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**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, LLC. – ACQUISITION AND  
OPERATION EXEMPTION – WOODINVILLE SUBDIVISION – VERIFIED PETITION  
FOR EXEMPTION PURSUANT TO 49 U.S.C. § 10502**

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**PUBLIC VERSION  
COMMENTS OF KING COUNTY, WASHINGTON AND CENTRAL PUGET SOUND  
REGIONAL TRANSIT AUTHORITY TO BALLARD TERMINAL RAILROAD  
COMPANY, LLC.'S PETITIONS**

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Dated: October 17, 2013

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Pursuant to the Board’s Orders dated April 19, 2013, 78 Fed Reg. 24465 (April 25, 2013), and August 1, 2013, and the Board’s procedures during the government shutdown, King County, Washington, a political subdivision of the State of Washington (the “County”) and Central Puget Sound Regional Transit Authority (“Sound Transit”) file these joint comments on the three petitions filed by Ballard Terminal Railroad Company, L.L.C.’s (“BTR”) on April 3, 2013 in the above-captioned dockets.

BTR seeks, *inter alia*, to vacate the NITU, acquire the tracks and rail facilities, acquire the County’s reactivation authority, and obtain operating authority, all with respect to an 11.2-mile portion of the Woodinville Subdivision, formerly owned by the BNSF Railway Company, between MP 23.8 in Woodinville, WA, and MP 12.6 in Bellevue, WA (the “Line”). The Line is currently in railbanked status pursuant to the Notice of Interim Trail Use (“NITU”) issued by the Board in 2008. *BNSF Ry. C. – Abandonment Exemption – In King County, WA*, STB Docket No.

AB-6 (Sub-No. 465X), slip op. at 6 (Service Date Nov. 28, 2008) (“NITU Order”). The County is the interim trail user.

## I. INTRODUCTION

When BTR initiated this proceeding, it made clear that the success of its Petitions depended on two things: (1) preservation of the rails on the 5.75-mile portion of the Line in Kirkland – the removal of which “would effectively moot the new STB proceeding” – and (2) the existence of shipper demand for freight service on the Line. After almost six months of motions, discovery, and factual investigation, it is overwhelmingly clear that BTR’s Petitions fail by BTR’s own terms. The Board denied BTR’s Motion for Preliminary Injunction and Kirkland has now removed all of the rails, ties, and other track material from the Kirkland portion of the Line. By BTR’s own admission, it is unable to afford the estimated \$10,000,000 cost to replace the rails, ties, and switches and is physically unable to initiate or provide service. On that basis alone, this proceeding is “effectively moot” and should be dismissed.

Despite BTR’s efforts to find shippers, it has failed to do so. BTR’s petitions presented two letters from potential shippers – Wolford Trucking and Demolition and CalPortland – but neither letter requests service and the authors of the letters have denied that they have any current need for service. Recently, BTR has suggested that other potential shippers exist, but none of them have actually requested service, the projected shipping volumes are too low to support new service, and, in any event, there are no tracks available to serve them. Again, BTR’s Petitions fail on their own terms.

BTR’s Petitions also fail by the terms the Board has established. On August 1, 2013, the Board denied BTR’s Motion for Preliminary Injunction because, *inter alia*, BTR could not show a likelihood of success on the merits. Specifically, the Board held a railroad may reactivate

service on a railbanked line only if there is genuine shipper demand *and* if the railroad has the financial capability to initiate service, including acquisition of the necessary right-of-way. As noted above, the Board found, and the full record confirms, that there is no genuine shipper demand.

The Board also found, and the full record also confirms, that BTR lacks the financial resources to initiate service, even assuming the rails had not already been removed. BTR has limited financial reserves and is relying only on vague promises that it will be able to raise funds in the future. Those limited financial resources were insufficient to allow BTR to meet its obligations when the rails were in place. Now that the rails have been removed from the Kirkland portion of the Line, BTR is approximately \$10,000,000 farther away from being able to initiate and provide freight service on the Line. Moreover, BTR owns no portion of the Line, leases no portion of the Line, and has no contract or other permission to use, or acquire any interest in, any portion of the Line. BTR is not currently negotiating with any of the owners of the Line to acquire any of those rights and has not presented any concrete plan to obtain the financing necessary to reactivate service, including the funds necessary to acquire an interest in the right-of-way. BTR's optimism about future funding and right-of-way acquisition is insufficient to make it a "bona fide" petitioner for purposes of reactivation.

Granting BTR's Petitions would not advance the national railroad policy because it would not lead to the reactivation of freight rail service. Absent any showing by BTR that there are actual shippers demanding service on the Line, absent any showing that BTR has the property rights it needs to make use of the Line, and absent any showing that BTR has the financial capacity to acquire such property rights or install new track infrastructure, there is simply no plausible basis to believe that BTR could successfully restore service. Conversely,

vacating the NITU based on such an unrealistic and completely speculative proposal would contravene the Congressional policy favoring the recreational and public use of dormant rail corridors and encourage energy efficient transportation use. More immediately, vacating the NITU on the Line would effectively wipe out the tens of millions of dollars the County, Sound Transit, Kirkland and other stakeholders have invested in the Line as part of a comprehensive, multi-jurisdictional effort to develop the Line for a variety of important public uses, including preservation of the Line for potential future rail service by a bona fide railroad. Much would be lost and nothing gained by granting BTR's ill-conceived Petitions.

