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ATTORNEYS AT LAW
THE FOUNDRY BUILDING ♦ 1055 THOMAS JEFFERSON STREET, NW ♦ SUITE 500 ♦ WASHINGTON, D.C. 20007
TELEPHONE: 202-342-5200 ♦ FACSIMILE: 202-342-5299

RICHARD BAR
BRENDAN COLLINS
STEVEN JOHN FELLMAN
EDWARD D. GREENBERG
MATTHEW T. JOURNY
KATHARINE FOSTER MEYER
DAVID K. MONROE
TROY A. ROLF
DAVID P. STREET
KEITH G. SWIRSKY
THOMAS W. WILCOX
CHRISTOPHER B. YOUNGER

OLIVER M. KRISCHIK
KRISTINE O. LITTLE

MINNESOTA OFFICE:
114 FIRST STREET SOUTH
BUFFALO, MN 55313
(T) 763-682-6620 (F) 763-682-6261

WRITER'S DIRECT E-MAIL ADDRESS
EGREENBERG@GKGLAW.COM

WRITER'S DIRECT DIAL NUMBER
202-342-52778

May 2, 2018

VIA E-FILING

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

Re: Docket No. FD 36178, Metropolitan Council - Petition for Declaratory Order

Dear Ms. Brown:

Attached for e-filing in the above-referenced proceeding is the Reply of Metropolitan Council to Initial Comments of Twin Cities & Western Railroad Company.

Please do not hesitate to contact me if you have any questions.

Sincerely,

A handwritten signature in blue ink, appearing to read "E. Greenberg", is written over a light blue circular stamp.

Edward D. Greenberg
Attorney for Metropolitan Council

cc: Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 36178

METROPOLITAN COUNCIL – PETITION FOR DECLARATORY ORDER

**REPLY OF METROPOLITAN COUNCIL TO INITIAL COMMENTS OF TWIN
CITIES & WESTERN RAILROAD COMPANY**

On April 4, 2018, the Metropolitan Council (“Council”) filed a Petition for Declaratory Order (“PDO”) in this Docket that requested the Board to confirm that it has no jurisdiction over the Council’s acquisition of certain rail assets under the line of precedent beginning with *Maine, DOT – Acq. Exemption, Me. Central R. Co.*, 8 I.C.C. 2d 835 (1991) (“*State of Maine*”). On April 24, 2018, the Twin Cities & Western Railroad Company (“TCWR”), which has overhead trackage rights to use these two rail segments as well as other rights set forth in two agreements,¹ filed what it calls “Initial Comments”² on the PDO. However, these “comments” make numerous inaccurate factual and legal allegations relating to the transactions described in the PDO, and also ask the Board to take certain actions concerning the processing of the PDO, including dismissing the PDO

¹ These trackage rights derive from: (1) an agreement dated July 26, 1991 (as amended) between TCWR and Soo Line Railroad Company d/b/a Canadian Pacific (“CP”) pertaining to operations on the Bass Lake Spur (the “BLS TRA”); and (2) an agreement between CP, TCWR and Hennepin County Regional Railroad Authority (“HCRRA”) dated August 10, 1998 (as amended) relating to operations on the Kenilworth Corridor (the “KC TRA”).

² It is unclear why TCWR believes it has some procedural right to file “Initial Comments” and presumably reserve the right to file further pleadings in this Docket. The Council submits TCWR has no such rights absent permission from the Board, which should not be granted in these circumstances.

entirely or holding this proceeding in abeyance, or, in the alternative, to “set a procedural schedule to allow for public comment, discovery, development of a complete record, and a deeper analysis of both proposed transactions.” Initial Comments at 20. The Council, which is the governmental entity responsible for planning, constructing and operating the Southwest Light Rail Transit project (“SWLRT Project”), respectfully replies to TCWR’s Initial Comments.³ The majority of the factual and legal allegations asserted by TCWR are irrelevant to the narrow jurisdictional issue presented by the PDO, and are wrong in any event. With the filing of this Reply by the Council, the Board has a complete record upon which to render a decision on the PDO.⁴ Moreover, there is no basis for the Board to hold this PDO proceeding in abeyance, no basis for dismissing the PDO, and no basis for establishing a procedural schedule and commencing the unnecessary proceedings TCWR proposes.

I. BACKGROUND

The Council and HCRRA have been studying and planning the SWLRT Project for at least a decade. When constructed, it will be the largest public works project constructed in the State of Minnesota and will carry tens of thousands of passengers a day. Like other municipal governments

³ Because this Reply responds to new allegations and requests for relief by TCWR in its Initial Comments, it is not a “reply to a reply” that requires Board authorization. However, to the extent the Board considers any aspects of this Reply to fall into that category, the Council asks the Board to accept this entire filing into the record of this proceeding because it will provide the Board with a more complete and accurate record upon which to make a decision. *See, City of Alexandria, Va.—Pet. for Declaratory Order*, FD 35157, slip op. at 2 (STB served Nov. 6, 2008) (allowing reply to reply “(i)n the interest of compiling a full record”); *followed by, Finch Paper, LLC – Pet. for Declaratory Order*, FD 35981, slip op. at 3, note 4, (STB served Jan. 11, 2017) and numerous other STB decisions.

⁴ HCRRA is also submitting a responsive filing to TCWR’s Petition to Reject or Stay the Exemption Notice, filed in Docket FD No. 36177 on April 24, 2018. The Council submits that no other filings or evidence beyond these replies are necessary in either docket to resolve the issues presented in both proceedings.

in other locales, the Council is building the SWRLT Project adjacent to active freight rail tracks. While the safety of its light rail passengers is paramount, the Council understands the extra challenges and responsibilities that are posed by the existence of freight rail. It has accordingly developed plans and specifications that protect the interests of both freight rail and light rail and that comply with state and federal law. As explained in more detail in this Reply, the Council and HCRRA have gone to enormous and costly efforts over the past several years to ensure their agreements, and the construction and operation of the SWLRT Project, comply with those laws, including ensuring that TCWR's legitimate exercise of its overhead trackage and related rights on the Kenilworth Corridor and Bass Lake Spur will not be unreasonably interfered with during the construction and subsequent operation of the SWLRT Project.

Further, TCWR's Initial Comments omit that TCWR was a frequent and active participant in the Council's public process that led to the SWLRT Project approval, not only during the environmental review, but also before Council planning committees and in technical discussions with Council staff. Regardless of whether TCWR is a party to operating agreements with the Council, the Council knows that TCWR is a stakeholder and that the parties will share these corridors for decades to come.

As described in detail in the PDO, the rail lines in question consist of: (1) 2.6 miles of freight railroad track called the Kenilworth Corridor that is currently owned by HCRRA; and (2) 6.7 miles of freight railroad track called the Bass Lake Spur that is currently owned by CP. On April 5, 2018, HCRRA—which the Board has confirmed in two prior proceedings holds an underlying common carrier obligation to ensure the continuation of freight rail service on the Kenilworth Corridor—filed a Notice of Exemption pursuant to 49 C.F.R. § 1150.42, to obtain the common carrier rights and obligations on the Bass Lake Spur from CP. As a result of the

transactions described in the PDO and the Notice of Exemption, the Council would own the physical freight rail assets of the Kenilworth Corridor and Bass Lake Spur and HCRRA would have the common carrier obligation to ensure the continued provision of freight rail service on both the Kenilworth Corridor and the Bass Lake Spur. The transaction documents recognize and are subject to TCWR's rights under the BLS TRA and the KC TRA and the Council designed and will construct and operate the SWLRT Project so as to not unreasonably interfere with TCWR's freight operations pursuant to those rights.

