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237738

February 12, 2015

Ms. Cynthia T. Brown  
Chief of the Section of Administration, Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, D.C. 20423-0001

ENTERED  
Office of Proceedings  
February 12, 2015  
Part of  
Public Record

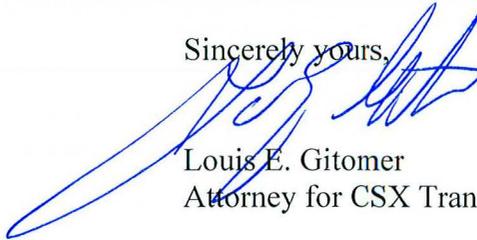
Re: **Docket No. FD 35853, SEA-3 – Emergency Petition for Declaratory  
Order**

Dear Ms. Brown:

CSX Transportation, Inc. is e-filing the attached Petition to Intervene and  
Comments in support of SEA-3, Inc.

Thank you for your assistance. If you have any questions, please contact me.

Sincerely yours,



Louis E. Gitomer  
Attorney for CSX Transportation, Inc.

Attachment

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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DOCKET NO. FD 35853

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SEA-3, INC. —EMERGENCY PETITION FOR DECLARATORY ORDER

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CSX TRANSPORTATION, INC. – PETITION TO INTERVENE AND COMMENTS IN  
SUPPORT

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Attorneys for: CSX TRANSPORTATION, INC.

Dated: February 12, 2015

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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DOCKET NO. FD 35853

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SEA-3, INC. —EMERGENCY PETITION FOR DECLARATORY ORDER

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CSX TRANSPORTATION, INC. – PETITION TO INTERVENE AND COMMENTS IN  
SUPPORT

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CSX Transportation, Inc. (“CSXT”) petitions the Surface Transportation Board (the “Board”) for leave to intervene under 49 CFR 1112.4 in support of the Emergency Petition for Declaratory Order (the “Petition”) filed by SEA-3, Inc. (“SEA-3”) on August 4, 2014.

**BACKGROUND**

SEA-3 owns and operates a propane storage and distribution terminal in the Town of Newington, NH (the “Facility”). The Facility is directly served by The Boston and Maine Corporation and Springfield Terminal Railway Company (collectively “Pan Am”). The Facility can unload six rail cars a day. Petition at 3.

SEA-3 applied to the Newington Planning Board (the “Planning Board”) for the construction of five additional rail berths and two rail tracks to serve the berths as well as unloading equipment on land owned by Pan Am adjacent to the Facility.<sup>1</sup> Petition at 41 and 47. The five berths will be constructed between the two new tracks. SEA-3 wants to increase the capacity of the Facility to be able to unload 16 rail cars per day, an increase of 10 rail cars that will be facilitated by the construction of the five additional berths and two tracks. Petition at 4.

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<sup>1</sup> Pan Am owns the land where the new tracks will be constructed (Petition at 41 and 47). Pan Am will lease the land to SEA-3 (Petition at 47).

By Findings issued on May 21, 2014, the Planning Board approved the proposal subject to certain conditions. Petition, Exhibit G, Page 41.

The City of Portsmouth, New Hampshire (“Portsmouth”) opposed the application because of the increased traffic that would move through Portsmouth over Pan Am that was to be delivered to the Facility. Petition pages 34, 37 and 39. Portsmouth appealed the Planning Board’s approval to both the New Hampshire Superior Court (the “Court”) and Newington’s Zoning Board of Appeals (the “ZBA”). Petition at 4. The ZBA upheld the Planning Board and Portsmouth has appealed that decision to the Court. The appeals to the Court have stayed the effectiveness of the Planning Board’s approval, delaying the expansion of the Facility until the conclusion of the appeal, at an unknown time in the future. SEA-3’s application was filed on November 5, 2013 and approved on May 21, 2014. The appeals filed by Portsmouth on June 16, 2014 have delayed construction and will continue to delay (or perhaps even prevent) construction until acted on by the Court, which will delay the project indefinitely.

SEA-3 filed the Petition with the Board to end the delay caused by Portsmouth’s appeals, which seek to both indirectly and directly interfere with railroad operations.

#### **CSXT’S PETITION FOR LEAVE TO INTERVENE**

Pursuant to 49 CFR 1112.4, CSXT seeks leave to intervene and comment briefly in support of SEA-3.

CSXT’s interest in this proceeding arises from its interchange of propane traffic with Pan Am for delivery to SEA-3 and the future traffic growth that is being delayed. As the Board has not issued a schedule, CSXT’s intervention will not disrupt the schedule. 49 CFR 1112.4(a)(1). CSXT will not broaden the issues raised in this proceeding, because CSXT will only address the preemption issue raised by the parties to the proceeding involving the expansion of SEA-3’s

Facility.

CSXT has demonstrated that its intervention complies with the Board's rules and respectfully requests the Board to grant intervention in this proceeding.

