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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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ENTERED  
Office of Proceedings  
September 11, 2013  
Part of the Public  
Record

**STB Docket No. AB-6 (Sub-No. 465X)**

**BNSF RAILWAY COMPANY – ABANDONMENT EXEMPTION – IN KING COUNTY,  
WASHINGTON  
(Woodinville Subdivision)**

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**STB Finance Docket No. 35731**

**BALLARD TERMINAL RAILROAD COMPANY, L.L.C. – ACQUISITION AND  
OPERATION EXEMPTION – WOODINVILLE SUBDIVISION – VERIFIED PETITION  
FOR EXEMPTION PURSUANT TO 49 U.S.C. § 10502**

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**THE CITY OF KIRKLAND'S REPLY TO  
BALLARD TERMINAL RAILROAD COMPANY, LLC'S  
PETITION FOR RECONSIDERATION OF  
ORDER DENYING BALLARD'S MOTION FOR PRELIMINARY INJUNCTION**

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Counsel for the City of Kirkland, Washington

Dated: September 11, 2013

## I. INTRODUCTION

On August 1 the Board denied the Motion for Preliminary Injunction of Ballard Terminal Railroad Company, L.L.C. (“Ballard”) to enjoin the City of Kirkland, Washington (“Kirkland”) from salvaging the tracks and ties in the “Cross Kirkland Corridor” or “CKC” – the 5.75 mile segment of railbanked right-of-way owned by Kirkland that is part of the approximately 12 mile railbanked right-of-way at issue in these proceedings (the “Line”).<sup>1</sup> Thereafter, Kirkland instructed its contractor to begin salvage work. On August 22 Ballard filed a Petition for Reconsideration, alleging that the Board overlooked evidence of Ballard’s financial strength and evidence of the demand for freight service on the rail corridor.<sup>2</sup>

Ballad’s Petition for Reconsideration fails for multiple reasons. As a threshold matter, it is moot. In addition, Ballard has not met the criteria for reconsideration. Under 49 C.F.R. § 1115.3(b), a party seeking reconsideration must show that the decision at issue either (1) “will be affected materially because of new evidence or changed circumstances” or (2) “involves material error.”<sup>3</sup> Ballard has shown neither. Ballard has not identified changed circumstances or new evidence that could not have been previously adduced, and the Board’s August 1 Decision does not involve any error. Accordingly, Ballard’s Petition for Reconsideration should be denied.

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<sup>1</sup> *Ballard Terminal Railroad Company, L.L.C. – Acquisition and Operation Exemption – Woodinville Subdivision*, STB Docket No. 35731 (STB served Aug. 1, 2013) (“Decision”).

<sup>2</sup> Ballard’s Petition for Reconsideration was filed a day late, under the schedule prescribed by 49 C.F.R. § 1115.3(e), which provides that “[p]etitions must be filed within 20 days after the service of the action or within any further period (not to exceed 20 days) as the Board may authorize.”

<sup>3</sup> 49 C.F.R. § 1115.3(b)(1), (2).

## II. ARGUMENT

### A. Rail Salvage Is Underway, Making Ballard's Petition for Reconsideration Moot.

Ballard's Petition for Reconsideration is moot, as Kirkland has largely completed the salvage operation that Ballard seeks to enjoin. In asking the Board to rule by August 1 Kirkland cited guidance from its salvage contractor, A&K Railroad Materials, Inc. ("A&K"), that rail removal work could be completed in 2013 if the City provided a notice to proceed by August 1.<sup>4</sup> When the Board denied Ballard's preliminary injunction request, Kirkland issued a notice to proceed. At this time A&K has removed the tracks from approximately 2.82 miles or 50 percent of the 5.75 mile-long CKC.<sup>5</sup> Thus, the relief that Ballard seeks is unavailable, and Ballard's Petition for Reconsideration should be denied as moot.

### B. Ballard Has Not Pointed to Any New Evidence Warranting Reconsideration.

Even if the track and ties were intact, Ballard has submitted no new evidence that would warrant reconsideration of the Board's August 1 Decision. Under 49 C.F.R. § 1115.3(c), a petition for reconsideration must present either new evidence or changed circumstances, and "an explanation must be given why it was not previously adduced." As the Board has explained, "Evidence does not qualify as 'new' if it could have been placed before the Board in the original proceeding."<sup>6</sup> The Board will not accept evidence on appeal "if that evidence was available but was withheld until after a result is obtained that is not to a party's liking."<sup>7</sup>

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<sup>4</sup> See The City of Kirkland's Motion for Expedited Ruling on Ballard Terminal Railroad Company, LLC's Motion for Preliminary Injunction, at 4 (filed July 10, 2013).

<sup>5</sup> See Verified Statement of Aaron McDonald, at ¶ 6 (filed herewith).

<sup>6</sup> *Town of Babylon and Pinelawn Cemetery – Petition for Declaratory Order*, STB Finance Docket No. 35057, slip op. at 4 (STB served Sept. 26, 2008) (citing *Town of Springfield v. STB*, 412 F.3d 187, 189 (D.C. Cir. 2005) (denying request for reconsideration because parties could have sought to supplement record with information at issue before the Board reached its

(continued . . .)

The factual development of this case illustrates why the Board bars reconsideration of its decisions based on evidence that could have been presented earlier. Ballard's so-called "new evidence" consists of allegations about newly discovered shippers and assertions that Ballard has financial resources beyond those disclosed in its earlier briefing. Kirkland conducted discovery on both of these issues.

With respect to shippers, Kirkland submitted interrogatories that asked Ballard to identify all potential shippers on the Line. Ballard's response, which was verified by Byron Cole on May 23, listed CalPortland, Wolford Demolition and Trucking, Inc., and General Mills.<sup>8</sup> At Mr. Cole's deposition the next day he was asked repeatedly if Ballard knew of any other prospective shippers.<sup>9</sup> Mr. Cole testified that Ballard received telephone inquiries from "people in Portland, from people in Longview, from people in Spokane,"<sup>10</sup> but he refused to identify any names other than the three mentioned in Ballard's interrogatory answer, out of concern that Kirkland would subpoena them to testify.<sup>11</sup> Mr. Cole also was specifically asked whether he was aware of any

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(. . . continued)

decision); *Pejepscot Industrial Park, Inc. d/b/a Grimm Industries – Petition for Declaratory Order*, STB Finance Docket No. 33989, slip op at 3, 3 n.8 (STB served Nov. 7, 2003) (citing authorities).

<sup>7</sup> *Keokuk Junction Railway Company – Feeder Line Acquisition – Line of Toledo, Peoria and Western Railway Corporation Between La Harpe and Hollis, IL*, STB Finance Docket No. 34335, slip op. at 5 (STB served Feb. 7, 2005) (citing authorities).

<sup>8</sup> See Ballard's Responses to Interrogatory Nos. 1 and 2 (attached hereto as Ex. 4). Mr. Cole subsequently conceded that neither General Mills nor Safeway requested service on the Line. See Cole Dep. Tr. at 112:22-113:6 (attached hereto as Ex. 5).

<sup>9</sup> See Cole Dep. Tr. at 106:1-110-23 (attached hereto as Ex. 5)

<sup>10</sup> Cole Dep. Tr. at 109:13-110:3 (attached hereto as Ex. 5).

<sup>11</sup> See Cole Dep. Tr. at 110:15-23 (attached hereto as Ex. 5).

letters of support from any other potential shippers, and he testified, “I haven’t tried to get them.”<sup>12</sup> Doug Engle of Eastside Community Rail, L.L.C., Ballard’s business partner, testified similarly.<sup>13</sup>

Now, Ballard asserts that there are other businesses interested in receiving rail service on the Line and that the Board did not consider these businesses. In contrast to its earlier answers in discovery, Ballard claims that General Mills and Safeway are interested in rail service, even though Ballard did not correct or supplement earlier discovery responses. Ballard also never previously mentioned CT Sales, which Mr. Engle claims is interested in receiving rail service.

