to set aside a 26-foot-wide “rail transportation corridor” within the existing 100-foot right-of-way that will remain available for future rail service, without the need to remove or re-route any substantial portion of the planned Westpark Tollway expansion (the Rail Preservation Corridor). The Rail Preservation Corridor is simply a contractual requirement between METRO and FBCTRA so that commuter and/or transit rail can be operated sometime in the future within the 26 feet of the Rail Preservation Corridor. Under the Interlocal Agreement, FBCTRA is obligated to keep the toll roadway facilities clear of this Rail Preservation Corridor so that it is feasible to build commuter rail in the future should that be necessary. In addition to the Subject ROW that FBCTRA plans to purchase from METRO, FBCTRA has acquired and will acquire, additional real property along portions of the Subject ROW, including the segment where the planned tollway extension will be located, to comprise a 300-foot-wide transportation corridor.

In its September 19, 2014 decision (Decision I), the Board stated that based on the pleadings, it appears that only a 26-foot-wide right-of-way was retained for interim trail use and rail banking. The Board directed METRO and FBCTRA to submit “a more detailed discussion

⁶ **Note:** Concurrent with this Response, FBCTRA is filing a separate pleading withdrawing its Verified Notice of Exemption to Acquire METRO’s Right to Restore Service Over Railbanked Right of Way in Harris, Fort Bend, Austin, Wharton and Colorado Counties, Texas, filed in STB Finance Docket No. 35847 on July 29, 2014. FBCTRA has determined that acquisition of such rights is unnecessary at this time.

as to why the remaining 26-foot right-of-way would be adequate to accommodate future rail service.”⁷

On January 26, 2015, the Board issued a second decision (Decision II) that directed METRO and FBCTRA to submit “a more detailed explanation as to what reactivation rights METRO holds in light of UP’s retained rights.”⁸ Decision II also invited METRO, FBCTRA, and Union Pacific Railroad Company (UP) to “submit comments on UP’s apparent retained right to veto reactivation.”

METRO and FBCTRA are addressing Decision II in a separate response. This Response addresses only Decision I.

Response

A. METRO And FBCTRA Do Not Seek to Narrow the Subject ROW to 26 Feet.

In Decision I, the Board indicated that based on the pleadings, it appears that only a 26-foot-wide right-of-way was retained for interim trail use and rail banking. The Board directed the parties to demonstrate that the “*remaining width* of the rail-banked right-of-way would be sufficient to permit the reestablishment of rail service” and cited its decision in *Missouri Pacific Railroad—Abandonment Exemption—In Red River and Bowie Counties, Texas*, Docket No. AB-3 (Sub-No. 137X) (STB served May 16, 2007), a case where the interim trail user sought to

⁷ The Board directed the parties to respond to Decision I by October 21, 2014. On October 17, 2014, METRO and FBCTRA requested an extension of time to respond to Decision I. The Board granted that request on October 20, 2014, extending the deadline to reply until February 18, 2015. On February 17, 2015, METRO and FBCTRA requested a second extension of time. The Board granted that request on February 18, 2015, extending the deadline to reply to May 19, 2015.

⁸ The Board directed the parties to respond to Decision II by February 18, 2015. On February 17, 2015, METRO and FBCTRA requested an extension of time to respond to Decision II. The Board granted that request on February 18, 2015, extending the deadline to reply to May 19, 2015.

remove 50 feet of width of the involved right-of-way from the National Trails System.⁹ It appears, however, that the Board misconstrued FBCTRA's intentions with respect to the Subject ROW. By their Joint Petition, METRO and FBCTRA do not seek to *narrow* the width of the Subject ROW nor do they seek to *remove* any portion of the Subject ROW from the National Trails System. Rather, FBCTRA intends for the entire 100-foot width of the Subject ROW to remain a rail-banked right-of-way in the National Trails System.

As the Board is aware, FBCTRA's development plans include using a portion of the Subject ROW to expand the Westpark Tollway in a westerly direction to approximately milepost 34. FBCTRA's plans for extension of the Westpark Tollway by building a toll road over a portion of the Subject ROW are consistent with an interim trail user's statutory National Trails System Act (Trails Act) obligation to preserve the rail-banked right-of-way for future restoration of rail service.¹⁰ FBCTRA's plans do not include paving the *entire* 100-foot width of the right-of-way. In fact, FBCTRA's plans for the expanded tollway call for paving, on average, less than 60 feet of the Subject ROW width within that 13-mile stretch. As noted above, within that 13-mile stretch, FBCTRA has acquired and will acquire additional real property adjacent to such portion of the Subject ROW to comprise a 300-foot-wide transportation corridor for multiple modes of transportation, which could include both freight and passenger rail.

⁹ STB Decision in Docket Nos. AB 33 (Sub-No. 156) and (Sub-No. 253X), dated September 19, 2014 at p. 2.