### **CSXT COMMENTS**

CSXT interchanges propane traffic with Pan Am. Pan Am delivers the propane to the existing tracks at the SEA-3 Facility in Newington, NH for (1) unloading and ultimately distribution by truck in New England for residential and commercial heating or (2) intermodal transloading by SEA-3 to ship for export. With the cost advantage of propane produced in the United States, CSXT expects significant growth in the handling of propane for local delivery and export through the Facility. CSXT seeks to handle the increased propane traffic efficiently and without interference over its lines and in interchange with Pan Am for Pan Am to deliver to the existing and new tracks at the SEA-3 Facility. However, SEA-3 does not have the capacity at its Newington Facility to handle an increase in propane traffic. Petition at 6. Portsmouth's appeals are delaying construction of the infrastructure necessary to increase the transportation of propane to the Facility.

In order to handle the growth in propane traffic, SEA-3 sought and obtained approval from the Newington Planning Board for the construction of five additional rail berths and two rail tracks that would increase the capacity of the Facility to 16 propane cars per day. Petition at 6. Dissatisfied with the approval of the construction, Portsmouth appealed to both the Court and ZBA. Petition at 4. Portsmouth's appeal to the ZBA was denied and Portsmouth then appealed that ruling to the Court. Portsmouth's actions have now caused over eight months of delay.

Portsmouth is seeking to prevent the construction of the additional five berths and two tracks at the SEA-3 Facility to prevent increased rail traffic through Portsmouth. Petition pages

34, 37, and 39. Portsmouth is in essence seeking to use the zoning process to improperly regulate the volume of traffic moving through Portsmouth. Regulation of the use of a railroad line through the zoning process is one of the most invasive forms of regulation and is clearly preempted under 49 U.S.C. §10501(b). Portsmouth’s position is similar to the position of the Town of Winchester, MA, which sought to ban certain freight rail transportation conducted by Pan Am through its zoning regulations.<sup>2</sup> There, the Board concluded that “Pan Am is a rail carrier conducting freight rail transportation over these tracks, and Tighe has rights provided by federal law to ask for and receive common carrier rail service.” *Id.* 4-5. The actions taken by Portsmouth are interfering with the movement of the propane cars over the tracks of CSXT and Pan Am. Delivery of those cars to the SEA-3 Facility by Pan Am is transportation by or under the auspices of a rail carrier. The nature of the propane is not changed, merely the mode of transportation from rail to truck or ship.

The Board has stated that:

the term “transportation” is broadly defined in the Interstate Commerce Act to encompass the facilities used for and services related to the movement of property by rail, expressly including receipt, delivery, transfer in transit, storage, and handling of property. 49 U.S.C. § 10102(9). Citing this language, the Board has explained that, generally, “intermodal transloading operations . . . are part of rail transportation that would come within the Board’s jurisdiction.” *New England Transrail—Construction, Acquis. & Operation Exemption—in Wilmington & Woburn, Mass. (NE Transrail)*, FD 34797, slip op. at 6 (STB served July 10, 2007). The Board has distinguished these types of loading and unloading operations from “manufacturing and commercial transactions that occur on the property owned by a railroad that are not part of or integral to the provision of rail service,” which are not embraced within the term “transportation.” *Id.* at 10. Activities constitute manufacturing or commercial transactions if they change the nature or physical composition of the commodity being transported.

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<sup>2</sup> *Boston and Maine Corporation and Springfield Terminal Railroad Company-Petition for Declaratory Order*, Docket No. FD 35749 (served October 31, 2013).

*Diana Del Grosso, Ray Smith, Joseph Hatch, Cheryl Hatch, Kathleen Kelley, Andrew Wilklund, and Richard Kosiba—Petition for Declaratory Order, Docket No. FD 35652 (served December 5, 2014), slip op. at 5-6.*

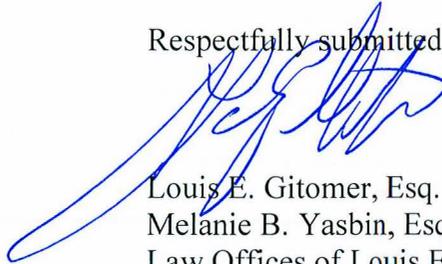
In this proceeding, SEA-3 has demonstrated that there is a demand for increased rail traffic requiring the construction of the five new rail berths and two new tracks at its Facility. The new tracks will be used by Pan Am for delivery. In addition, the new tracks will facilitate operations over existing railroads, in particular Pan Am and CSXT. Without the new tracks, CSXT and Pan Am will be required to either (1) forego the additional traffic, which will not foster sound economic conditions in transportation (49 U.S.C. §10101(5)) because of the lost revenues, or (2) to store and cause congestion on their lines because of the lack of capacity at the SEA-3 Facility, which will not promote an efficient rail transportation system (49 U.S.C. 10101(3)).

In addition, the intermodal transloading that SEA-3 will perform has been found to be “part of rail transportation that would come within the Board’s jurisdiction.” *Id.*

## CONCLUSION

CSXT respectfully requests the Board to grant its request for intervention, to conclude that prevention of the construction of the new rail tracks at the Facility is preempted by 49 U.S.C. 10501(b), and to grant SEA-3's Petition.

Respectfully submitted,



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Attorneys for: CSX TRANSPORTATION, INC.

Dated: February 12, 2015

CERTIFICATE OF SERVICE

I hereby certify that I have caused the Petition to Intervene and Comments in Support in  
Docket No. FD 35853, *SEA-3, Inc. —Emergency Petition for Declaratory Order*

to be served electronically on:

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February 12, 2015