At no point before the Board’s August 1 Decision did Ballard mention RJB Wholesale, Inc., which is a pipe distributor in Kirkland that figures prominently in Ballard’s Petition for Reconsideration. Ballard has submitted a letter dated June 17 from RJB to the Board that supports reactivation of rail service, but which apparently did not reach the Board or the other parties.<sup>14</sup> Mr. Cole did not mention RJB in his May 23 deposition, and Ballard did not mention RJB in either its June 24 sur-reply in support of its Motion for Preliminary Injunction or its July 12 opposition to Kirkland’s Motion for Expedited Ruling. The latter two omissions are especially perplexing, given that Ballard filed those materials well after the date of RJB’s first letter, and Ballard devoted much of its June 24 sur-reply to rehabilitating its contention that there is robust shipper interest in freight service on the Line.

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<sup>12</sup> See Cole Dep. Tr. at 123:3-5 (attached as Ex. 5).

<sup>13</sup> See Engle Dep. Tr. at at 23:19-24:21, 188:3-9 (attached as Ex. 6).

<sup>14</sup> Kirkland was never served with a copy of RJB’s letter dated June 17. That letter does not appear in the dockets for these proceedings.

As noted, the Board's rules, 49 C.F.R. § 1115.3(c), require Ballard to explain why evidence relating to RJB or any other new rail service demand was not presented before the Board's August 1 decision. Such an explanation is conspicuously absent from Ballard's Petition for Reconsideration. The absence of any explanation is all the more troubling given that Ballard apparently had this information well before the Board's August 1 Decision.<sup>15</sup> Again, this Board has made clear that parties are not permitted to wait to present evidence only after receiving an adverse ruling.<sup>16</sup> That is what Ballard has done here. Accordingly, Ballard has failed to comply with this Board's rules, and for this reason alone the Board should decline to consider Ballard's so-called "new evidence."

In addition, Ballard's failure to disclose information about RJB and other supposed shippers is a violation of the Board's discovery rules and is unfairly prejudicial to Kirkland. The Board's rules, 49 C.F.R. § 1114.29, direct a party to supplement its response to discovery with respect to any question addressed to the identity of persons having knowledge of discoverable matters. The same rule requires a party who learns that his response is incorrect to correct the response. Therefore, it was incumbent on Ballard to identify RJB as a potential shipper as soon as it had contact with RJB other businesses, as well as correct earlier answers about General Mills and Safeway, if indeed there is a genuine interest in rail service. Kirkland would have conducted discovery on Ballard's claims, including the credibility of RJB's interest, the feasibility and practicability of constructing a spur to RJB's facility, whether RJB sought rail

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<sup>15</sup> See 78 Fed. Reg. 24,465, 24,466 (Apr. 25, 2013) (setting July 18 as the deadline for replies to comments); Ballard's Petition for Reconsideration at 1 (explaining that materials filed in support of Ballard's Petition for Reconsideration are "some, albeit not all, of the evidence that would have been filed had the Board retained its original procedural schedule").

<sup>16</sup> See notes 6 and 7 *supra*, and accompanying text.

service when the Line was active, and if not why not. But in responding to Ballard's Petition for Reconsideration Kirkland has no opportunity to gather evidence on these issues.

The same flaws are present in Ballard's request for reconsideration of the Board's findings that Ballard lacks the financial resources to reinstitute service.<sup>17</sup> Ballard asserts that it is well-financed, while withholding information on this issue that Kirkland requested in discovery. Ballard had custody of all the relevant information at all times since Ballard initiated these proceedings. Kirkland ultimately filed a motion to compel discovery of Ballard's recent financial statements that Ballard resisted. The Board granted that motion on August 22, and directed Ballard to produce financial statements and other relevant records by September 11 – the day Kirkland's response is due to Ballard's petition for reconsideration.

In its Petition for Reconsideration (page 1) Ballard asserts that it had no obligation to produce "the entirety of the case in support of rail retention" until the deadline to file comments on Ballard's reactivation petitions. This contention ignores 49 C.F.R. 1121.3, which required Ballard to file its entire case in chief in support of its reactivation petition. Ballard also overlooks the burden of a party moving for a preliminary injunction to satisfy each element of the four-part test for the award of injunctive relief.<sup>18</sup> It is Ballard's option to withhold evidence it believes would have supported its motion, but Ballard cannot fault the Board for resolving Ballard's motion on the basis of the information Ballard presented.

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<sup>17</sup> See Decision, *supra* n.1, slip op at 5.

<sup>18</sup> See Decision, *supra* n.1, slip op. at 4 (citing *Middletown & New Jersey R.R. – Lease and Operation Exemption – Norfolk So. Ry.*, STB Finance Docket No. 35412, slip op. at 2 (STB served Oct. 6, 2010); 5 U.S.C. § 556(d); see also *BP Amoco Chemical Company v. Norfolk Southern Railway Company*, STB Docket No. 42093, slip op. at 4 (STB served June 3, 2005); *Seminole Electric Cooperative, Inc. v. CSX Transportation, Inc.*, STB Docket No. 42110, slip op. at 4 (STB served Dec. 18, 2008); *Arkansas Electric Cooperative Corporation – Petition for Declaratory Order*, STB Docket No. FD 35305, slip op. at 2 (STB served Nov. 5, 2010).

**C. None of the Information Presented in Ballard’s Petition for Reconsideration Undermines the Board’s Decision Denying Ballard’s Request for an Injunction.**

Even if the Board accepted Ballard’s so-called “new evidence” – which it should not – Ballard has failed to show that this information materially affects the Board’s August 1 Decision or that the Board’s Decision otherwise involves a material error. In its August 1 Decision, the Board explained that two issues are critical to assessing Ballard’s likelihood of success on the merits: (1) whether Ballard has sufficient financial resources to reactivate rail service on the Line and (2) whether there is a credible demand for freight service.<sup>19</sup> Ballard does not contend that the Board erred in identifying these issues as the critical lines of inquiry. Rather, Ballard asserts that the recently disclosed information in its Petition for Reconsideration establishes that it has the financial capability to reactivate rail service and that there is genuine demand for freight service. Ballard is incorrect.

Addressing Ballard’s financial status first, none of the information in Ballard’s Petition for Reconsideration calls into question the Board’s conclusion that Ballard “appears to have insufficient financial resources” to reinstitute rail service.<sup>20</sup> In its August 1 Decision, the Board observed that “given Ballard’s current financial position, it is unlikely that Ballard would be able to pay appropriate compensation for use of the right-of-way in the event we grant authority requested”<sup>21</sup> and that “[g]iven the relatively high property values in the area, the costs likely would be substantial.”<sup>22</sup> Significantly, Ballard does not dispute either of these points.

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<sup>19</sup> See Decision, *supra* n.1, slip op. at 4-5, 7.

<sup>20</sup> Decision, *supra* n.1, slip op. at 7.

<sup>21</sup> Decision, *supra* n.1, slip op. at 5.

<sup>22</sup> Decision, *supra* n.1, slip op. at 5 n.10.

Ballard's assertion that it "has access to significant funding with respect to the reactivation"<sup>23</sup> is without support. In his letter of August 21, Mr. Engle states that "[t]here is investment capital available from private parties, and there is SBA and public railroad financing programs available to make this line's reactivation successful."<sup>24</sup> Mr. Engle has not identified such alleged investors, the particular financing programs that would support Ballard's effort to reinstitute rail service, or the amount of funding that Ballard could realistically hope to obtain. Daniel T. Behr's letter of August 21 does not reflect any commitment of or assurance of access to capital financing. Mr. Behr states only that his investment firm "is prepared to become engaged by the principals in a business advisory capacity, to advise them on securing finance to help make the Ballard Terminal Railroad Company line to Bellevue a success."<sup>25</sup> The additional letters of Paul Nerdrum, the majority owner of Ballard, similarly fail to demonstrate that Ballard has the financial resources necessary to reinstate rail service. Mr. Nerdrum asserts that "[w]e don't have a lot of debt. We are prepared to make the necessary investments and support the financing, to reactivate the line to Bellevue,"<sup>26</sup> but he provides nothing to support these statements. Bald assertions, such as these, do not, and cannot, demonstrate that Board erred.

