

FOSTER PEPPER PLLC

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

July 25, 2016

VIA E-FILING

241159

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

ENTERED
Office of Proceedings
July 25, 2016
Part of
Public Record

Re: *Tri-City Railroad Co. v. The City of Kennewick and The City of Richland*
STB No. FD 35915

Dear Ms. Brown:

Enclosed for filing in the above-referenced matter on behalf of the City of Kennewick and the City of Richland (the "Cities") are:

- Notice of Supplemental Authority; and
- Verified Statement and Affidavit of P. Stephen DiJulio Regarding Notice of Supplemental Authority.

Very truly yours,

FOSTER PEPPER PLLC



P. Stephen DiJulio

PSD:mlb

cc: Counsel for Parties of Record

Docket No. FD 35915

BEFORE THE
SURFACE TRANSPORTATION BOARD

TRI-CITY RAILROAD COMPANY, LLC, a Washington
limited liability company,

Petitioner,

v.

THE CITY OF KENNEWICK, of the State of Washington, located in
Benton County, Washington; THE CITY OF RICHLAND, of the State of
Washington, located in Benton County, Washington,

Respondents.

NOTICE OF SUPPLEMENTAL AUTHORITY

Lisa Beaton,
Kennewick City Attorney,
WSBA # 25305
Heather Kintzley
Richland City Attorney,
WSBA # 35520

FOSTER PEPPER PLLC
P. Stephen DiJulio, WSBA No. 7139
Christopher G. Emch, WSBA No. 26457
Stephanie G. Weir, WSBA No. 41722
1111 Third Avenue, Suite 3000
Seattle, Washington 98101-3299
Telephone: (206) 447-4400
Email: steve.dijulio@foster.com
Email: chris.emch@foster.com
Email: Stephanie.weir@foster.com

Attorneys for Respondents City of Kennewick and City of Richland

The Cities respectfully submit for the STB's consideration and review the Order Granting Motion for Reconsideration and Amending Opinion (filed July 19, 2016), and the Order Denying Motion for Reconsideration (filed July 21, 2016), *Tri-City Railroad Company, LLC v. State of Washington, Utilities and Transportation Commission*, State of Washington Court of Appeals, Division III, No. 33031-1-III, which are attached to the Verified Statement and Affidavit of P. Stephen DiJulio Regarding Notice of Supplemental Authority, filed herewith.

These two Orders relate to the Benton County Superior Court and Washington State Court of Appeals proceedings referenced by the parties in their prior submissions to the STB in this action, affirmed the Washington Utilities and Transportation Commission's final order under review in those proceedings. *See, e.g.*, TCRY's Petition For Declaratory Order, filed with the STB on March 19, 2015 at p. 21 ("See January 2, 2015 Notice of Appeal to Division III of the Court of Appeals, Benton County Sup. Ct. No. 14-2-01894-8"); Cities' Reply Brief, filed with the STB on June 15, 2015, at pp. 3-4 (citing "the record from the Court of Appeals, Division III"), and at pp. 18-19 ("TCRY has appealed the Benton County Superior Court decision to the Washington State Court of Appeals, Division III. Thus, the STB may take notice of and rely upon the record from these administrative and judicial proceedings"). They also relate to

the June 16, 2016 Court of Appeals decision that was previously submitted to the STB in this action as supplemental authority on June 17, 2016.

RESPECTFULLY SUBMITTED this 25th day of July, 2016.

Lisa Beaton,
Kennewick City Attorney, WSBA # 25305
Heather Kintzley,
Richland City Attorney, WSBA # 35520

FOSTER PEPPER PLLC

By: 

P. Stephen DiJulio, WSBA No. 7139
Christopher G. Emch, WSBA No. 26457
Stephanie G. Weir, WSBA No. 41722
1111 Third Avenue, Suite 3000
Seattle, Washington 98101-3299
Telephone: (206) 447-4400
Facsimile: (206) 447-9700
Email: steve.dijulio@foster.com
Email: chris.emch@foster.com
Email: Stephanie.weir@foster.com

*Attorneys for Respondents City of Kennewick
and City of Richland*

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of July, 2016, I caused to be served a true and correct copy of the foregoing document, by the method indicated below and addressed to the following:

William J. Schroeder Gregory C. Hesler William C. Schroeder Anne K. 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	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> E-Mail
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Christopher G. Emch

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SURFACE TRANSPORTATION BOARD

TRI-CITY RAILROAD COMPANY, LLC, a
Washington limited liability Company,

Petitioners,

v.

THE CITY OF KENNEWICK, a Washington
municipal corporation; THE CITY OF
RICHLAND, a Washington municipal
corporation,

Respondents.