¹⁰ In *CSX Transportation, Inc.—Abandonment Exemption—In Monroe and Owen Counties, IN*, AB-55 (Sub-No. 514X) (STB served Sept. 30, 1997) a trail user intended to construct a public road over right-of-way, and the Board rejected a challenge that argued building a road is inconsistent with Trails Act. The Board noted, "Nothing in the statute or regulations precludes a right-of-way from being used for mixed highway (or light rail) and recreational use." *Id.* (citing *The Baltimore and O.R. Co., Metropolitan So. R. Co. and Washington and W. Md. Ry. Co.—Aband. and Discont. of Serv.—in Montgomery Cty, MD, and the Dist. of Col.*, Docket No. AB-19 (Sub-No. 112) (ICC served Mar. 2, 1990)).

The Board's directive to the parties suggests that the Joint Petition was not clear on the exact purpose of FBCTRA's plans for the Rail Preservation Corridor. METRO and FBCTRA executed an Interlocal Agreement to provide for the development of transportation projects permitted by, and the cooperative preservation of the Subject ROW (milepost 20.42 through milepost 61.2) as well as the Harris County ROW (milepost 3.48 through milepost 20.42) under, the Trails Act and its implementing regulations, while providing for the transfer of ownership and control of the Subject ROW and assignment of the trail use agreement for the Subject ROW to FBCTRA. In the Interlocal Agreement, METRO and FBCTRA pledged to maintain the Subject ROW for future rail transit use. In order to meet that contractual obligation, FBCTRA intends to preserve 26 feet of the existing 100 feet of the Subject ROW, the Rail Preservation Corridor, by keeping it clear so that it is feasible to install and operate commuter rail in the future. As the replacement interim trail user, it is not FBCTRA's intent that FBCTRA fulfill its Trails Act obligation by narrowing the width of the Subject ROW to only the 26 feet of the Rail Preservation Corridor. Rather, by specifically carving out the Rail Preservation Corridor in the Subject ROW, FBCTRA is fulfilling its Interlocal Agreement contractual obligation to METRO to preserve a 26-foot-wide corridor for commuter and transit passenger rail in any development of the Subject ROW.

Furthermore, in the Joint Petition, FBCTRA specifically acknowledged that its use of all 100 feet of the Subject ROW is subject to possible future reconstruction and reactivation of rail service.¹¹ FBCTRA's Interlocal Agreement contractual obligations to METRO do not alter this statutory obligation that FBCTRA would assume as interim trail user. With FBCTRA as the

¹¹ See Joint Petition, Exhibit D, Statement of Willingness to Assume Financial Responsibility.

replacement interim trail user, the *entire* 100-foot-width of the Subject ROW will remain available for future restoration of rail service, as is required under the Trails Act.

B. Even Though The Full 100-Foot Right-Of-Way Is Available For Reactivation Under The Trails Act, The Rail Preservation Corridor Is Sufficient And Adequate For Restoration Of Rail Service Because It Provides More Width For Reactivation Than Was Previously Utilized By Freight Operators Along The Subject ROW.

As the Board is aware, METRO purchased the Westpark Line and improvements from Southern Pacific Transportation Company (SP) in December 1992.¹² Following METRO's purchase of the Westpark Line, SP (and then UP¹³) continued conducting freight operations and operating as a common carrier over the line pursuant to an operating easement (the Railroad Easement) reserved to it in the special warranty deeds (the Vesting Deeds) used to accomplish the purchase transaction. *See generally Metropolitan Transit Authority of Harris County, TX-Petition for Declaratory Order*, 9 I.C.C.2d 559, F.D. 32260 (Apr. 15, 1993) (finding that METRO-SP transaction was not subject to ICC jurisdiction). The Vesting Deeds described the Railroad Easement as follows:

the portion of the Property located within an area twelve and one-half feet (12.5') on either side of the center line of the existing railroad tracks attached to the Land, together with

¹² METRO submitted a petition for a declaratory order that the sale transaction, which included the reservation of the 25-foot-wide easement for freight rail service, was outside of the Interstate Commerce Commission's (ICC's) jurisdiction. The ICC's declaratory order agreed:

A review of the purchase and sale agreement between SP and petitioner indicates that the permanent and unconditional easements retained by SP for the purpose of conducting rail freight operations over the properties transferred (or to be transferred) reflect property rights sufficient to enable SP to fulfill its obligations as common carrier without interference from METRO.

Metropolitan Transit Authority of Harris County, TX-Petition for Declaratory Order, 9 I.C.C.2d 559, F.D. 32260 (Apr. 15, 1993).

¹³ UP succeeded to SP's rights under the Railroad Easement.

access thereto across all other Property as reasonably necessary for Grantor's use and enjoyment of this Railroad Easement; ... (emphasis added)

Thus, following the 1992 conveyance, SP and then UP continued providing freight rail service within the Railroad Easement—a **25-foot-wide portion of the Subject ROW**. That rail easement remains in effect, is currently owned by METRO, and will be transferred to FBCTRA within the Subject ROW.