Turning to the issue of freight demand, Ballard has not pointed to any information that warrants reconsideration. Contrary to Ballard's contention, RJB's letters of support do not show

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<sup>23</sup> Ballard's Petition for Reconsideration, at 2.

<sup>24</sup> Letter of August 21, 2013 from Doug Engle to Cynthia Brown, at 6 (attached as Tab 1 to Ballard's Petition for Reconsideration).

<sup>25</sup> Letter of August 21, 2013 from Daniel T. Behr to Cynthia Brown, at 2 (attached as Tab 5 to Ballard's Petition for Reconsideration).

<sup>26</sup> Letter of August 20, 2013 from Paul Nerdrum and Byron Cole to Cynthia Brown, at 2 (attached as Tab 5 to Ballard's Petition for reconsideration).

that it is “ready, willing and able” to utilize rail service.<sup>27</sup> RJB’s facility adjoins the right-of-way, but there is no evidence that RJB ever requested, much less received rail service when the Line was active.<sup>28</sup> As the Board recognized in the *GNP* matter<sup>29</sup> and in its August 1 Decision (page 4), a critical factor in assessing the credibility of a supposed freight demand is whether a potential shipper has the facilities necessary to receive rail service. The portion of the Line adjacent to RJB’s warehouse has now been salvaged.<sup>30</sup> For RJB to receive rail service, this portion of the Line would need to be reconstructed, and a spur or siding would need to be built to access RJB’s facility. Such an undertaking would be substantial, as the rail bed sits atop a berm approximately 12 vertical feet above RJB’s small yard, and the drainage area between the rail bed and RJB’s yard is as much as 14 feet below the surface elevation of the rail bed.<sup>31</sup> Any siding or spur would need to run a substantial distance to gradually descend the elevation difference between the Line and RJB’s yard and therefore would likely have to cross adjacent properties. As was the case in *GNP*,<sup>32</sup> neither Ballard nor RJB has shown how it would overcome the physical and financial obstacles to rail service to RJB’s facilities. In light of RJB’s

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<sup>27</sup> Ballard’s Petition for Reconsideration, at 2.

<sup>28</sup> BNSF Railway Co. made no mention fo RJB in its petition for abandonment of the Line. See BNSF’s Petition for Exemption, *BNSF Railway Company – Abandonment Exemption – In King County, Washington*, STB Docket No. AB-6 (Sub-No. 465X) (filed Aug. 11, 2008).

<sup>29</sup> See *GNP Rly, Inc. – Acquisition and Operation Exemption – Redmond Spur and Woodinville Subdivision*, STB Docket No. FD 35407, slip op. 6 (STB served June 15, 2011).

<sup>30</sup> See Verified Statement of Aaron McDonald, at ¶¶ 6, 7.

<sup>31</sup> See Verified Statement of Aaron McDonald, ¶ 8, and the topographical maps attached hereto as Exs. 1, 2, and 3.

<sup>32</sup> *GNP*, *supra* n.29, slip op. at 6.

lack of practicable access to the Line, coupled with the absence of past rail service, Ballard's claim of shipper demand is not credible.

Ballard's other attempts to bolster its claim of robust freight demand likewise fail. In its August 1 Decision (page 5), the Board recognized that CalPortland had not actually made a request for rail service. CalPortland still has not made such a request. In its latest letter solicited by Mr. Engle, CalPortland reiterates its earlier position that it is interested in an expansion of transportation options.<sup>33</sup> Similarly, even though Ballard and Mr. Engle claim that CT Sales, General Mills, and Safeway are interested in rail service, there is no evidence of this claim, other than Mr. Engle's unsworn letter.<sup>34</sup> Such hearsay evidence is insufficient. In short, Ballard has failed to show that shippers that it claims are ready, willing, and able to receive rail service either have contracts to transport materials via rail or facilities necessary access to the Line.

## V. CONCLUSION

As set forth above, Ballard's Petition for Reconsideration fails. The relief Ballard seeks is unavailable, and Ballard's Petition is therefore moot. Moreover, Ballard has failed to meet the threshold requirements allowing it to present additional information. And even if the Board accepted the additional information presented by Ballard, Ballard has failed to show that it would materially affect the Board's August 1 Decision. Accordingly, Ballard's Petition for Reconsideration should be denied.

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<sup>33</sup> See Letter of August 16, 2013 from Michael Skrivan of CalPortland to Douglas Engle (attached as Tab 4 to Ballard's Petition for Reconsideration).

<sup>34</sup> See Letter of August 21, 2013 from Doug Engle to Cynthia Brown, at 3 (attached as Tab 1 to Ballard's Petition for Reconsideration).

Respectfully submitted,



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Counsel for the City of Kirkland, Washington

Dated: September 11, 2013

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day caused to be served a copy of the foregoing reply upon the following parties of record in the above-captioned proceedings via e-mail and by first class mail with postage prepaid and properly addressed:

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\_\_\_\_\_  
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Counsel for the City of Kirkland, Washington

Dated this 11th day of September 2013

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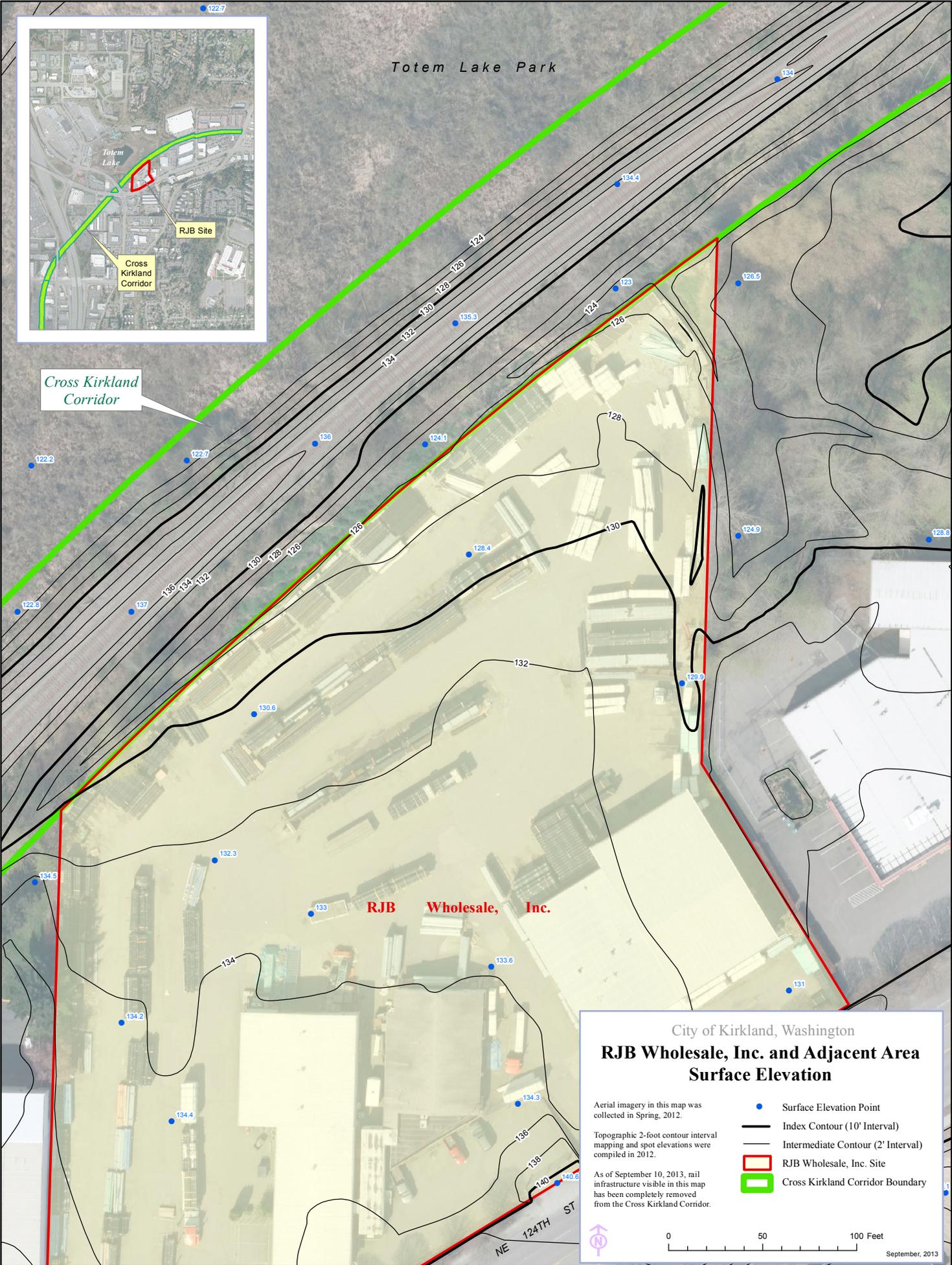
City of Kirkland, Washington  
**RJB Wholesale, Inc. and Surrounding Area**