TCWR's Initial Comments are remarkable and, to the Council's knowledge, unprecedented in the context of a *State of Maine* proceeding. TCWR owns none of the track assets associated with the rail lines at issue, yet TCWR now contends that its rights under the overhead trackage rights agreements provide it with an absolute veto right over these transactions and it can therefore unilaterally and substantially interfere with an important public project. Stripped of TCWR's hyperbole that it used to raise concerns among its shipper customers and the other parties who submitted nearly identically worded letters in this Docket, it appears TCWR's complaints are rooted in money. As explained in more detail in this Reply, the Council was willing to make a reasonable compromise settlement payment to TCWR to attempt to resolve its objections, which primarily relate to the planned removal of certain side tracks associated with the Bass Lake Spur. Although TCWR does not own any of the railroad sidings, and currently uses some of the sidings in breach of the BLS TRA, TCWR rejected the monies that the Council offered that it could have used to replace the sidings that would be removed, and TCWR demanded more. Its 11th hour new demands were so fundamentally unreasonable that the Council and HCRRA came to the inevitable conclusion that TCWR would need simply to remain as a tenant with its existing overhead trackage and other rights under the TRAs, which the Council and HCRRA would protect in accordance

with applicable law and trackage rights agreements. In response, TCWR now strains to contend that there is something about these transactions that is unique and that only through discovery, hearings, and a prolonged series of additional filings can the Board possibly divine what is going on. It also preceded its Initial Comments with filing the same afternoon of a complaint in federal court, an action it claims justifies holding this proceeding in abeyance, or even dismissing the PDO.

Only three pages of TCWR's 150-page filing attempt to address the issues in the PDO and argue that the transactions described in the PDO and set forth in the PDO attachments do not fall within the *State of Maine* line of cases. These arguments are refuted below. The undisputed facts are:

- (1) the Council intends to acquire freight rail assets;
- (2) HCRRA—which already holds the underlying common carrier obligation⁵ over the Kenilworth Corridor despite TCWR's new contention after 24 years of operations with HCRRA as its landlord—will acquire the common carrier rights and obligation on the Bass Lake Spur currently held by CP;
- (3) the Council's ownership of the rail assets and HCRRA's ownership of the underlying common carrier obligations on the lines will be subject to TCWR's

⁵ Under Minnesota law, a regional rail authority, like HCRRA, is set up to “plan, establish, acquire, develop, construct, purchase, enlarge, extent, improve, maintain, equip, operate, regulate, and protect railroads and railroad facilities, including but not limited to terminal buildings, roadways, crossings, bridges, causeways, tunnels, equipment, and rolling stock.” Minn. Stat. § 398A.04, subd. 2. In its Petition to Reject or Stay the Exemption Notice filed in Docket No. FD 36177, TCWR has raised unfounded allegations concerning HCRRA's ability and willingness to fulfill the common carrier obligations associated with the Bass Lake Spur and Kenilworth Corridor. These allegations are obliquely referenced in TCWR's Initial Comments. Initial Comments at 5, 18-19. HCRRA has responded to these allegations in its Reply to TCWR's Petition. The Council concurs with HCRRA's arguments on these points in this Reply, and hereby incorporates them by reference.

rights under the BLS TRA and KC TRA, including TCWR's easement to provide freight rail service on the Kenilworth Corridor;⁶

- (4) the Board has authorized many municipalities to hold the underlying common carrier obligation to ensure rail service on a jurisdictional line of railroad even though they do not themselves actually provide any needed service; and
- (5) despite TCWR's statements to the contrary, the Council and HCRRA took great pains to obtain input from TCWR and its shippers concerning the proposed project and to adopt many of the construction plans, specifications, and schedules proposed by TCWR to ensure TCWR's service to its shippers will not be unreasonably affected as a result of the construction and operation of the SWLRT Project.

The Board should deny the relief requested by TCWR and grant the PDO on the current record as soon as possible.

II. ARGUMENT

A. **TCWR's Commencement of its Federal Court Case Contemporaneously with its Initial Comments Should have No Bearing on Consideration of the PDO**

On April 24, 2018, 20 days after the Council filed the PDO and just hours before TCWR filed its Initial Comments in this docket, TCWR commenced a federal court lawsuit seeking (among other things): (1) declaratory relief against the Council and HCRRA that "the plans to realign, relocate, reconstruct, and remove side tracks ... will constitute the interference of and regulation of TCW's operations in violation of Section 10501(b)" and (2) money damages and other relief for the alleged breach of the BLS TRA against CP and the alleged breach of the KC TRA against HCRRA.⁷ Despite affirmatively stating in its Initial Comments that it is not asking

⁶ TCWR's assertion that "[t]he Project also contemplates the elimination, presumably through eminent domain, of TCW's easement in the Kenilworth Corridor" is unsupported and simply wrong. *See also* pages 12-13, *infra* (describing how HCRRA's retained easement on the Kenilworth Corridor is made expressly subject to TCWR's overhead trackage and other rights under the KC TRA).

⁷ *See*, Exhibit A to Initial Comments at ¶¶ 63, 78-82, and 83-88.

the Board to rule on its preemption claims, and that this PDO proceeding is also not the proper forum to argue the merits of its contract breach claims, Initial Comments at 14, TCWR nevertheless devotes the majority of its filing to presenting unsupported arguments and largely baseless factual assertions related to both its preemption and its contract claims.⁸ TCWR further asserts in its Initial Comments that the PDO should be held in abeyance (if not dismissed outright) because “the questions to be answered and the record to be developed” in the federal court lawsuit with respect to the preemption and contract breach claims “could well moot the need for Board review at all.” Initial Comments at 7.⁹

TCWR’s claims in its court case have no bearing on the jurisdictional issues presented by the PDO, and they provide no basis for holding this proceeding in abeyance. In support of its request to hold this PDO proceeding in abeyance, TCWR relies exclusively on *Soo Line Railroad Company – Petition for Declaratory Order*, FD 36107 (STB served Aug. 10, 2017) (“*Soo Line*”). In *Soo Line* the Board held in abeyance a petition for declaratory order filed by Soo Line Railroad Company asking the Board to state it had jurisdiction over an interchange agreement, due to the pendency of a federal district court lawsuit filed by Norfolk Southern Railway (“NS”) claiming it had the contractual right to terminate the interchange agreement. *Id.*, slip op. at 4-5.

TCWR’s reliance on *Soo Line* is misplaced for three important reasons. First, and foremost, unlike here, where TCWR filed its lawsuit after the Council filed its PDO, the lawsuit in *Soo Line* that prompted the petition for declaratory order had been commenced by NS several

⁸ The Council concurs with TWCR that there is no reason for the Board to take any action related to TCWR’s preemption claims or contract claims in this PDO proceeding. Further, nothing in this Reply waives any rights the Council has concerning counterclaims, defenses, or other rights in response to the federal court claim.

⁹ TCWR later asserts more definitively its unfounded view that, if it prevails in the federal court lawsuit, “the Board would not need to act at all on the Petition.” Initial Comments at 8.

months before the petition. *Soo Line* therefore does not provide precedential support for a party filing a lawsuit *after* a petition for declaratory order has been filed at the STB, and then arguing that the pending STB petition should be held in abeyance because of the lawsuit. If the Board were to condone this practice, parties could bring claims in court to delay the Board's issuance of declaratory relief. This would be particularly prejudicial in cases such as this where circumstances described in the PDO have required the Council to request expedited consideration of the discrete STB jurisdictional issues associated with the SWLRT Project.