No. FD 35915-0

VERIFIED STATEMENT AND
AFFIDAVIT OF P. STEPHEN DIJULIO
REGARDING NOTICE OF
SUPPLEMENTAL AUTHORITY

COMES NOW P. Stephen DiJulio who declares under penalty of perjury that the following is true and correct:

1. I am one of the attorneys for the Respondents, the City of Kennewick and the City of Richland, in the above-captioned action. I am competent to testify to the matter contained herein based on my personal knowledge.
2. Attached hereto as **Exhibit A** is a true and correct copy of the Order Granting Motion for Reconsideration and Amending Opinion, *Tri-Cities Railroad Company, LLC v. State of Washington, Utilities and Transportation Commission*, State of Washington Court of Appeals, Division III, No. 33031-1-III (filed July 19, 2016). I personally participated in the Court of Appeals proceedings on behalf of the Cities, and received the attached Opinion and accompanying transmittal letter from the Court on July 19, 2016.

VERIFIED STATEMENT AND AFFIDAVIT OF
P. STEPHEN DIJULIO REGARDING NOTICE OF
SUPPLEMENTAL AUTHORITY- 1

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3000
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

1 3. Attached hereto as **Exhibit B** is a true and correct copy of the Order Denying Motion for
2 Reconsideration, *Tri-Cities Railroad Company, LLC v. State of Washington, Utilities and*
3 *Transportation Commission*, State of Washington Court of Appeals, Division III, No.
4 33031-1-III (filed July 21, 2016). I personally participated in the Court of Appeals
5 proceedings on behalf of the Cities, and received the attached Opinion and accompanying
6 transmittal letter from the Court on July 21, 2016.

7

8 **SIGNED AND SWORN STATEMENT**

9 Pursuant to 49 CFR 1112.9:

10 State of Washington)
11) ss.
12 County of King)

13 P. Stephen DiJulio, being duly sworn, deposes and says that he has read the foregoing
14 statement, knows the facts asserted there are true and that the same are true as stated.

15 Signed 
16 P. Stephen DiJulio

17

18 Signed and sworn to before me this 25th day of July, 2016.

19 
20 Marcella L. Brandt
21 Notary Public in and for the State of Washington.
22 My Commission expires: 03/01/2020.

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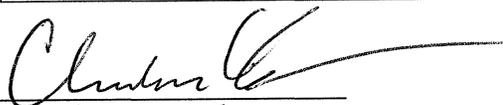
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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of July, 2016, I caused to be served a true and correct copy of the foregoing document, by the method indicated below and addressed to the following:

William J. Schroeder	<input checked="" type="checkbox"/> U.S. Mail
Gregory C. Hesler	<input type="checkbox"/> Hand Delivery
William C. Schroeder	<input type="checkbox"/> Overnight Mail
Anne K. Schroeder	<input checked="" type="checkbox"/> E-Mail
Paine Hamblen LLP	
717 West Sprague Avenue, Suite 1200	
Spokane, WA 99201	
william.schroeder@painehamblen.com	
greg.hesler@painehamblen.com	
will.schroeder@painehamblen.com	



Christopher G. Emch

EXHIBIT A

FILED
JULY 19, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

TRI-CITIES RAILROAD COMPANY, LLC,)	No. 33031-1-III
a Washington corporation,)	
)	
Appellant,)	
)	ORDER GRANTING MOTION
v.)	FOR RECONSIDERATION
)	AND AMENDING OPINION
STATE OF WASHINGTON, UTILITIES)	
AND TRANSPORTATION)	
COMMISSION,)	
)	
Respondent.)	

THE COURT has considered Respondent's motion for reconsideration and is of the opinion the motion should be granted. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of June 16, 2016, is hereby granted.

IT IS FURTHER ORDERED the opinion filed June 16, 2016, is amended as follows:

The first sentence of the first full paragraph on page 4 that reads:

The at-grade crossing would be constructed across two active tracks that Tri-City leases from the Port of Benton and that it uses, along with a short, parallel spur, for switching and storing rail cars.

shall be amended to read:

The at-grade crossing would be constructed across two active tracks that Tri-City leases from the Port of Benton and that it uses, one of which is a short, parallel spur, for switching and storing rail cars.

PANEL: Judges Siddoway, Korsmo, Lawrence-Berrey

FOR THE COURT:



GEORGE B. FEARING, Chief Judge

EXHIBIT B

FILED
JULY 21, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

TRI-CITIES RAILROAD COMPANY, LLC)
a Washington corporation,)

Appellant,)

v.)

STATE OF WASHINGTON, UTILITIES)
AND TRANSPORTATION)
COMMISSION,)

Respondent.)

No. 33031-1-III

**ORDER DENYING MOTION
FOR RECONSIDERATION**

THE COURT has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of June 16, 2016, is hereby denied.

PANEL: Judges Korsmo, Siddoway, Lawrence-Berrey

FOR THE COURT:



GEORGE B. FEARING, Chief Judge