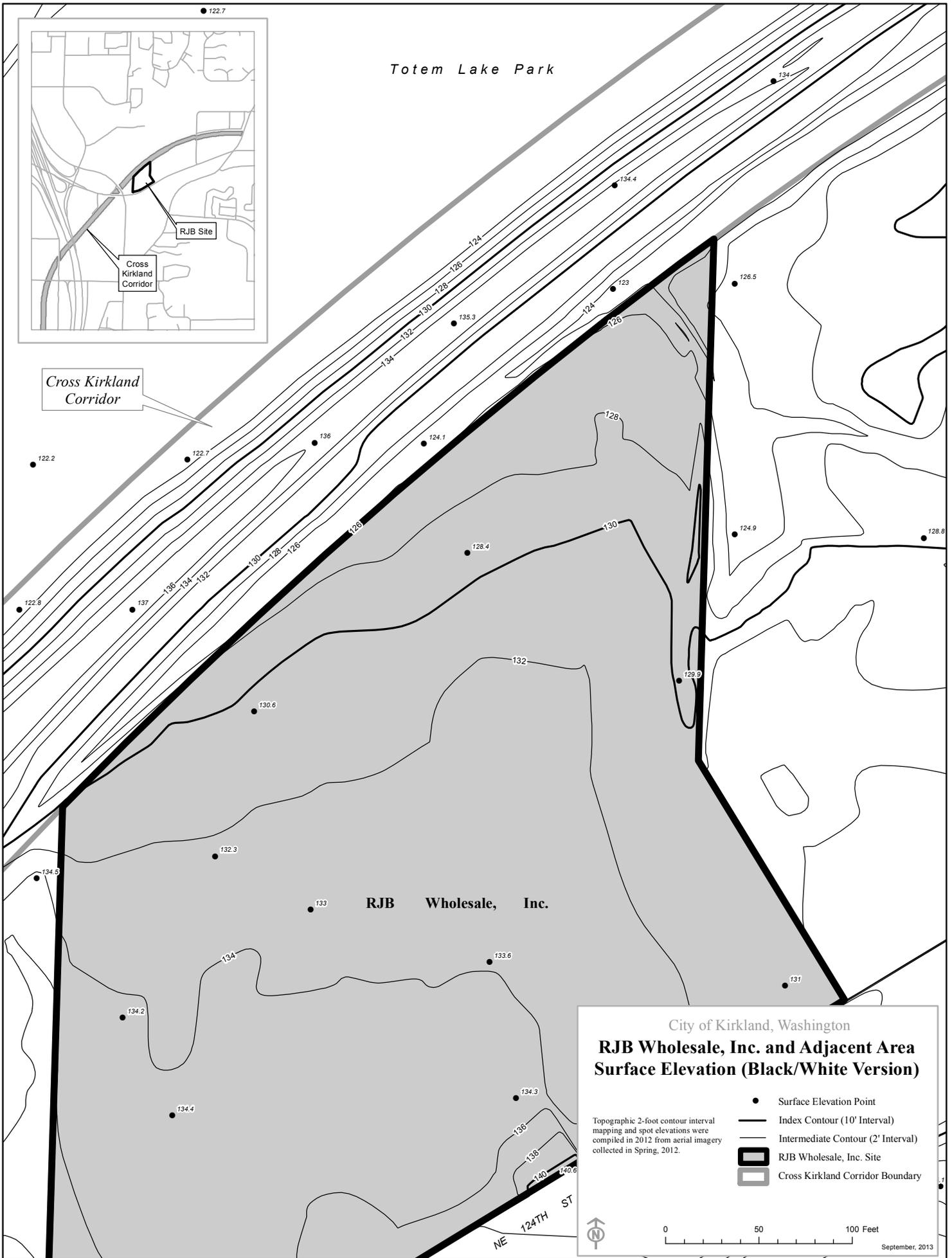
- RJB Wholesale, Inc. Site
- Cross Kirkland Corridor (Railbanked)



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September, 2013





BEFORE THE SURFACE TRANSPORTATION BOARD

**STB FINANCE DOCKET NO. 35731  
BALLARD TERMINAL  
RAILROAD COMPANY, L.L.C.  
—ACQUISITION AND EXEMPTION—  
WOODINVILLE SUBDIVISION**

**STB DOCKET NO. AB-6 (SUB. NO. 465X)  
BNSF RAILWAY COMPANY  
—ABANDONMENT EXEMPTION—  
IN KING COUNTY, WA**

**BALLARD TERMINAL  
RAILROAD COMPANY, LLC'S  
ANSWERS TO CITY OF  
KIRKLAND'S FIRST SET OF  
INTERROGATORIES**

Ballard Terminal Railroad Company, LLC (“Ballard”), by and through its counsel, hereby answers the City of Kirkland’s (“Kirkland’s”) First Set of Interrogatories as follows.

**GENERAL OBJECTIONS**

1. Ballard objects to Kirkland’s interrogatories to the extent that they call for the disclosure of information protected by the attorney-client privilege.
2. Ballard objects to Kirkland’s interrogatories to the extent that they call for the disclosure of information protected by the attorney work-product privilege.
3. Ballard objects to Kirkland’s interrogatories to the extent that they impose any obligations on Ballard beyond those permitted under the Code of Federal Regulations and the United States Code.
4. Ballard objects to Kirkland’s interrogatories to the extent that they call for information relating to the “Freight Segment,” as defined in Definition 8 of Kirkland’s interrogatories, on the basis that all such interrogatories are overly broad, unduly burdensome, seek information that is irrelevant or immaterial, are not sufficiently limited in scope, and are not reasonably calculated to lead to the discovery of admissible evidence.

5. Ballard objects to Definition 9 of Kirkland's interrogatories on the basis that the time period that Kirkland purports to be relevant is overly broad and not sufficiently limited with respect to time frame.

**INTERROGATORIES**

**INTERROGATORY NO. 1:** Please identify all potential shippers that you contacted or attempted to contact regarding the resumption of freight rail service on the Line.

**ANSWER:** CalPortland  
Wolford Demolition and Trucking, Inc.  
General Mills

**INTERROGATORY NO. 2:** Please identify all potential shippers that contacted you regarding the resumption of freight rail service on the Line.