Second, as stated above, in *Soo Line* the petition for declaratory order was on the question of whether NS had the ability to terminate the subject interchange agreement without first seeking Board authorization. The Board pointedly noted in its decision: (1) such agreements “are not generally subject to Board approval;” and (2) “no Board authority was sought or obtained upon the parties entering into the [agreement].” *Id.*, slip op. at 4. Nevertheless, the Board ultimately concluded that it would only need to rule on *Soo Line*'s claim of jurisdiction if the court in the pending case found the contract terms gave NS the right to terminate. *Id.* In contrast to the contract issue in *Soo Line*, resolution of the contract issues in the TCWR lawsuit would *not* moot this PDO proceeding. The Board has exclusive jurisdiction over the question it has been presented in this PDO—whether the proposed transaction structure meets the *State of Maine* criteria. Accordingly, a ruling in TCWR's favor on its contract claims (and even an award of damages) would not moot the issues presented by the PDO. *See, Indiana Harbor Belt RR Co., et al – Trackage Rights – Consolidated Rail Corp., CSXT Transp., Inc., and Norfolk Southern Ry. Co., FD No. 36099, et al.* (STB served March 14, 2017), slip op. at 5 (where the Board allowed notices of exemption for trackage rights to become effective despite a pending court case in part because such authority did

not “impact pending litigation in District Court or constitute a ruling on the parties’ contractual relationships.”).

Third, *Soo Line* did not involve any assertion or suggestion for the proposition TCWR now seeks to ascribe to it, namely, that a court ruling on an Interstate Commerce Commission Termination Act (“ICCTA”) preemption question could moot a question regarding the Board’s authority to regulate the sale of a line of railroad. The Board has exclusive and plenary authority over the acquisition of lines of railroad under 49 U.S.C. § 10901. As stated above, the Board also has the exclusive authority to determine whether a proposed transaction is *not* within the Board’s jurisdiction under the criteria of *State of Maine* and its progeny, as the Council has requested with its PDO. None of the cases cited by TCWR regarding a federal court’s concurrent jurisdiction to construe the scope of ICCTA preemption suggests that such concurrent jurisdiction extends to preemption issues that implicate the Board’s exclusive jurisdiction over line sales. Whatever the federal court might decide on TCWR’s preemption arguments, the decision could not moot the PDO without running afoul of this Board’s exclusive jurisdiction.

B. TCWR’s Arguments that the Proposed Transactions do Not Meet the *State of Maine* Standards Should be Rejected

Despite TCWR’s mischaracterization of the transactions presented to the Board in its Initial Comments, the PDO and Notice of Exemption follow the well-developed path of a myriad of *State of Maine* transactions. The record, including this Reply, provides all of the information the Board needs to answer the narrow question presented in the PDO: whether the transactions as structured and the agreements as written successfully ensure that the common carrier obligation to provide service is held by the party selling the rail assets in the form of an exclusive easement, and the party acquiring the railroad assets will not have undue control over the transferring party’s exercise of the common carrier obligation. As such, the Board has all the information that is material and

relevant for it to declare that the Council needs no approval from the Board to acquire the physical rail assets on the Bass Lake Spur and the Kenilworth Corridor.

TCWR makes several attempts to argue that the transactions run afoul of the *State of Maine* requirements, all of which are easily refuted.

First, as summarized in detail in Section IV of the PDO, it is well-settled law before the Board after several decades that where “no common carrier rights or obligations are being transferred,” the Board does not impose the underlying common carrier obligation on the acquiring entity and Board authorization is not required for the transfer of assets. *State of Maine* at 837. The Board’s *State of Maine* principles hold that when a rail carrier selling a rail line retains a permanent easement to permit it to continue to provide common carrier freight service, or transfers that easement to a third-party operator, the Board has typically declined to assert its jurisdiction. *Port of Seattle – Acquisition Exemption – Certain Assets of BNSF Railway Company*, FD No. 35128 (STB Served October 27, 2008). *See also, Atlanta Dev. Auth. D/B/A/ Invest Atlanta and Atlanta Beltline – Verified Petition for a Declaratory Order*, FD 35991 (STB served Dec. 15, 2016), slip op. at 8, *citing, Fla. Dep’t of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc.*, FD 35110, slip op. at 5 (STB served Dec. 15, 2010) (“the Board’s State of Maine line of precedent holds that the sale of the physical assets of a rail line by a carrier to a state or other public agency does not constitute the sale of a rail line within the meaning of § 10901 *when the selling carrier* retains: (1) a permanent, exclusive freight rail operating easement giving it the right and common carrier obligation to provide freight rail service on the line; and (2) sufficient control over the line to carry out common carrier operations without undue interference by the owner of the physical assets.”) (emphasis supplied).

In this case, the “selling carriers” of the track assets that are retaining the appropriate exclusive easements to provide common carrier service are initially CP, which will convey its retained easement over the Bass Lake Spur to HCRRA, and HCRRA, which already possesses the underlying common carrier obligation for the contiguous Kenilworth Corridor. The *State of Maine* test the Board is being asked to apply by the Council is whether the agreements between HCRRA and the Council provide HCRRA with sufficient control over the subject lines to fulfill HCRRA’s obligation to ensure common carrier service is provided without undue interference from the Council as the acquiring entity. *See*, PDO at 13, and cases cited therein. These agreements readily satisfy the *State of Maine* test.

TCWR does not own any track assets on the subject lines to sell, and the transaction agreements expressly and repeatedly state they are made subject to the BLS TRA and the KC TRA. Nevertheless, TCWR has made the novel and utterly unsupported assertion in its Initial Comments that for purposes of the Board’s analysis of whether HCRRA and the Council have complied with the *State of Maine* principals, TCWR should be treated as the selling carrier. Initial Comments at 17 (the carrier with the common carrier obligation, *i.e.*, the selling carrier for purposes of compliance with *State of Maine* principles, “should be viewed as TCW and not HCRRA”). Having made this leap, TCWR then claims that the proposed transactions do not pass muster under *State of Maine* because the agreements and the SWLRT Project, if implemented, might interfere with TCWR’s rights and operations. *Id.*

TCWR’s speculative claims of potential harm to it if certain events come to pass are simply not part of the *State of Maine* analysis. None of the decisions cited by TCWR on page 17 of its Initial Comments provide any support for this novel theory. Indeed, each decision recounts typical *State of Maine* cases where the *selling railroad* retained a permanent, exclusive easement and the

STB examined whether the transaction agreements gave the party acquiring the rail assets too much control over the selling carrier's exercise of its common carrier obligations.¹⁰ The extent to which these proposed transactions and the SWLRT Project might affect TCWR should the Project go forward are therefore irrelevant to the narrow question of whether the agreements between HCRRA and the Council meet the applicable *State of Maine* standards—which they do.

To the limited extent TCWR has alleged in its Initial Comments that the agreements between HCRRA and the Council do not comply with the *State of Maine*, these arguments are easily refuted by the plain language of the relevant documents. For example, TCWR alleges that the transactions between HCRRA and the Council will infringe upon the easement over the Kenilworth Corridor which TCWR obtained in 1998, and that HCRRA's reservation of an exclusive freight easement in accordance with the *State of Maine* principles cannot co-exist with TCWR's easement. *Id.* As stated in the citations above and other *State of Maine* cases, the retention of the “exclusive” easement by the selling carrier in a *State of Maine* transaction is necessary to help demonstrate that the purchaser of the rail assets cannot exert undue control over the *selling carrier's* exercise of its common carrier obligations. For *State of Maine* compliance purposes this relationship is consistent with a holder of an easement to provide overhead trackage rights on the same tracks as is the case here.