Under 16 U.S.C. § 1247(d), the purpose of the Trails Act is to preserve established railroad rights-of-way for future reactivation of rail service. SP and UP successfully operated freight rail service over the 25-foot-wide Railroad Easement for nearly nine years. METRO and FBCTRA know of no reason that a restoring carrier or other party would require additional rail-service width beyond the 25 feet previously utilized by SP and UP to run freight rail along the Subject ROW.¹⁴ FBCTRA's 26-foot-wide Rail Preservation Corridor along the Subject ROW preserves the 25-foot Railroad Easement within which both SP and UP operated. In fact, FBCTRA's 26-foot-wide Rail Preservation Corridor provides *more* width than SP and UP previously utilized to operate freight rail service.¹⁵ Thus, SP's and UP's prior operations over the 25-foot-wide Railroad Easement indicates that a 26-foot-wide Rail Preservation Corridor is

¹⁴ Furthermore, the configuration of the 26-foot-wide Rail Preservation Corridor along the Subject ROW provides for the appropriate curvatures to allow for the future reactivation of rail service.

¹⁵ UP's prior use of the Subject ROW for freight rail service shows that a 26-foot-wide corridor is more than adequate to accommodate the restoration of rail service. In a Letter Agreement between METRO and UP, dated May 25, 2001, UP acknowledged that the Railroad Easement reserved in the Vesting Deeds is 25-feet wide.

sufficient and adequate to support active freight rail service, if and when such service is reactivated.¹⁶

C. FBCTRA's Plans for Expansion of the Westpark Tollway Provide for Sufficient Unpaved Width Along a 13-Mile Segment of the Subject ROW to Permit the Restoration of Rail Service in Accordance with the Trails Act.

FBCTRA's plans to expand the Westpark Tollway along a 13-mile segment of the Subject ROW are consistent with, and do not preclude, the Trails Act requirement to preserve established rights-of-way for reactivation/restoration of rail service. As discussed above, the entire 100-foot right-of-way is available for reactivation under the Trails Act. As shown in Exhibits 1 and 2 attached hereto, FBCTRA will acquire, in fee simple, sufficient property on either side of the Subject ROW to create a 300-foot-wide transportation corridor. These acquisitions will enable FBCTRA to design the tollway expansion such that only 141 feet of the 300-foot corridor, on average, will be paved. As mentioned above, the construction of roads is not inconsistent with the purpose of the Trails Act.¹⁷ In addition, the parties agree that the unpaved portions of the corridor could be used for parallel service roads and other structures and facilities necessary for the reactivation of rail service. Thus, should reactivation become necessary or desired along the improved segment of the Subject ROW, the obvious and preferred location to reactivate service (for any carrier or METRO) would be on the 26-foot-wide Rail Preservation Corridor. If that Rail Preservation Corridor is insufficient, the carrier could utilize a part of the larger 300-foot corridor or, if necessary, reactivate service on whatever portion of the 100-foot Subject ROW as is necessary to support the reactivated rail service. Even though the

¹⁶ METRO and FBCTRA are **not**, and do **not** by any of the filings herein intend to become, railroads with a common carrier obligation to provide freight service. Further, METRO and FBCTRA have **not** and do **not** intend to operate freight service over any portion of the Westpark Line.

¹⁷ See *supra* note 10.

full 100-foot width of the Subject ROW is subject to reactivation under the Trails Act, FBCTRA has designed the expansion such that the full corridor width (including additional width outside the original 100-foot width of the Subject ROW) is available for easier and more cost-efficient reactivation of rail use.

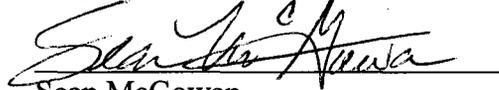
Conclusion

The parties do not seek to narrow the Subject ROW. The proposed actions and preservation of a 26-foot-wide Rail Preservation Corridor within the Subject ROW are consistent with the Trails Act. The parties' decision to preserve a 26-foot-wide portion of the Subject ROW for future rail transit does not preclude the future reinstatement of rail service on any portion of the 100-foot-wide Subject ROW. Furthermore, as described above, the 26-foot-wide Rail Preservation Corridor is sufficient and adequate for restoration of rail service. Thus, FBCTRA's request to be substituted as interim trail user and its proposed plans for the Subject ROW are consistent with the Trails Act.

Based on the Joint Petition and the information contained herein, METRO and FBCTRA respectfully request that the Board: (1) reopen proceedings in the Abandonment Dockets, (2) vacate the CITU issued on November 8, 2000, as modified on December 1, 2006, in AB-33 (Sub-No. 156), with respect to a portion of the subject right-of-way (milepost 20.42 to milepost 52.9), under which METRO has been operating as trail user, (3) vacate the NITU issued on March 24, 2008 in AB-33 (Sub-No. 253X) (milepost 52.9 to milepost 61.2), under which METRO has been operating as trail user, (4) reissue a CITU in AB-33 (Sub-No. 156) to FBCTRA with respect to a portion of the subject right-of-way (milepost 20.42 to milepost 52.9), and (5) reissue a NITU in AB-33 (Sub-No. 253X) to FBCTRA with respect to milepost 52.9 to milepost 61.2.

Should further information be required, please contact the undersigned.

Respectfully submitted/



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Authority of Harris County,
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County Toll Road Authority

Dated: May 19, 2015

Certificate of Service

I hereby certify that on May 19, 2015, I served a copy of the foregoing *Response* on the following:

By first class mail, postage pre-paid

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