**ANSWER:** See Ballard's answer to Interrogatory No. 1.

**INTERROGATORY NO. 3:** Please state the basis for your estimate, as represented in your STB filings, that reactivation of rail service on the Line "would translate to approximately 50,000 carloads of freight."

**ANSWER:** Ballard objects to Interrogatory No. 3 on the basis that it is vague and ambiguous. Subject to and without waiving this objection, see Skrivan and Wolford letters. The capacity of a freight car is 60 cubic yards. Thus, a demand to ship 3 million cubic yards of aggregate materials over the course of the next decade equates to 50,000 carloads of freight.

**INTERROGATORY NO. 4:** Please state the basis for your estimate, as represented in your STB filings, that it would cost \$10 million to install rail tracks and ties in the 5.75 mile-long segment of the Line owned by Kirkland, if the existing rail infrastructure within this segment is removed.

**ANSWER:** Ballard objects to Interrogatory No. 4 on the basis that it is vague and ambiguous. Subject to and without waiving this objection, see ECR 893.

Dated May 23, 2013

Respectfully submitted,

By:   
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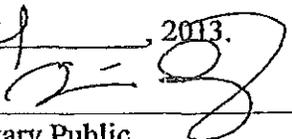
**ATTORNEYS BALLARD TERMINAL  
RAILROAD COMPANY, LLC**

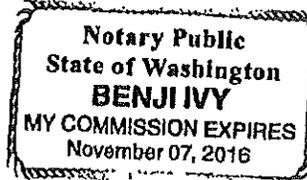
**VERIFICATION**

BYRON D. COLE, being first duly sworn on oath, state that he/she has read the foregoing Ballard Terminal Railroad Company, LLC's Answers to City of Kirkland's First Set of Interrogatories and further states that the responses set forth therein are true and correct to the best of his/her knowledge and belief.

  
Byron Cole

SUBSCRIBED AND SWORN TO  
before me this 23rd day of

MAY, 2013.  
  
Notary Public



ATTORNEY CERTIFICATION OF SERVICE

I, Thomas C. Paschalis, an attorney-at-law of the State of Illinois, hereby certify that I served a copy of the foregoing document to the following person by electronic mail on May 23, 2013:

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*Attorney for City of Kirkland*

  
\_\_\_\_\_  
Thomas C. Paschalis

BEFORE THE SURFACE TRANSPORTATION BOARD

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STB FINANCE DOCKET NO. 35731            )  
           BALLARD TERMINAL                )  
           RAILROAD COMPANY, L.L.C.        )  
 -ACQUISITION AND EXEMPTION-            )  
           WOODINVILLE SUBDIVISION        )  
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 STB DOCKET NO. AB-6 (SUB. NO. 465X)    )  
           BNSF RAILWAY COMPANY            )  
 -ABANDONMENT EXEMPTION-                )  
           IN KING COUNTY, WA             )  
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DEPOSITION UPON ORAL EXAMINATION  
   OF  
   BYRON COLE

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Taken at 600 University Street, Suite 3600  
   Seattle, Washington

DATE:            Friday, May 24, 2013  
 REPORTED BY:Katie J. Nelson, RPR, CCR  
                   CCR NO.: 2971

1 Q. -- bottom of the page, you state, "We have been  
2 engaged in active discussions with several shippers  
3 interested in restoring rail service via the  
4 Woodinville-Bellevue line segment."

5 You see that statement?

6 A. I see that.

7 Q. So I'm going to ask you about CalPortland and Bob  
8 Wolford in a minute. I know about those two.

9 A. Okay.

10 Q. Tell me about all the others. Who else have you  
11 been engaged in active discussions with?

12 A. We're not talking about hundreds, but on our  
13 other lines, we have some trans-loaders. Trans-loader is  
14 someone who has a warehouse or an open yard, hard surfaced  
15 yard, maybe a security fence around it, and has a rail  
16 siding where stuff from all over the country can be shipped  
17 by rail, which is cheaper per mile than by truck. Can be  
18 shipped by rail into the Puget Sound region, unloaded from  
19 the railcars, warehoused inside or outside, depending on  
20 the needs of the product, and then delivered the last few  
21 miles. In the trucker 's view, the last few miles is at  
22 least 150, if not 200 miles. That's a short haul for them  
23 these days on the freeways.

24 So customer whose product is in the train gets it  
25 moved 95 percent of the way across the country at the

1 lowest possible rates because the rails are cheaper than  
2 the trucks by a factor of about 25 percent. And so that is  
3 a business called trans-loading, to get the product out of  
4 the railcars onto the ground or into a warehouse and send  
5 the boxcar, empty boxcar back to Burlington Northern. And  
6 then call the customer, Okay, your stuff has landed here,  
7 safe, no damage, and they make a deal to -- as to what the  
8 delivery schedule would be for the product. Maybe it's one  
9 chunk and it all goes on one truck or maybe it's something  
10 else. They dole it out month after month.

11 So I have two of those. We have two quite active  
12 trans-loaders on our line in Puyallup. And I've talked to  
13 those people about possible opportunity in Bellevue or  
14 Woodinville or Maltby. And those guys are always, their  
15 ears perk up. And they're little guys, like us, in most  
16 cases. And these people with, you know, some limits on  
17 their finances. They like the idea of them having another  
18 one of these distribution center reloads, trans-loading  
19 facility.

20 And so, it's hard for them to get too excited  
21 when all we are is in court, and we're the little guys  
22 against people with money they haven't counted yet. So you  
23 can only get them so excited about it, all right.

24 But those people, if we are able to make a deal  
25 to get down to Bellevue, it goes right through Totem Lake

1 where there's about, at least ten warehouses that use --  
2 that are right there to be served by rail, in some cases  
3 the sidings are still there even. What's inside of them,  
4 indoor basketball courts and all kinds of adaptive reuses.

5 Q. Mr. Cole, we're going to get out of here at some  
6 point today if you would just focus on --

7 A. I'm answering your question. Have we talked to  
8 other trans-loaders, to other people who would be  
9 interested, the answer is yes. If you want to settle that,  
10 that's it.

11 Q. I want to know about the shippers interested in  
12 restoring rail service to serve businesses on the  
13 Woodinville-Bellevue segment, the line. That, as I said --

14 A. That's the guys I've been talking about.

15 Q. Who are they?

16 A. I'm not giving you the names.

17 Q. You're going to have to.

18 A. I don't know that I do.

19 Q. Okay.

20 MR. COHEN: Mr. Montgomery, you should -- I  
21 won't address this to you.

22 MR. MONTGOMERY: Thank you.

23 Q. (By Mr. Cohen) I'm afraid, Mr. Cole, that if you  
24 don't share that information -- I can't even advise you.

25 Who are the names of the shippers you've been

1 talking to about providing service on the  
2 Woodinville-Bellevue segment? Name all of them.

3 A. Do I have to do this? These guys are already  
4 busy with their businesses, they're not big-time operators  
5 like Boeing or something. They don't need to be given a  
6 bumpy ride by people who don't want them to come to  
7 Kirkland and Bellevue. What do I do here?

8 MR. MONTGOMERY: I can't instruct you not to  
9 answer. It's your call.

10 THE WITNESS: I don't know. What happens to  
11 me if I don't answer? You're shaking your head, what does  
12 that mean?

13 Q. (By Mr. Cohen) Mr. Cole, you made a  
14 representation to the Surface Transportation Board that  
15 Ballard Terminal Railroad is in active discussions with  
16 several shippers interested in restoring rail service via  
17 the Woodinville-Bellevue line segment. You mentioned two  
18 of them. We're going to talk about them shortly. I want  
19 to know if there are any others, and if so, who they are?