But in any event, in this transaction TCWR's allegation of interference from the presence of HCRRA's exclusive easement over the Kenilworth Corridor is patently false. TCWR itself

¹⁰ See, e.g., *New Jersey Transit Corp. – Acquis. Exemption – Norfolk S. Ry*, FD 35638, slip op. at 3 (STB Served Mar. 27, 2013) (“But when the carrier selling a rail line retains an exclusive, permanent easement to permit it to continue to provide common carrier freight service and has sufficient control over the line to carry out its common carrier obligations, the Board (and its predecessor agency, the Interstate Commerce Commission (ICC)) typically has found that Board (or ICC) authorization is not required, and that ownership of the line remains with the selling carrier for purposes of § 10901(a)(4)”).

notes HCRRA's reservation of an exclusive freight easement is made expressly "subject to the provisions of the TRA as defined in Section 2.4" of the Freight Rail Operating Agreement and Consent to LRT. Initial Comments at 17. However, TCWR disingenuously omits the relevant language of Section 2.4 of this agreement, which specifically and unambiguously states "[t]his reservation of easement is being made subject to: . . . (2) *that certain Railroad Easement dated August 10, 1998, from HCRRA to TCWR as part of the TRA.*" HCRRA Freight Rail Operating Easement and Consent to LRT at 2 (emphasis added). Thus, HCRRA's exclusive easement for purposes of complying with *State of Maine vis-à-vis* the Council's acquisition of the rail assets expressly recognizes and is made subject to TCWR's existing rights. There is no need to first terminate TCWR's easement in the KC TRA to comply with the applicable standards of *State of Maine*, as TCWR wrongly implies the Council will attempt to do by condemnation. See Initial Comments at 18. Such a requirement would be bad policy by allowing a party with no ownership rights in a line of railroad to veto the transfer of such assets. As is the case with most trackage rights agreement, the BLS TRA requires the owner's consent if the tenant assigns its rights under the TRA; It places no such restriction on the owner's right to sell the line and assign the TRA to the new owner. Giving the tenant the right to veto as TCW seeks here, would confer on TCW a right that is not in the contract. It would impermissibly rewrite the parties' bargain both here and across the industry. And it could discourage host railroads from entering into trackage rights in the first place.

TCWR's sole remaining argument that the transaction documents between HCRRA and the Council do not comply with the applicable principles is the claim, unsupported by any citation, that "the Joint Powers Agreement [between HCRRA and the Council] appears to transfer responsibility to Met Council for administering on behalf of HCRRA the TRA's and HCRRA's

performance of its common carrier obligations.” Initial Comments at 18.¹¹ However, nothing in the Joint Powers Agreement is contrary to the applicable principles that require the Council to not interfere with HCRRA’s fulfillment of the common carrier obligations associated with its retained exclusive rail freight easement. Specifically, Section 5 of the Joint Powers Agreement¹² merely establishes a process by which the Council, on request from HCRRA, is obligated to find a third party on behalf of HCRRA to perform the railroad operating, maintenance, and dispatching responsibilities on the acquired lines. The Council has agreed to take on certain obligations to pay the costs of such third parties. However, the Joint Powers Agreement is explicit that HCRRA at all times will retain the underlying common carrier obligation to ensure that freight rail service is provided over the lines on reasonable request, subject to TCWR’s existing overhead trackage rights.¹³ Neither the Council nor HCRRA intend for the applicable trackage rights agreements to be amended or modified in any respect.

In summary, TCWR has failed to provide any cogent explanation as to why it is necessary to treat these transactions—each of which utilize well-established STB-approved *State of Maine* procedures—any differently than the dozens of cases that have preceded them. There is no basis for the Board to hold this proceeding in abeyance or establish a procedural schedule to initiate discovery and the submission of additional factual evidence and argument, either of which would

¹¹ Minnesota Statutes section 471.59, subd. 10, authorizes the governing body of any governmental unit (and any instrumentality of a governmental unit) to enter into agreements with any other governmental unit to perform on behalf of that unit any service or function which the governmental unit providing the service or function is authorized to provide for itself. However, this state authority cannot be used to assign a federal common carrier obligation to provide rail service held by a state entity such as HCRRA.

¹² A copy of the Joint Powers agreement is included as Exhibit D to Attachment 3 of the PDO (PDO PDF 990 to 1000). Section 5 is found at PDO PDF page 996.

¹³ *Id.* at Section 1(b), PDO PDF page 993.

only result in needless and potentially fatal delay of the SWLRT Project. The Council's acquisition of the physical rail assets of the Kenilworth Corridor and Bass Lake Spur are fundamentally simple transactions. In both instances, the Council is acquiring the track and rights-of-way associated with both of these relatively short segments of rail track. In both instances, the common carrier obligation and rights are either being retained (in the case of the Kenilworth Corridor) by HCRRA or are being transferred to HCRRA by CP. As such, and consistent with the discussion in the PDO (at 9-14), there is no Board authorization required for the transfer of these physical rail assets. *State of Maine*, 8 I.C.C. 2d at 836-37.

Similarly, despite the volume of paper included in its submission, HCRRA's Notice of Exemption in Docket No. FD 36177 is a routine notice of exemption filed pursuant to the regulations in 49 C.F.R. § 1150.42. Pursuant to that Notice, HCRRA would now be the common carrier in both the Kenilworth Corridor and the contiguous Bass Lake Spur. This is a routine transaction and procedure that has been followed by various governmental entities for many years. TCWR has presented no cogent reason why that Notice of Exemption should not be permitted to go into effect in accordance with the regulation.

C. TCWR's Other Factual and Legal Allegations are Irrelevant to the Issues Presented by the PDO and are Wrong in Any Event

1. TCWR and its Shippers Have Actively Participated in the SWLRT Process and Their Input is Incorporated into the Project Documents

TCWR's Initial Comments are replete with false and unsupported complaints that TCWR has had very little input into the proposed transactions and the SWLRT Project, and that there are no agreements whatsoever between TCWR and the Council or HCRRA for accommodating TCWR's overhead rights and freight rail operations. Both notions are preposterous. For years, TCWR has not only engaged in discussion and public participation with the Council, it has also

been influential in the design and planning of this nearly \$2 billion, important publicly-funded project.

Nevertheless, prior to filing its Initial Comments and commencing its action in federal court, TCWR's President and CEO widely disseminated a letter to TCWR's shipper customers and numerous others seeking support for opposing HCRRA and the Council based on the false and unsupported statements regarding the impact of the SWLRT Project on TCWR customers and TCWR operations. Appended hereto as Exhibit A is, a copy of the undated letter obtained by the Council.¹⁴ The contents of the letter achieved their desired effect, as a series of nearly identical letters containing many of the same false and unsupported claims were filed in this docket.

In almost every instance, the support letters mirror TCWR's false and unsupported allegations that: (1) the Council inappropriately ended negotiations with TCWR that were intended to minimize disruption caused by the construction of the SWLRT and avoid compelling shippers to subsidize the SWLRT Project; (2) HCRRA is not competent to hold the common carrier responsibility on the Bass Lake Spur; (3) neither HCRRA nor the Council has ever sought public input regarding freight rail needs along this roughly nine miles of freight rail corridor; and (4) these are complicated transactions that need full public input that can only be satisfied through establishing a procedural schedule to further study those issues. These statements are carried forward to TCWR's Initial Comments, which notably do not provide an explanation of how

¹⁴ This letter states that TCWR intended to transmit a further communication on April 13, 2018 "to more specifically address the STB filings by the Council and HCRRA and the need to fight for your long-term interests." The Council does not have a copy of that promised communication.

engaging in this extended process would help the Board decide the narrow jurisdictional issues properly before it in the PDO.¹⁵

The representations made by TCWR in its letter and its Initial Comments, are patently wrong and unsupported, and therefore warrant a brief response in this Reply to provide a complete record for the Board. What TCWR failed to tell its shippers and other entities, and in turn this Board, was that the Council and TCWR worked together for almost two years to develop construction protocols to ensure that the design, construction and operation of the SWLRT Project would not unreasonably interfere with TCWR's exercise of its rights under the BLS TRA and the KC TRA. Indeed, the Council and TCWR worked closely under two "Railroad Coordination Agreement(s)" for this purpose. The two parties developed mutually acceptable design and construction plans and specifications (which are reflected in the construction bid specification for the project), established safety procedures, staff communications protocols, and worked out construction sequencing that maintained an operational freight track alignment within the Bass Lake Spur and Kenilworth Corridor during construction, including a mutually acceptable schedule of "pre-planned outages" that would provide for short service interruptions that would be required to construct the SWLRT Project.

