

**BEFORE THE SURFACE TRANSPORTATION BOARD
DEPARTMENT OF TRANSPORTATION**

240951

STB Finance Docket No. 36041

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**OPPOSITION TO SWINOMISH INDIAN TRIBAL COMMUNITY
MOTION TO EXTEND TIME FOR REPLY**

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Dated: June 21, 2016

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**OPPOSITION TO SWINOMISH INDIAN
TRIBAL COMMUNITY MOTION TO EXTEND TIME FOR REPLY**

Tesoro Refining & Marketing Company, LLC (“Tesoro”), opposes the request of the Swinomish Indian Tribal Community (“SITC”) for a 45-day extension on the customary 20-day schedule for filing a responsive pleading with the Board. Tesoro respectfully requests that the Board deny SITC’s motion, for four reasons.

I. Board Action on Tesoro’s Petition Is Urgent and Should Not Be Delayed

As described in the Petition, Tesoro has requested a declaratory order from the STB confirming Tesoro’s rights as a shipper to receive rail service to its Anacortes refinery. The refinery depends on rail shipments of oil and other materials to and from its facility on the Anacortes Subdivision of BNSF. The urgency of the matter arises from a lawsuit that SITC initiated in U.S. District Court to curtail Tesoro’s rail service. Compl., *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, No. 2:15-cv-00543, ECF No. 1 (W.D. Wash. filed Apr. 7, 2015). In this lawsuit, SITC specifically seeks to shut down – by court injunction – the rail shipments on the Anacortes Subdivision upon which Tesoro relies. Compl. at ¶ 5, 7. SITC has already filed its motion for summary judgment, and BNSF must file its reply and motion for summary judgment in short order. Consequently, Tesoro depends upon the Board’s prompt consideration and affirmation of its right to rail service under the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10101 *et seq.* (“ICCTA”), before the question is adjudicated by the court without the benefit of the Board’s expertise and judgment.

II. No Response From the Tribe Is Required for the Board to Act on the Petition

Tesoro's petition to the Board does not initiate an adversarial proceeding against SITC or anyone else, and it does not seek to adjudicate any contract or relationship with SITC. Rather, the petition seeks the Board's affirmation of legal rights that are recognized by federal statute. While Tesoro does not object to the timely participation of a properly interested entity in the proceeding before the Board, SITC's participation before the Board is not necessary to adjudicate Tesoro's rights under ICCTA, since these rights do not arise from SITC or the lease agreement it concluded with BNSF. Indeed, the point of the petition that Tesoro has filed is to confirm its right to rail service independent of the contractual issues that may lie between SITC and BNSF.

Moreover, it is unclear why SITC is seeking an extension when it has no intention to participate as a party or an intervenor. In its request for extension of time, SITC affirms that it "is not a party to this proceeding and does not believe its intervention is necessary for the limited purpose of replying to Tesoro's Petition." Mot. of the Swinomish Indian Tribal Community to Extend Time for Reply at 1 n.1. Further, SITC expressly reserves and affirms "its sovereign immunity from unconsented suit." *Id.* This reservation calls into question whether SITC would seek to prevent Tesoro from addressing SITC in the STB proceeding if SITC did participate, even as SITC seeks to delay the proceeding so that it can be heard. *See id.*

Under these circumstances, given the urgency of the matter, the Board's action should not be delayed to accommodate participation by an entity that is not necessary for adjudicating the issue before the Board and that appears to seek to be heard by the Board without accepting the jurisdiction of the Board or consenting to be addressed by Tesoro in the Board proceeding.

III. SITC Has Had a Reasonable Opportunity to Prepare a Filing

SITC has had weeks to prepare a filing if it chooses to do so. SITC and its outside counsel both received notice of Tesoro's petition no later than the morning of June 4, 2016. SITC's counsel

has been advising SITC for more than a year on matters relating to rail service supplying Tesoro's refinery; indeed, in April 2015 its counsel signed and filed the original complaint initiating the very lawsuit that seeks to curtail Tesoro's rail service. Moreover, SITC has already filed its motion for summary judgment with the federal court specifically to adjudicate the question whether rail service may be curtailed. *See* SITC Mot. for Summary Judgment, No. 2:15-cv-00543, ECF No. 31 (W.D. Wash. filed Mar. 10, 2016).

In short, SITC and its counsel are fully conversant with the legal issue brought before the Board in Tesoro's petition and have already briefed – to the court – their argument that Tesoro's rights should be abridged. Under these circumstances, additional time to prepare is not merited.

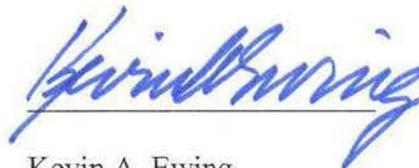
IV. Tesoro's Petition to the Board Should Not Become Hostage to Procedural Skirmishes in Court Between Parties Unrelated to Tesoro

In its request for an extension of time, SITC asserts that a particular court deadline – for BNSF's motion for summary judgment – would be renoted “for a later date” but does not specify the date. Mot. at 1-2. SITC further asserts that it would be discussing the date with BNSF's counsel today. *Id.* at 2. However the date may be negotiated by the litigants or directed by the court, the reality is that SITC has already filed its motion for summary judgment on the very issue that drives Tesoro to the Board. Whether BNSF's motion for summary judgment is renoted to be filed in a matter of days or a few weeks is inconsequential in comparison to the time Tesoro would need to address the commercial consequences of the court injunction for which SITC presses the court. Fundamental fairness forbids holding Tesoro's petition hostage to the tactical interests of litigants in a court proceeding to which Tesoro is not a party, concerning a lease agreement to which Tesoro is not a party. Action by the Board is appropriate now, before the court acts.

For these reasons, Tesoro opposes SITC's request for extension of time and respectfully requests that the Board deny the request and proceed with adjudicating the petition Tesoro filed.

Dated: June 21, 2016

Respectfully submitted,



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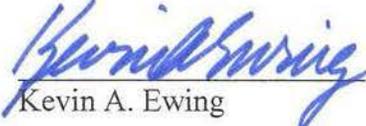
*Counsel for Tesoro Refining &
Marketing Company, LLC*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Opposition to Swinomish Indian Tribal Community Motion to Extend Time for Reply** was provided via e-filing to the Board, and to Equilon Enterprises LLC d/b/a/ Shell Oil Products US and to the Swinomish Indian Tribal Community via email. As a courtesy, a copy of the foregoing Opposition has also been provided to BNSF Railway Company via email.

Dated: June 21, 2016

Respectfully submitted,


Kevin A. Ewing