20 A. I get calls from people in Portland, from people  
21 in Longview, from people in Spokane, they're often small  
22 trucking companies that have their toe in the trans-loading  
23 operation somewhere in those cities. I get -- it isn't  
24 like I get the call every day, but I get calls for those  
25 kind of people wondering about opportunities that might be

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1 on our lines, our three lines here in the Northwest part of  
2 the state. And I've made some notes on a couple of those  
3 phone conversations.  
4 But some of them I talk to and say, Well, these  
5 things are a possibility, why don't we try to get together  
6 sometime, drive up here and I'll show you what we've got  
7 and see if there's land that can be developed that would  
8 work that we already control. That's what's going on today  
9 down there where they dumped another, I don't know, 200  
10 tons of rock on the acre parcel without me being there.  
11 I -- I -- doesn't seem right to me that they  
12 should come under whatever pressure you guys will apply to  
13 them just because they suggested they had an interest in  
14 trans-loading opportunity in the Northwest.  
15 Q. Okay. So you're not willing to provide those  
16 names?  
17 A. I'm afraid of what you would do to them. And it  
18 could end up that they say, Well, that guy Cole, he just --  
19 we were pestered to death and subpoenaed and so forth and  
20 so on. They're not going to like that. Can you make some  
21 kind of a pledge that you'll just talk to them and be nice  
22 and not give them a bunch of guff and make them be sitting  
23 in this chair next week?  
24 Q. I can't give you that assurance.  
25 A. Then that's not a very good deal. What kind of

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1 justice is this? How does this work?  
2 Q. Okay. You answered an interrogatory stating that  
3 you had spoken with General Mills?  
4 MR. MONTGOMERY: Objection to the extent it  
5 mischaracterizes the interrogatory.  
6 Q. (By Mr. Cohen) Do you recall that answer?  
7 MR. MONTGOMERY: Same objection.  
8 THE WITNESS: I actually haven't spoken to  
9 General Mills.  
10 MR. FERGUSON: It's Exhibit 37.  
11 THE WITNESS: I spoke to them a couple of  
12 years ago when, to our surprise, the stream of flour  
13 carrying, pressure differential cars, all of a sudden came  
14 to life again. And I'm looking on -- we get a daily report  
15 every morning at 3:30, all the cars in North America that  
16 are inbound to our three railroads. It's broken up by the  
17 three railroads. Sometimes I print them off.  
18 But anyway, there was -- I see General Mills. I  
19 called them up. I said, Hey, what is going on? The  
20 pipeline of flour back to the Safeway bakery in Bellevue is  
21 open again? And the guy said, Yes. I said, Well, that's a  
22 nice pleasant surprise. And he said, Yeah, he said, we got  
23 the contract back. Something to that effect. It was not a  
24 long conversation. It was the manager of the mill or  
25 something, I guess. I don't know for sure who it was, but

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1 it was just a confirmation that somehow the nation's  
2 network for moving all these freight cars to the place  
3 they're really supposed to go to hadn't screwed up and  
4 reverted back to something from ten months ago or  
5 something. It was true, it came.  
6 So that was my -- that was the extent of my talk  
7 with General Mills back in Great Falls, Montana. It was  
8 just about the fact that there was cars destined for  
9 Ballard again where we would unload them into pressure  
10 differential stainless steel truck trailers and truck them  
11 to the Safeway bakery.  
12 Q. This was a conversation about service to Ballard?  
13 A. That's right. They were showing up in the  
14 morning on the Ballard, here's the inbound cars. It's  
15 like, huh, the pipeline is flowing again.  
16 Q. Okay.  
17 A. And it was. That went on for a while. It was  
18 since ceased again, and again with no call from Safeway  
19 either way and no call from General Mills. We're not  
20 getting any cars right now. I don't know what their  
21 criteria is.  
22 Q. So you are not currently considering any proposal  
23 from General Mills to ship freight to or from any location  
24 on the line?  
25 A. We're not. But if we were successful in getting

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1 opened for freight, I imagine that Safeway would  
2 immediately hook up with General Mills and start sending  
3 the cars directly there, that would be the cheapest way to  
4 get the flour to their bakery. Great Falls, Montana does  
5 not compete well with flour by truck compared to flour by  
6 rail.  
7 Q. Does General Mills have a business operation on  
8 the line?  
9 A. No, all they would be doing is selling the flour  
10 to Safeway and that's a transaction that takes place with  
11 Richmond, California. Richmond, that's where the Safeway  
12 regional, you know.  
13 Q. So General Mills is not a perspective shipper on  
14 the line?  
15 A. No, I didn't say that. I think if we were able  
16 to gain access to the use of the line, that Safeway will  
17 see that and look at what the freight rates used to be and  
18 see that that's the cheapest opportunity. Beats trucking  
19 and it beats rail to Ballard, for example, and trucking  
20 over to the bakery at night. And so they would see that,  
21 Hey, this is good news and hook back up with General Mills.  
22 Q. And when you say "Safeway would hook back up with  
23 General Mills" --  
24 A. Well, I think there's been times when they bought  
25 flour from General Mills' competitors.

1 A. Right.

2 Q. Okay. All right. But no written communications?

3 A. No. It's amazing, you can go a long way with the

4 money of a handshake deal, a lot of times, but it's not a

5 very complicated business, so...

6 Q. Okay. Does Ballard have any letters of support

7 from any perspective shippers that you have not filed with

8 the Surface Transportation Board?

9 A. Would you say that again?

10 Q. Yes. So you filed letters of support from

11 CalPortland?

12 A. Mm-hm (answers affirmatively).

13 Q. And Bobby Wolford --

14 A. Right.

15 Q. -- Wolford Trucking?

16 Do you have any other letters, you or your

17 counsel, letters of support for the reactivation of rail

18 service on the line that you have not yet filed with the

19 Surface Transportation Board?

20 A. I don't think that we have any. I can't speak

21 for Doug. But I haven't tried very hard to do something

22 like that. It was a pretty big step for us to decide to do

23 this filing that brings me here today for a little outfit

24 like us. And STB regulates us and -- I want to be careful

25 that we don't poison the well with STB through some goofy

1 misstep. So I've just tried hard here to have good counsel

2 and get it right the first time.

3 Q. So no other letters of support from perspective

4 shippers that you're aware of?

5 A. I haven't tried to get them.

6 Q. Okay. Has any perspective shipper asked Ballard

7 for a rate quote?

8 A. Well, people do that. But the answer in today's

9 world for rate quotes is, go to your computer, dial up

10 BNSF, rates are there. The rates for, unless you're Boise

11 Cascade, where you can pick up the phone and call Fort

12 Worth and get an account executive, an AVP, to talk to you

13 about your rates from your 11 saw mills and 15 board plants

14 and so forth, when Boise Cascade calls, the railroads

15 listen.

16 Okay. But I get calls usually from much smaller

17 companies. But they can do the same thing, the published

18 rates are right there. You can see what the freight rate

19 is in a 100-ton boxcar and just put in what the commodity

20 and what the departure point is and what the destination

21 is.

22 Q. Right. But since --

23 A. So they don't need to call me about rates. They

24 can sit after dinner at their home computer and figure out

25 if we could ship it to Ballard Terminal's facility at

1 Puyallup, freight rate seems to be, blah, blah, blah. On

2 the other hand, if we shipped it to Woodinville or Maltby,

3 the rate would be something else. The only thing they need

4 from us is for me to tell them the rate from the

5 interchange, from our interchange with Burlington Northern

6 down to Maltby.

7 Q. My question is, has anybody asked you what the

8 rate would be for a delivery on the line?

9 A. Well, I get them from time to time.

10 Q. From who?

11 A. Well, it's -- a lot of times it's people I don't

12 even know. It's somebody in New England.

13 Q. Okay.

14 A. And he makes, I don't know, power takeoffs for

15 jet turbine boats or something. And he's trying to see if

16 shipping by rail in a boxcar is better for him than

17 shipping by truck. And we're in this national directory of

18 railroads, and that's where they get our number and we call

19 and talk about it.