The Council also took steps to avoid any economic burden to TCWR for its participation in this process. For example, the Council paid TCWR \$500,000 to compensate TCWR for its review and comment efforts in coordinating these SWLRT Project issues that are particularly critical to TCWR and its customers.

¹⁵ In one instance, the April 19, 2018 letter from Form-A-Feed Inc. goes further, expressing concern that these transactions will result in the abandonment of TCWR's service over these lines. Abandonment, of course, is not an issue in these dockets and TCWR's right to exercise its trackage rights is being preserved.

Further, the Council and TCWR negotiated a series of agreements by which TCWR, not HCRRA, would have assumed the underlying common carrier rights and responsibility on the Kenilworth Corridor and Bass Lake Spur. The principal terms of these agreements were finalized to the point that in the middle of August, 2017, TCWR advised the Council that TCWR's board of directors had agreed on the key business terms and that the parties' staffs could finalize the draft agreements. At that point, Council staff presented the proposed final agreements to its governing body for approval. In reliance on TCWR's representations, on August 16, 2017, the Council's governing body authorized its staff to complete the negotiations and execute those agreements.

Unfortunately, TCWR reneged on its pledge to finalize the agreements, adding new demands to the terms already approved by the Council that were unrelated to the construction and operating terms agreed upon to protect TCWR's rights, and which demands, if met, would have significantly increased the Council's costs, liability, and risk of damages unrelated to any fault attributable to the Council or the SWLRT. At that point, the Council reluctantly terminated any further negotiations with TCWR and sought an arrangement that would preserve TCWR's rights under the BLS TRA and the KC TRA without entering into a new written agreement with TCWR. Nonetheless, the Council has committed to preserve the freight design, construction and operating protocols to which it and TCWR had agreed. These commitments were explained to TCWR in a March 8, 2018 letter from the Council's Chair to TCWR, attached hereto as Exhibit B (attachments to letter omitted), which stated, in part,

the Project intends to follow the construction specifications and protocols TC&W and the Project Office have discussed and collaboratively developed in great detail, to the extent consistent with the TRAs and applicable safety protocols. This includes construction phasing and work windows that allow TC&W to operate its overhead service during construction.

TCWR's Initial Comments also do not reveal to the Board and TCWR's shippers and other affected parties that the planned SWLRT would result in substantial infrastructure improvements to the Bass Lake Spur and Kenilworth Corridor tracks and facilities at no cost to TCWR. Among other things, the Council intends to replace the existing rail track with new rail, ballast and ties, and reconstruct four existing freight rail bridges. In addition, the SWLRT Project would install new signals and gates at road crossings, grade separating an existing at-grade trail crossing as well as installing new freight equipment defect detection devices along the track. *Id.* The planned construction of the SWLRT Project also entails significant improvements to the connection between the Bass Lake Spur and CP's "M&S Spur," which will facilitate TCWR's rail operations beyond the Bass Lake Spur.¹⁶ None of those improvements will be made if the SWLRT Project does not move forward.

In addition, contrary to the misinformation spread by TCWR, during the environmental review process for the SWLRT Project, which predated TCWR's negotiations of the aforementioned agreements, there were significant opportunities for public comment on the alternatives being studied for the construction of the SWLRT and the future of freight rail service in this corridor, opportunities TCWR and its shippers took full advantage of in order to express their views.¹⁷ As the Board knows from its participation as a Cooperating Agency during the

¹⁶ See the map attached to the Real Estate Purchase Agreement between the Council and CP which is Attachment 3, Exhibit B-2 to the SPO and graphically shows the far more efficient connection that will be constructed between the Bass Lake Spur and the M&S Spur. PDO PDF page 984.

¹⁷ Indeed, several of the commenters that now seek to delay the approval of these transactions—because they purportedly had not been given the opportunity to provide public comment—actually participated in the various public comment periods by providing feedback on freight rail impacts, and in some cases, provided letters on TCWR's behalf in support of the current route for the SWLRT Project during one of the various public comment periods. These commenters include: Corona Grain and Feed, Cenex Farmers Union Co-Op Oil Company, Glacial

preparation of the federal Environmental Impact Statement (“FEIS”) for the SWLRT Project, the project plans and alternatives were the subject of numerous public hearings and comment periods dating back to 2012 with the issuance of the Draft Environmental Impact Statement (“DEIS”). The public review process on the DEIS was followed by the issuance of a Supplemental Draft Environmental Impact Statement (“SDEIS”) in May 2015, which was followed by another extensive public hearing and comment process. The issuance of the FEIS a year later in May 2016 triggered still another round of public input. TCWR and many of its shipper customers actively participated in every stage of the EIS process.

TCWR submitted multiple sets of comments, arguing strenuously that the alternative freight rail routing being considered during project development for the SWLRT Project was inappropriate, as it would have led to a relocation of the freight rail track alignment that TCWR preferred, which was to keep the alignment in the Bass Lake Spur and Kenilworth Corridors. Consequently, although it now objects to the SWLRT Project—because the only practicable routing necessarily involves the removal of some sidings on the east side of the Bass Lake Spur—TCWR essentially supported the very co-location of freight and passenger rail tracks it now contests. Regardless, and notwithstanding TCWR’s inaccurate representations to the entities on its mailing list, the SWLRT Project can scarcely be said to have been one that has moved “under the radar.”

Plains Cooperative, Minnesota Valley Regional Rail Authority & Coalition, The Mosaic Company, Union Farmers Cooperative, City of Montevideo, City of Steward, Carver County, McLeod County, Renville County, Sibley County, CHS, Inc., Heartland Corn Products, Farmers Cooperative Elevator Company, Southern Minnesota Beet Sugar Cooperative, Form-A-Feed, Consolidated Grain & Barge, and Step Saver, Inc.

TCWR’s President and CEO also addressed the Corridor Management Committee, a statutorily-prescribed committee which advises the Council on the design and construction the SWLRT Project, on more than one occasion. Ten of TCWR’s shippers (7 of which filed comments in this proceeding) joined him in addressing the Corridor Management Committee on May 12, 2014, to discuss the potential impacts of light rail on their business.

There have been numerous public opportunities for TCWR and its shipper customers to discuss their concerns with the Council, and they took full advantage of them; indeed, many of their suggestions are included in the final design and construction plans.

2. TCWR's Claims of Unreasonable Interference Are Factually and Legally Without Merit

As discussed above, TCWR's claims of potential future unreasonable interference with its operations and contract breach raised in its federal court complaint are not relevant to the narrow issues presented by the PDO. Indeed, TCWR states that the Board is not the forum for deciding these claims.¹⁸ There is no need for the Board to hold this proceeding in abeyance and engage in the "public comment, discovery, development of a complete record, and deeper analysis of both proposed transactions" on the facts underlying those claims, as TCWR has requested. Initial Comments at 20. The Council is nevertheless compelled to briefly address in this Reply some of the more egregious flaws and misstatements in TCWR's filing on these issues, in order to ensure the Board has a more complete and accurate record before it.

First, TCWR's attempts to inflate its limited rights to operate over the Bass Lake Spur rail sidings are belied by the BLS TRA.¹⁹ Its provisions clearly provide that TCWR's use is limited to non-exclusive,²⁰ overhead service on traffic originating generally to the west of the Bass Lake Spur (for example, from or to industries located on the so-called Ortonville Line which CP sold to

¹⁸ As stated previously, the Council does not concede that all of the claims and issues TCWR has presented to the district court in its complaint are appropriately decided in that forum, and the Council reserves all of its rights concerning those claims, to which the Council has yet to answer or otherwise respond.

