

31878

February 21, 2012

via electronic filing

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423

Office of Proceedings

FEB 21 2012

Part of
Public Record

RE: Finance Docket No. 35583, Eastern Alabama Railway LLC – Petition for Declaratory Order

Dear Ms. Brown:

On February 15, 2012, the Paducah & Louisville Railway, Inc. (“P&L”) filed “Comments” in the above-captioned proceeding. In the Comments, P&L asserts that it is having ongoing problems with the Louisville Water Company (“LWC”). P&L seemingly wants the Surface Transportation Board (“STB”) to provide some sort of statement to aid resolution of these claimed problems, without giving the LWC an opportunity to respond or rebut its allegations. The STB can and should disregard the Comments as irrelevant to the preemption question that was referred to the STB by the U.S. District Court for the Northern District of Alabama (“Court”).

This case was referred to the STB by the Court to resolve a dispute between the Utilities Board of the City of Sylacauga (“Utilities Board”) and Eastern Alabama Railway LLC (“EARY”). P&L strays far adrift when it calls this a “general” declaratory order proceeding. The final round of evidence is being filed today, and the STB previously found that expedited treatment of this referral question is warranted. The concerns raised by P&L are irrelevant to this case, and the STB can and should expeditiously move toward a final decision.

Out of caution, the Utilities Board responds briefly to the general tenor of the Comments, as well as a few assertions made therein. The Utilities Board is compelled to address P&L’s misleading statements and subtle association of the Utilities Board with alleged bad acts of LWC and other entities.

P&L uses the word “safety” ten times in its 7-page document, apparently in the hope that the STB will be swayed by the allegation that public utilities regularly engage in dangerous and “careless” activities. This stratagem is regrettable. Public utilities like the Utilities Board provide vital public services such as fresh water, electricity, and waste water treatment to various entities from private homes to hospitals. It is precisely because these services are so important to the public that most utilities have been given the right to use eminent domain. In other words,

February 21, 2012

Page 2

the legal system recognizes that the public good is at stake when utilities operate. The implicit suggestion in the Comments that railroads have an unbridled monopoly on the public health and welfare is patently not true. Eminent domain exists specifically so that vital public services provided by the Utilities Board and other utilities are not held hostage to unreasonable demands, financial or otherwise, of landowners when the public good is at stake.

The entire premise of the Comments rests upon accepting EARY's allegations at face value. Based on this acceptance, P&L claims that its problems with LWC are "similar" (Comments at 1 and 3) to the dispute between the Utilities Board and EARY, but the truth is that the Utilities Board has refuted all of EARY's allegations. Indeed, the most important allegation – that the Utilities Board's construction and operation of underground pipelines unreasonably interferes with EARY rail service – has been shown to be false via sworn testimony from EARY's own employees. Furthermore, as P&L itself noted, LWC has refused to use eminent domain to obtain a pipeline easement.¹ Comments at 3. In contrast, the Utilities Board has followed the proper legal procedure in Alabama, filed a condemnation action, and has followed the application process of the incumbent railroad, EARY.

P&L's concern about interference with rail operations from alleged actions of LWC (and other unspecified utilities) is also misplaced in this proceeding. Under Alabama Code § 18-1A-72(b), the Utilities Board will have to prove, in the condemnation case, that its pipelines will not materially interfere with EARY operations. Thus, P&L's concerns about alleged interference elsewhere are not germane.

P&L asserts that EARY is arguing for "as applied" preemption in this case (Comments at 3), but EARY's filings tell a different story. Although EARY has not been entirely clear regarding its legal position, EARY appears to believe that the condemnation action is categorically preempted. In Exhibit 3 of the EARY Petition for Declaratory Order, EARY stated that "it is clear that the Utilities Board has no authority to condemn the property at issue." See EARY Notice of Removal at 4 (attached at Ex. 3 to Pet. for Decl. Order). The absolute nature of this statement suggests that EARY believes the Utilities Board's condemnation is categorically preempted. P&L's attempt to re-cast and reformulate EARY's legal position is improper and should be rejected.

In P&L's view, the past was a golden age where simple prior approvals of railroad crossings were "almost universally obtained" for a "small license fee" and contentiousness was nowhere to be found. Comments at 4. Due to the supposed harsher realities of today, P&L wants the STB to recognize that its decision in this case will have "ramifications" beyond this proceeding. Comments at 4. The intent of this statement is misguided.

¹ For the sake of this letter, the Utilities Board is assuming that P&L has accurately stated the facts surrounding its problems with LWC.

February 21, 2012

Page 3

The Utilities Board agrees that, in an ideal world, a railroad and a public utility would come to a reasonable agreement for all rail crossings, thereby making eminent domain unnecessary. However, when the parties cannot agree, issues about rail interference can and properly should be addressed in the appropriate condemnation proceeding. Mandating technical specifications for pipelines, as P&L seems to want the STB to do (Comments at 6), is simply not within STB jurisdiction and would overwhelm the STB's limited staff.

P&L wishes for some "middle ground" in the crossing arena (Comments at 6), but such a middle ground already exists – the STB and the courts have repeatedly found that routine utility crossings do not unreasonably interfere with rail service. See Utilities Board Reply to Petition at 9. Given this established precedent, a railroad must show extremely unusual circumstances to claim that unreasonable interference exists with these routine crossings. Most importantly, issues about interference with rail operations can be addressed in the respective condemnation proceeding, just as they are in Alabama, where the Utilities Board must show that its crossing will not materially interfere with EARY rail operations. Ala. Code § 18-1A-72(b). A dispute about the appropriate compensation can obviously also be resolved in court. When the parties cannot agree, the ability to bring a condemnation complaint is crucial to the ongoing operations of utilities such as the Utilities Board in providing vital public services like fresh water, electricity, and sewage treatment. Without the ability to use eminent domain, the public good for all society would be at the mercy of landowners seeking unreasonable terms and conditions.

In sum, the Comments consist largely of complaints about alleged behavior by LWC and arguments about policy issues inherent in the use of eminent domain. The former are irrelevant to this declaratory order proceeding; to have these complaints addressed, P&L can always file a claim against LWC in whatever forum may be proper. The latter are similarly outside the bounds of this proceeding, and can and should more appropriately be addressed to the respective legislature(s) in the state(s) where P&L believes existing eminent domain law is insufficient. With the final round of evidence being filed today, the STB should promptly conclude this proceeding with a decision.

If you have any questions, please do not hesitate to contact the undersigned.

Sincerely,



Sandra L. Brown

David E. Benz

Counsel for the Utilities Board of the City of Sylacauga

February 21, 2012

Page 4

cc: Louis Gitomer, Counsel for EARY (via e-mail)
Scott Williams, Counsel for RailAmerica (via U.S. first-class mail)
William A. Mullins, Counsel for P&L (via e-mail)