20 Q. Mr. Cole, I want to be careful. I'm asking you

21 about the line between Woodinville and Bellevue, not your

22 freight segment. Have you received calls from anyone

23 asking for rate quote for service on the line?

24 A. Well, they usually never are that specific. In

25 fact, I'd say they always are not that specific. One of

1 their first questions that they ask is where do you have

2 trans-load facilities. I say -- now I say, Well, we have

3 three railroads. So one place is Woodinville on this

4 railroad we're working on here. And we have Ballard. And

5 we have two trans-loaders on our Meeker line in Puyallup.

6 So I ask them, where are you trying to get to

7 once you get it out of the boxcar. And then they tell me,

8 Well, we're trying to get to the Port of Tacoma. Well,

9 then, the logical thing is to send it to our Meeker

10 Southern railroad, because it's only 10 miles to the first

11 gate on the first dock. And they love that. That railroad

12 is in a really good strategic spot.

13 And Port of Seattle, where, I don't know, I count

14 the number of boats in the Port when I go home to West

15 Seattle and there's only two in here for the last two or

16 three days. Two freighters. That's not much.

17 Anyway, you know, the conversations are what

18 could you do for us. Well, we have three railroads, what

19 are you trying to do? Well, I want to get to the Port of

20 Tacoma docks with my product I make. Well, then, the

21 Meeker is the one to do it. Then we talk.

22 Sometimes it turns out to be traffic and

23 sometimes it doesn't. I try and direct it. I don't have

24 to invent the wheel, again, I give them the names and phone

25 numbers of the two trans-loaders we have on that line.



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1 A. Because Mr. Cole and I primarily communicate via  
2 phone.  
3 Q. And do you recall having a telephone conversation  
4 with Mr. Cole in which you discussed the need to pay court  
5 filing fees?  
6 A. Yes, more than once.  
7 Q. Number 7 reads, "STB filing fees of 10k (Doug)."  
8 Am I reading that correctly?  
9 A. Yes.  
10 Q. Do you recall what this Number 7 refers to?  
11 A. Yes.  
12 Q. Can you describe it, please?  
13 A. I was trying to ascertain the exact dollar  
14 amounts of the filing fees which Byron Cole or Ballard  
15 Terminal paid. There were two checks that had to be filed  
16 with the STB, one for, I believe around 8,000 and another  
17 one I believe for around 1,800. And Byron paid both of  
18 those.  
19 Q. Looking at Number 6 here, references a Ballard  
20 legal agreement with Tom Montgomery. Have you seen a copy  
21 of that agreement?  
22 MR. MONTGOMERY: Just a minute. Object to  
23 the form, assumes facts not in evidence; foundation.  
24 I'm sorry, did you say have you seen a copy?  
25 MR. FERGUSON: Yes.

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1 MR. MONTGOMERY: Form and assumes facts.  
2 Foundation.  
3 THE WITNESS: I don't recall, but I know  
4 that I have not seen an executed agreement.  
5 Q. (By Mr. Ferguson) But do you think you have seen  
6 a document that constitutes what you referenced here as the  
7 Ballard legal agreement?  
8 A. Perhaps. I don't recall.  
9 Q. Okay. Can you recall what it is you were  
10 referring to here in Number 6 with reference to the Ballard  
11 legal agreement?  
12 A. Again, this constitutes a status, and this would  
13 have been a to-do, something else that needed to be done.  
14 And this Item Number 6 would refer to another item, another  
15 task that needed to be completed.  
16 Q. That was a task that needed to be completed by  
17 Mr. Cole?  
18 A. Yes.  
19 Q. Okay. Looking at Number 9, there appears to be  
20 what is another task for Mr. Cole. The Item Number 9  
21 reads, "Safeway letter - bonus points (Byron)."  
22 Am I reading that correctly?  
23 A. Yes.  
24 Q. Can you describe what that refers to?  
25 A. The question was, around this point in time,

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1 Safeway was delivering carloads of flour to Ballard  
2 Terminal Railroad in Ballard. And the question was would  
3 they be willing to ship back to Bellevue.  
4 Q. Was Mr. Cole tasked with writing a letter to  
5 Safeway regarding shipments to Bellevue?  
6 A. The question for Byron was whether Safeway would  
7 be interested in that. But before he could get to it,  
8 Safeway shifted their shipments to Tacoma.  
9 Q. Their shipments of flour?  
10 A. Yes.  
11 Q. Do you know where the flour comes from Safeway?  
12 Does it come from north up towards Bellingham or does it  
13 come from the east or the south?  
14 A. That would be speculation. I don't know where it  
15 comes from. It comes from BNSF.  
16 Q. So do you know if Mr. Cole ever wrote a letter to  
17 Safeway in the past three months?  
18 A. I believe what this refers to is obtaining a  
19 letter. But as I previously answered, that was drawn mute  
20 from the perspective that the flour shipments were stopped  
21 going to Ballard and started going to Tacoma.  
22 Q. Okay. Number 8 here, reads "Minor edits to  
23 CalPortland letter (Monday)."  
24 Is Monday an individual or are you referring to a  
25 day of the week?

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1 A. That would be a day of the week.  
2 Q. Okay. Do you know if a particular individual was  
3 tasked with this to-do item?  
4 A. I believe that I followed up on that with Mike  
5 Skrivan at CalPortland following a meeting that Byron Cole  
6 and myself had with Mike Skrivan.  
7 Q. Item 8 refers to "Minor edits to the CalPortland  
8 letter," is that letter the letter that Mike Skrivan signed  
9 that was submitted to the Surface Transportation Board?  
10 A. Yes.  
11 Q. Did someone make minor edits to that letter, as  
12 indicated here under Item Number 8?  
13 A. If I remember correctly, it was primarily getting  
14 the to address straightened out, and I believe we had some  
15 updated information.  
16 Q. When you say the "to address," you mean  
17 addressing it to Cynthia Brown, a recipient at the STB?  
18 A. Yes, I believe that's one of the things that...  
19 Q. And you reference, there might have been some  
20 updated information?  
21 A. Yes, similar to what I brought today.  
22 Q. Okay. We will get to that in a moment.  
23 I take it from your answer that you can't recall  
24 looking at this e-mail, what the updated information was?  
25 A. Correct.