¹⁹ Copies of the BLS TRA, together with supplements, are included in the PDO transaction materials, including Exhibit J to Attachment 3 of the PDO. (PDO PDF pages 1114-1117.)

²⁰ TCWR's right to use the trackage is in common with CP and any other carrier that CP admits. *See* BLS TRA Sec. 1.4.

TCWR and on the Minnesota Valley Railroad) and from various points east of the Kenilworth Corridor.

Under Section 1.2 of the BLS TRA, CP retains the right to modify or remove “facilities, appurtenances, signals and switches” of the Subject Trackage “at the sole discretion of [CP].”²¹ Further, Section 2.1 of the BLS TRA provides that CP retains the exclusive right to conduct any construction, maintenance, repair and renewal of the tracks covered by the BLS TRA. In addition, that section provides that CP has the right to, among other things, make any “removals to or along” the line it deems necessary and desirable, as long as that change does not “materially interfere” with TCWR’s right to use the line in exercise of the rights defined in the agreement.²²

As an essential part of the plan to construct the SWLRT Project, it will be necessary to remove approximately 16,000 feet of siding track that consists of several different segments currently owned by CP on the east side of the Bass Lake Spur (approximately 10,500 feet of uninterrupted siding on the Bass Lake Spur will remain). This track is encompassed in the tracks covered by the BLS TRA. As transferee of CP’s rights under the BLS TRA once these transactions are completed, HCRRA will stand in CP’s shoes and have the right to remove these particular sidings consistent with Section 2.1 of the BLS TRA, as long as that removal does not materially interfere with TCWR’s exercise of its overhead trackage rights. Once these transactions are consummated, HCRRA will authorize the Council to physically remove these sidings as part of the construction of the SWLRT.

TCWR’s unsupported claims in its Initial Comments about the “critical” role the sidings allegedly play in its provision of service are grossly overstated. By its plain terms, the BLS TRA

²¹ *Id.* at 1115.

²² *Id.* at 1121-22.

limits TCWR's use of the sidings.²³ TCWR is authorized to use the Bass Lake Spur tracks only "for setting out, picking up and switching of cars."²⁴ TCWR is expressly prohibited from using any part of the line for storing rail cars, "except as necessary for handling locomotives, cabooses or cars bad ordered en route."²⁵

TCWR offers no specifics for its claims that it uses the sidings "in its daily operations," and that TCWR "simply cannot provide the same level of service without those tracks." Initial Comments at 12. Based on its understanding of TCWR's actual use of the sidings gained from observations and TCWR's comments on the SWLRT Project, the Council maintains that TCWR will be able to utilize the remaining sidings on the Bass Lake Spur for any legitimate activities that are authorized by the BLS TRA, and that the construction and operation of the SWLRT Project will not interfere with TCWR's use of the remaining Bass Lake Spur sidings and main line tracks.

Finally, TCWR's claims of interference as a result of the transactions between HCRRRA and the Council are belied by the fact that the Council has taken the additional step to protect TCWR's existing rights and operations during the early stages of the SWLRT Project by obtaining a commitment from CP to dispatch and maintain the Bass Lake Spur until a third party or third parties can be retained to perform these functions.

III. CONCLUSION

TCWR's concerns are not grounded in the facts or the law. There is no reason to entertain TCWR's requests to hold this proceeding in abeyance or to establish a procedural schedule for the purpose of conducting discovery and preparing and submitting evidence and public testimony.

²³ See Section 1.3(a) of the BLS TRA, which is attached hereto as Exhibit C.

²⁴ *Id.*, Section 1.3(d).

²⁵ *Id.*, Section 1.5(a).

There is certainly no basis for dismissing the PDO. It has always been the Council's intent to preserve the overhead rights that TCWR has today and in the future.

Notwithstanding the commotion TCWR has generated in its own self-interest presumably to delay the SWLRT Project until the Council and HCRRA accede to TCWR's financial and liability demands, requiring additional proceedings in this docket will not change the nature of the transactions, nor shed any further light on the narrow issues before the Board. Neither of these transactions will go forward unless the Board declares that it has no jurisdiction over the transactions in this PDO proceeding and permits the Notice of Exemption in Docket No. FD 36177 to become effective.

On the other hand, moving down the path requested by TCWR—holding this proceeding in abeyance—could cost tens of millions of dollars, delay, and jeopardize the Southwest LRT Project. As the Board is aware, the Council requested expedited consideration of the PDO because of a crucial milestone that must be reached to move forward with the project. Unless the Council is able to establish site control of the Kenilworth Corridor and Bass Lake Spur by the middle of July, 2018, it will be impossible to award civil construction contracts in August, 2018. If the project does not begin construction during the 2018 season, the unnecessary delay will significantly impact project costs and delay revenue service. This type of delay cannot be corrected later.

The Council recognizes that TCWR may be dissatisfied with the results of failing to consummate agreements with the Council. Regardless, TCWR cannot reasonably contend—and in fact, has not contended—that there is something novel about these transactions that requires the Board to treat this PDO as if the parties are plowing new ground that would warrant discovery and

additional briefs and evidentiary submissions. The Board should proceed to expeditiously decide the issues presented to it by the Council in the PDO.

Respectfully submitted,



Edward D. Greenberg
Thomas W. Wilcox
GKG Law, P.C.
1055 Thomas Jefferson Street N.W.
Suite 500
Washington, D.C. 20007
Telephone: 202-342-5277
Facsimile: 202-342-5299

Special Counsel for the Metropolitan Council

Ann K. Bloodhart, General Counsel
for Metropolitan Council
390 Robert Street North
St. Paul, MN 55101
Telephone: 651-602-1105

Dated: May 2, 2018

EXHIBIT A

To our shippers, cities, counties and communities that TC&W serves:

I am writing to you about grave concerns regarding events which affect our ability to serve you.

As you may be aware, TC&W has been involved in discussions with the Twin Cities' Metropolitan Council (Met Council) regarding the Met Council's intention to build the Southwest Light Rail Transit (SWLRT) within the freight rail corridor that TC&W uses to bring your rail freight to and from St Paul for interchange to railroads such as BNSF, CN, CP, UP, and the Minnesota Commercial Railway, as well as to ports on the Mississippi and Minnesota Rivers. Our goal in these discussions has been to protect both the safety and the economics of the freight rail service we provide to you during construction and operation of SWLRT in the freight rail corridor. This corridor consists of 6.2 miles that CP currently owns and 2.5 miles that Hennepin County currently owns. Both entities are proposing to transfer their freight rail track ownership to the Met Council as part of the SWLRT project.

OVERVIEW:

Since 2004, TC&W has been engaged with the proposed SWLRT, first with Hennepin County (2004-2012) and then with the Met Council (2013-present). TC&W's position all along has been that TC&W will not oppose the SWLRT project, as long as pre-SWLRT, post-SWLRT, the economics for TC&W's shippers remains the same.

In 2013, the Met Council asked TC&W if, in the interest of promoting Transit Oriented Development (TOD), whether TC&W's route east of Highway 169 in the southwest suburbs of Minneapolis could be placed on a new, to-be-built freight rail alignment on the property that Hennepin County Regional Rail Authority owns (an abandoned, parallel former freight rail corridor immediately to the north of the existing freight corridor), and TC&W's response was, "Yes, as long as pre-SWLRT, post-SWLRT, TC&W's economic ability to serve its customers doesn't change, we will work with you."

Specifically, there are side tracks (approximately 16,000 feet) in the existing CP-owned corridor that TC&W has the permanent right to use to sort your railcars as received in St. Paul, to assemble trains, to park unit trains when a customer needs to hold a train before their facility can accept it, for passing trains to meet, and in some cases to hold railcars for forwarding. The Met Council's plans are to permanently remove the 16,000 feet of side tracks. The Met Council has no plan to build replacement side tracks. Removal of the side tracks will damage TC&W's ability to efficiently and effectively provide freight rail service.

TC&W has been involved in protracted and intense discussions with the Met Council from October 2016 until September 2017 regarding how to protect the safety and economics of our freight rail operations during construction and during future operation where both light rail transit and freight rail will share the same rail corridor. We had made significant progress and were down to 5 remaining substantial unresolved issues early last fall. TC&W sent a letter to the Met Council in September 2017 with a path to solve the remaining open issues. We were hopeful that a mutual resolution of the remaining issues was in sight.

Unfortunately, TC&W received no response from the Met Council to its September 2017 letter, until a surprise conference call was insisted upon by the Met Council on March 8, during which the Met Council announced it would proceed with the SWLRT project without the Construction and Operations Agreements the two parties had worked so hard to complete, effectively bypassing the protocols we had mutually developed. That same day, the Met Council presented TC&W with a unilateral "settlement" document for TC&W to accept or reject by April 18th. This document appears to severely impact TC&W's ability to serve our customers in the future. In addition to the removal of the 16,000 feet of side tracks, it would entrust the common carrier obligation over our current freight rail corridor to the Hennepin County Regional Rail Authority (HCRRA) (which, despite its name, is not a railroad nor is it in the railroad business, but instead is just another name for the Hennepin County Board in its role as operator of bike and pedestrian trails in former railroad corridors) and would give the Met Council sole authority for making decisions with respect to SWLRT's construction and operation in the freight rail corridor without any input from us, the operating freight rail carrier responsible for bringing your goods to market safely and economically.

TC&W is developing a response to this unilateral demand from the Met Council (the spirit of which will be to protect the investments that you, our customers and our communities, have made because of our existence). However, before we could respond, late Wednesday, April 4, TC&W learned that the Met Council made a formal filing to the Surface Transportation Board – “STB” (the Federal Agency that governs freight rail commerce) requesting it “rubber stamp” the notion that the Met Council can acquire ownership of the tracks TC&W uses to funnel your commerce to and from North America and the world, without any say by TC&W. In addition, the Met Council requested expedited approval from the STB by May 24 so the Met Council can proceed with their SWLRT project. This filing was followed by a filing on April 5 from HCRAA seeking to acquire the freight easement on the Bass Lake Sub (the 6.2 miles that CP now owns).

REQUEST:

I am letting you know this now because TC&W intends to ask the STB to allow a period of public comment to this filing. This will allow you to have a voice in this process! I wanted to give you a “heads up” that TC&W will likely be sending you a request to communicate directly with the STB to show your support of TC&W’s request to the STB for an extended time frame to allow for a public comment period. My intent is to send you this communication by Friday, April 13.

I had earnestly hoped that the Met Council would have understood the need to preserve your long term rail shipping interests as part of its Southwest LRT proposal, but Wednesday’s actions indicate they intend to push forward without any agreements in place with your freight rail operator. As such, it is imperative that your voice be heard by the Federal Agency that governs freight rail commerce.

Look for an e-mail from me by Friday, the 13th of April (how lucky are we!) to more specifically address the STB filings by the Met Council and HCRRA and the need to fight for your long term interests. I will be sending to you an urgent request then to immediately respond to the STB, with the specifics on how to do so.

With much appreciation for your business, I send this as an update and a “heads up.”

Please let us know if there are others within your organization you would like us to send this e-mail to.

Mark

Mark Wegner

President & CEO

Twin Cities & Western Railroad Company

Glencoe, Minnesota

EXHIBIT B

THIS SETTLEMENT COMMUNICATION IS NOT AN ADMISSION OF LIABILITY OR RESPONSIBILITY AND IS NOT
ADMISSABLE IN ANY DISPUTE PER APPLICABLE RULES AND LAWS

March 8, 2018

Mr. Mark Wegner, President & CEO
Twin Cities & Western Railroad Company
2925 12th Street E
Glencoe, MN 55336

Dear Mr. Wegner:

As you are aware, the Metropolitan Council (Council) has been working to find a solution that will advance the Southwest Light Rail Transit Project (Project) while preserving the freight rail network that is a critical element of delivering goods from, into and within Minnesota. We appreciate Twin Cities & Western's (TC&W) time and partnership in this process.

We also appreciate that TC&W and the Council successfully reached an agreement on the key business terms that we brought to the Council's governing body for approval on August 16, 2017. That agreement included a \$16.1 million payment by the Council. Shortly after the Council acted, TC&W introduced new and additional conditions, including new indemnification and tax provisions, that were unacceptable because of our fiduciary responsibility to the public.

In light of TC&W's new conditions, we felt we had no other choice but to pursue another path forward; therefore, the Council has determined that our mutual interests are best advanced by acquiring the freight rail properties in the Kenilworth Corridor and Bass Lake Spur subject to your existing Trackage Rights Agreements (TRAs). Under this approach, we have carefully crafted a transaction that will allow TC&W to continue operating and serving its shippers under the TRAs it has today. Following Council approval, the Council intends to petition the Surface Transportation Board to acquire the rights-of-way, subject to the existing TRAs.

Unfortunately, we were not able to finalize an agreement, but I believe TC&W will benefit from the Project improvements. The Project will provide rail improvements that will enhance the safe operations within the corridor. These improvements include:

- New rail, ballast and ties;
- New signals and gates at roadway crossings;
- New bridge structures and retaining walls, freight equipment defect detection; and
- A more efficient connection to Canadian Pacific's MN&S line in St. Louis Park.

In addition, the Project intends to follow the construction specifications and protocols TC&W and the Project Office have discussed and collaboratively developed in great detail, to the extent consistent with the TRAs and applicable safety protocols. This includes construction phasing and work windows that allow TC&W to operate its overhead service during construction.

THIS SETTLEMENT COMMUNICATION IS NOT AN ADMISSION OF LIABILITY OR RESPONSIBILITY AND IS NOT
ADMISSABLE IN ANY DISPUTE PER APPLICABLE RULES AND LAWS

Further, TC&W will have the statutory co-location liability protections that you requested as provided by the legislature in 2017.

The Council strongly believes that our alternative path fully protects TC&W's legitimate rights, and accordingly, the plan can and will be implemented without further consideration to TC&W. However, in the event you have a different view, to avoid delay and uncertainty the Council has included a proposed settlement agreement for your consideration. The proposal will be presented to the Council's Transportation and Management committees on March 12 and March 14, 2018, and to the full Council on March 21, 2018. Pending Council approval, this offer is good until the close of business on April 18, 2018.

Other than these intentions, the Council withdraws any other offers made during previous discussions.

Sincerely,

A handwritten signature in blue ink, reading "Alene Tchourumoff". The signature is fluid and cursive, with a long horizontal stroke at the end.

Alene Tchourumoff, Chair
Metropolitan Council

EXHIBIT C

1.2 Attached to, incorporated in and made a part of this Agreement is a print marked Exhibit "A" of the Twin Cities terminal, which shows in solid red lines certain railroad lines from Tower E-14 (Milepost 435.06) near Hopkins, Minnesota, to Merriam Park (Milepost 416.43) (the "Merriam Park Line"); and from St. Louis Park (Milepost 17.23) to North Minneapolis near Camden (Milepost 0.85) (the "Camden Line"); and the connecting track between the two line segments (the "Connection"); and a print marked Exhibit "A-1" which shows in dashed red lines certain railroad lines from Milepost 3.07 at Camden to Milepost 8.66 in New Brighton, including certain tracks at Shoreham, which Exhibit A and A-1 trackage are hereinafter collectively referred to as the "Subject Trackage". The Subject Trackage includes all of SOO's trackage, track connections, facilities and appurtenances, signals and switches, as such facilities and appurtenances, signals and switches are from time to time added to, modified, or removed at the sole discretion of SOO.