<p style="text-align: right;">Page 186</p> <p>1 excursion or otherwise, that might be received from  2 activities on the segment between Bellevue and Woodinville?  3 A. That's correct.  4 Q. All right. Looking at Page 5.  5 A. Yes.  6 Q. Under Section 6, "Wolford spur."  7 A. Yes, sir.  8 Q. Refers to a new thousand foot spur that will be  9 developed into Wolford Demolition and Trucking site in  10 Maltby. If you've already answered that, apologize for  11 asking it twice, but who or what is going to pay for the  12 construction of a spur into Bobby Wolford's Maltby yard?  13 MR. MONTGOMERY: Object to the extent it  14 relates to Woodinville to Snohomish. Object as asked and  15 answered.  16 THE WITNESS: It's my expectation that it  17 would be done during the rehabilitation, and that payment  18 for that has yet to be determined. It's very likely to be  19 something that would be split with Wolford.  20 Q. (By Mr. Ferguson) Okay. Turning to Page 7, this  21 first paragraph under Section 7, "Possible Construction  22 Spoils," reads that, "There are no written plans,  23 agreements or otherwise to move spoils from Bellevue to  24 Snohomish County, although there have been many  25 conversations and some analysis. No other freight has been</p>	<p style="text-align: right;">Page 188</p> <p>1 business in the region. But not being there, it doesn't  2 constitute enough to worry about.  3 Q. (By Mr. Ferguson) Okay. No one -- no particular  4 business, other than CalPortland or Bobby Wolford and  5 excluding Kemper and Wright Runstad, no other business has  6 asked ECR to provide freight rail service in or out of  7 Bellevue?  8 A. Correct.  9 Q. Okay.  10 MR. MONTGOMERY: Slow down.  11 Q. (By Mr. Ferguson) If you would please turn to  12 page with four graphs on them. It's labeled in the  13 left-hand corner, "ECR Financial Detail 2013, February  14 11th."  15 A. Okay.  16 Q. Are these graphs that you created?  17 A. Yes, they are.  18 Q. I believe I have a copy that -- I can see what  19 you're looking at.  20 A. (Indicating.)  21 Q. Okay. Could you walk me through each one of  22 these, starting with the one labeled "Revenue," please.  23 A. Revenue depicts over the time period where we  24 achieve funding and starts to go out over the next ten  25 years in how the revenue growth would occur, and that is</p>
<p style="text-align: right;">Page 187</p> <p>1 identified in Bellevue. EsCR will support this should it  2 be needed in a partnership with Wolford Demolition and  3 Trucking."  4 Do you disagree with any aspect of that statement  5 I just read?  6 MR. MONTGOMERY: Object to the form.  7 THE WITNESS: As of the date written, the --  8 I don't think my statement, no other freight has been  9 identified in Bellevue, that that statement is not correct.  10 Clearly, it had been identified in years prior even. So I  11 think I could have worded that sentence better. I think  12 that I was addressing the spoils in the first sentence.  13 And in the second sentence, I was contemplating things more  14 consistent with the current operating line, meaning  15 lumberyard, a steel factory, something to that effect, a  16 typical shipper.  17 Q. (By Mr. Ferguson) Is the statement no other  18 freight has been identified in Bellevue accurate as of  19 today, if you exclude the possibility of hauling out  20 construction spoils or hauling in aggregate material?  21 MR. MONTGOMERY: Asked and answered.  22 THE WITNESS: Yeah, I think that specific  23 accounts have not been identified. General opportunity, we  24 believe is there in the way of other businesses in the area  25 that, if we were there, we could get some trans-load</p>	<p style="text-align: right;">Page 189</p> <p>1 almost entirely excursion.  2 Q. So your one begins only upon the receipt of  3 funding to rehabilitate the line to move from excepted  4 class to either Class 1 or Class 2?  5 A. Yes.  6 Q. Okay. Does this contemplate the running of an  7 excursion train on the line from Woodinville to Bellevue?  8 A. No.  9 Q. Do you have plans, though, to run an excursion  10 train, if you receive funding and if Ballard accesses the  11 line from Woodinville to Bellevue, to run an excursion  12 train south of Woodinville?  13 A. It's my understanding that Kathy and the wineries  14 would love to get to Bellevue.  15 Q. Do you know if any track upgrades will be  16 necessary on that 12-mile segment from Woodinville to  17 Bellevue to run a passenger excursion train?  18 A. Yes, they would be.  19 Q. And what would the funding source for that be?  20 A. Given we're presently waiting until the 2015  21 legislative session, I would suspect that it will be a  22 combination of sources significantly dependent upon the  23 state and local interest.  24 Q. So the earliest that an excursion train can run  25 from Woodinville to Bellevue would be at least after the</p>

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB Docket No. AB-6 (Sub-No. 465X)**

**BNSF RAILWAY COMPANY – ABANDONMENT EXEMPTION – IN KING COUNTY,  
WASHINGTON  
(Woodinville Subdivision)**

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**STB Finance Docket No. 35731**

**BALLARD TERMINAL RAILROAD COMPANY, L.L.C. – ACQUISITION AND  
OPERATION EXEMPTION – WOODINVILLE SUBDIVISION – VERIFIED PETITION  
FOR EXEMPTION PURSUANT TO 49 U.S.C. § 10502**

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**VERIFIED STATEMENT OF AARON MCDONALD**

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I, Aaron McDonald, declare under penalty of perjury as follows:

1. I have personal knowledge of, and am competent to testify to, the following facts.
2. In June 2000 I received a B.S. in Forest Engineering from the University of Washington. I have worked as an engineer since June 2000 and received my professional license in June 2007. Through my academic studies and professional work, I have received specialized education and training in terrain survey and mapping techniques, including the use of Geographic Information System (GIS) software and other tools.
3. For 8 years between June 2000 and October 2008, I was employed as a Forest Engineer for the Washington State Department of Natural Resources (“DNR”). As part of my job duties with DNR, I conducted surveys of terrain to support the design and construction of forest logging roads for timber sale operations. This work included evaluating terrain containing elevation differences.

4. Currently I am employed as a Project Engineer in the Public Works Department, Capital Projects Division, for the City of Kirkland (“Kirkland”). I have served in this capacity since October 2008.

5. One of my current responsibilities as a Project Engineer for Kirkland is to plan and supervise the salvage of rail infrastructure within the Cross Kirkland Corridor (“CKC”), which is the 5.75 mile segment of the railbanked right-of-way running between the cities of Woodinville and Bellevue, Washington that is owned by Kirkland. These responsibilities include coordinating and monitoring the work of A&K Railroad Materials, Inc. (“A&K”), which began salvage operations in August 2013. A&K began salvage operations at the northeastern end of the CKC at the intersection of the railbanked right-of-way and Slater Avenue NE (132nd Avenue NE) and has worked its way south along the CKC.

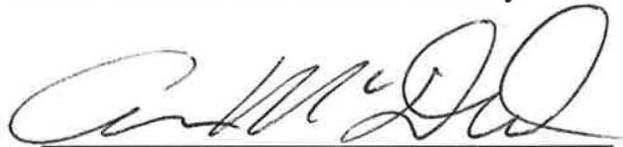
6. As of the morning of September 11, 2013, the tracks have been removed from rail bed along approximately 2.82 miles of the CKC, between Slater Avenue NE and NE 87th Street. Within this distance, all other track materials (e.g., joint bars, plates, anchors, and ties), except for ballast, have been completely removed from the rail bed along 1.16 miles of the CKC between Slater Avenue NE and NE 112th Street.

7. I have visited and observed the terrain of the section of the CKC adjacent to RJB Wholesale, Inc. (“RJB”) and studied maps of the terrain in this area. RJB’s facility is located in the vicinity of Totem Lake, a wetland area, near the northeastern end of the CKC where A&K commenced salvage work. All of the rail infrastructure has been removed from the section of the CKC adjacent to RJB’s facility

8. Within this section of the CKC, the rail bed sits atop a fill that slopes downward into a drainage running adjacent to the frontage of the RJB facility and neighboring parcels. I

have investigated this area of the CKC along the frontage of the RJB facility and neighboring properties, and observed terrain conditions and elevation differences between the surface levels of the rail bed, the drainage, and RJB's facility. Using my own height, which is approximately 6 feet, and other objects as reference points and drawing on my professional experience, studies, and training, I estimate that There are points within the drainage that appear to be between as much as 12 to 14 feet below the surface elevation of the rail bed. I also estimate the elevation differences between the surface levels of the rail bed and the frontage of RJB's facility range between 8 and 12 feet.

9. After studying the terrain of the CKC adjacent to RJB's facility, I discussed my observations with Kirkland's GIS consultant and coordinated with him to create maps of this terrain using GIS software and data. These maps are labeled as **Exhibits 1, 2, and 3** to Kirkland's response to Ballard Terminal Railroad's Petition for Reconsideration. They depict: (1) the location of RJB's facility, the CKC, and the surrounding area; (2) the surface elevation of the CKC, RJB's facility, and adjacent properties using aerial imagery; and (3) the surface elevation of the CKC, RJB's facility, and adjacent properties without aerial imagery. Based on my observations, these maps accurately depict the location of the CKC and RJB's facility and the general elevation differences between the surface of the rail bed and RJB's facility.



AARON MCDONALD, P.E.

Dated: 9/11/13

Place: Kirkland, WA