1.3 Subject to the terms and conditions contained in this Agreement, SOO hereby grants to Buyer, and Buyer hereby accepts from SOO, the nonexclusive rights to use the Subject Trackage for the operation of its freight trains and the locomotives and cabooses of said trains. Buyer shall have the following rights on the Subject Trackage:

(a) Subject to the limitations set forth in this Section 1, Buyer shall have the right to handle over the Subject Trackage all traffic originating

or terminating at industries physically located on the Ortonville Line, traffic originating and terminating at industries physically located on the Appleton - Ortonville segment, and traffic originating or terminating at industries physically located on the current Minnesota Valley Railroad ("Permitted Traffic"). Additionally, Buyer shall have the right to handle over the Subject Trackage cars hauled for SOO under a Haulage Agreement of an even date herewith, pursuant to Appendix VI to the Purchase Agreement ("Haulage Cars").

(b) Buyer shall have the right to originate and terminate traffic to or from the municipal river terminal at Camden, Minnesota, currently known as the Packer River Terminal ("Upper Harbor Terminal") (near Milepost 2.56).

(c) Buyer shall have the right to interchange Permitted Traffic and Haulage Cars in connection with its use of the Subject Trackage with any carrier that connects with the Subject Trackage or that SOO has admitted or may admit to the use of all or part of the Subject Trackage, including without limitation, Burlington Northern Railroad Company, Chicago and Northwestern Transportation Company, Minnesota Commercial Railway Company and SOO, at points consented to by SOO, which consent shall not be unreasonably withheld, which

CERTIFICATE OF SERVICE

I do hereby certify that on this 2nd day of May, 2018, I have served a copy of the foregoing Reply of Metropolitan Council to Initial Comments of Twin Cities & Western Railroad Company by first class mail on each of the following persons or entities:

Perry Aasness
Minnesota Agrigrowth Council
400 Robert Street North, Suite 1520
St. Paul, MN 55101-2069

Randy Maluchnik
Office Of County Commissioner Carver County
Government Center Human Services Building
602 East Fourth Street
Chaska, MN 55318-1202

Bruce Abbe
Midwest Shippers Association
10800 Lyndale Avenue South, Suite 159
Bloomington, MN 55420

William A Mullins
Baker & Miller PLLC
2401 Pennsylvania Ave, NW Suite 300
Washington, DC 20037

Gary Anderson
Heartland Corn Products
P.O. Box A
Winthrop, MN 55396

Joe Nagel
County Of Mcleod
830 11Th Street East
Glenco, MN 55336

Ron Antony
Yellow Medicine County Commissioner
180 8Th Avenue
Granite Falls, MN 56241

Jeff J. Nielsen
United Farmers Cooperative
P.O. Box 461
Winthrop, MN 55396

Eric Baukol
Granite Falls Energy LLC
P.O. BOX 216
Granite Falls, MN 56241-0216

Wendy Pederson
City Of Franklin, Minnesota
P.O. Box 326
Franklin, MN 55333-0326

Shaun Brooks
F.W. Cobs Company
Po Box 30
Saint Albans Bay, VT 05481

David Peters
Central Region Cooperative
P.O. Box E
Fairfax, MN 55332

Steve Christensen
Granite Falls Energy LLC
P.O. BOX 216
Granite Falls, MN 56241-0216

Douglas E. Punke
Renewable Products Marketing Group, Llc
1157 Valley Park Drive, Suite 100
Shakopee, MN 55379

Jeff Christoffersen
The Mosaic Company
13830 Circa Crossing Drive
Lithia, FL 33547

Matt Reiners
Poet Nutrition
4506 N Lewis Ave
Sioux Falls, SD 57104

Steven Domm
Southern Minnesota Beet Sugar Cooperative
83550 Cty Rd 21
Renville, MN 56284-56284

Jerry Settje
Corona Grain & Feed
P.O. Box 107
Corona, SD 57227

William Doyscher
Farmers Co-Operative Elevator Co .
1972 510Th Street
Hanley Falls, MN 56245

Steve Sjoström
Heartford Corn Products
PO Box A
Winthrop, MN 55396

Scott Dubbelde
Farmers Cooperative Elevator
1972 510Th Street
Hanley Falls, MN 56245

Dan Smith
Cooperative Network
145 University Avenue West, Suite 450
St. Paul, MN 55103

Joseph Fiereck
Ceres Global Ag Corp.
1660 S Hwy 100, Suite 350
St Louis, MN 55416

Michael V. Smith
Finger Lakes Railway Corp.
68 Border City Road
Geneva, NY 14456

Andy Ford
Midwest Agri-Commodities Company
999 Fifth Ave. Suite 500
San Rafael, CA 94901

Willie E. Smith, Jr.
National Sugar Marketing
700 Wilmington Island Rd
Savannah, GA 31410

Bob Fox
Renville County Board of Commissioners
Chairman of Minnesota Valley Regional Rail
Authority
PO Box 481
Redwood Falls, MN 56283-56283

Charles A. Spitulnik
Kaplan Kirsch & Rockwell LLP
1001 Connecticut Avenue, N.W. Suite 800
Washington, DC 20036

Jerome Fragodt
Farmers Union Oil Co.
124 W. Nichols Ave
Montevideo, MN 56265

Charles J. Steffl
Step Saver Inc.
120 2Nd St W
Morton, MN 56270

Jeff Franta
Heartland Corn Products
PO Box A
Winthrop, MN 55396

Brian Thalmann
Heartland Corn Products
PO Box A
Winthrop, MN 55396

Jarvis Haugeberg
Form A Feed Inc
740 Bowman St
Stewart, MN 55385

Charlie Threlkeld
Consolidated Grain & Barge Company
POST OFFICE BOX 249
Mandeville, LA 70470-0249

Craig Hebrink
Farmward Cooperative
PO Box 604
Renville, MN 56284

Thomas Traen
Glacial Plains Cooperative
543 Van Norman Ave.
Murdo Ck, MN 56271

Ronda Huls
City of Stewart
551 Prior Street
PO Box 195
Stewart, MN 55385

Roxy Traxler
Sibley County
400 Court Ave
Gaylord, MN 55334

Brad Jenkins
Pilot Travel Centers LLC
5508 Lonas Dr
Knoxville, TN 37909

Steven C. Jones
The City Of Montevideo
P.O. Box 517
Montevideo, MN 56265

Stephen Kossuth
Amerigas Propane
11450 Compaq Center West Dr., Suite 400
Houston, TX 77070

Randy Kramer
Renville County Board of Commissioners
105 South 5Th Street, Suite 315
Olivia, MN 56277-1484

Joe Ludowese
Heartland Corn Products
Sibley County
63901 190 St
Stewart, MN 55385

Dan Mack
CHS Inc.
5500 Cenex Drive, MS 320
Inver Grove Heights, MN 55077

Gregory Webb
Archer Daniels Midland Company
77 W. Wacker Drive, Suite 4600
Chicago, IL 60601

Janette Wertish
City of Renville
221 North Main Street
Renville, MN 56284

Shane Wohlman
City of Renville
221 North Main Street
Renville, MN 56284

Bob Zelenka
Minnesota Grain & Feed Association
3470 Washington Drive, Suite 200
Eagan, MN 55122

Honorable Jason Lewis
U.S. House of Representatives
2805 Cliff Road
Burnsville, MN 55337

Honorable Collin C. Peterson
United States House of Representatives
2204 Rayburn House Office Building
Washington, DC 20515



Edward D. Greenberg