Finally, the Board should be wary of granting the exemptions requested here because BTR's true goal is not to restore freight service, for which there is no demand and which BTR concedes will generate little revenue and not cover costs; rather the goal is to establish an intra-state excursion service, which BTR's noncarrier partner, Eastside Community Rail ("ECR"), and its predecessor GNP Railway have long pursued. An essential element of BTR and ECR's excursion rail plan was to use the existing rails in order to avoid the expense of constructing new track. When Kirkland decided to salvage the track to construct a trail on the rail bed, BTR and ECR set up a pretextual demand for freight rail service in a desperate attempt to stop Kirkland and preserve their excursion rail plan. That effort has now failed, and the Board should deny the Petitions and reject BTR's attempt to abuse the Board's jurisdiction.

## **II. BACKGROUND**

### **A. Overview of the Line and the Woodinville Subdivision**

The Line is part of the Woodinville Subdivision (the "Subdivision"), a line of railroad previously owned and operated by the BNSF Railway Company and its predecessors. The Subdivision consists of two parts: a 33.25-mile-long corridor extending from Subdivision

milepost 5.00 in Renton through the cities of Bellevue, Kirkland, Woodinville, and portions of unincorporated King County, to milepost 38.25 in Snohomish County; and a separate, 7.3-mile-long spur, which intersects the Woodinville Subdivision at a “wye” junction in Woodinville just north of Subdivision milepost 23.80, and continues south through downtown Redmond (the “Spur”).<sup>1</sup> See *BNSF Woodinville Subdivision, Existing Rail Lines and Regional Trails (May 1, 2005)*, attached hereto as Exhibit 1.

In 2008, BNSF sought authority from the Board to abandon the Subdivision, including the segment comprising the Line. See NITU Order at 1. In support of its petition, BNSF declared that there was no longer any demand for rail freight service on the Line. See *id.* at 2. BNSF explained that freight traffic on the Line had “been declining steadily in recent years,” and that there was insufficient freight demand to justify continued operation of the Line. See BNSF Petition for Exemption at 4, 10 (Filed Aug. 11, 2008) (“BNSF Petition”). At the time, there were only two shippers on the Line, both of which supported the proposed abandonment, NITU Order at 2 n.2, and due to changes in land use patterns and increased property values along the Subdivision there was “limited, if any, freight rail growth opportunities, even for a short line operator.” BNSF Petition at 13. BNSF estimated the net liquidation value of the Line at \$243,660,000. *Id.* at 5. The STB found that “[t]here are *no* other prospects for future rail traffic [on the Subdivision].” NITU Order at 3 (emphasis added).

In response to BNSF’s petition, King County filed a request for a NITU in order to establish a trail and other public uses on the Subdivision. See *id.* at 4-5. With BNSF indicating support, the Board authorized BNSF to abandon or to railbank the Line. *Id.* at 6. To ensure that

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<sup>1</sup> A short segment of the Subdivision known as the Wilburton Tunnel, from MP 10.25 to MP 11.65 (all in Bellevue), was fully abandoned in 2008 in order to allow WDOT to widen Interstate 405. *BNSF Railway Company – Abandonment Exemption – in King Cnty., WA*, STB Docket No. AB-6 (Sub-No. 453-X), Notice of Abandonment (Filed Mar. 10, 2008). This segment is among those that Port acquired from BNSF in 2009 and conveyed to King County in 2013, as explained *infra*.

no potential opportunity to preserve rail service was overlooked, the Board invited any interested party to submit an Offer of Financial Assistance (“OFA”) and conditioned the NITU Order on completion of the OFA process. *See* 73 Fed. Reg. 51,047 (Aug. 29, 2008); NITU Order at 4, 5, 7. Although BTR and its then-partner, GNP Rly, Inc. (“GNP”), considered submitting an OFA for GNP to pay \$81 million for the Subdivision, they opted not to do so. *See* Transcript of Deposition Upon Oral Examination of Douglas Engle, attached hereto as Exhibit 2 at pp. 174-175 (“Engle Dep.”). In fact, no OFA was filed. *See* NITU Order at 7.

Subsequently, BNSF entered into a trail use agreement with King County for the Renton-Woodinville segment of the Subdivision, including the Line and the Redmond Spur. NITU Order at 2.<sup>2</sup> King County also acquired BNSF’s reactivation right with respect to the railbanked portions of the Subdivision. *BNSF Ry. Co. – Acquisition Exemption – In King County, WA*, STB Finance Docket No. 35148 (Service Date Sept. 18, 2009).

In 2009, BNSF conveyed its property interests in the Subdivision to the Port for a purchase price of \$81.4 million and other consideration. *See* Subdivision Notice of NITU Consummation, *supra* n.2, at Exhibit A p. 1. BNSF retained, however, an exclusive freight easement over the northernmost portion of the Subdivision from Milepost 23.8 in Woodinville to Milepost 38.25 in Snohomish (the “Freight Segment”). BNSF issued a Request for Quotes (“RFQ”) seeking a Third Party Operator (“TPO”) to haul freight on the Freight Segment while acknowledging that other parts of the “the corridor will be railbanked for use as a trail.” Verified Statement of Susan Odom (“Odom V.S.”), attached hereto as Exhibit 3 at 1, ¶ 3, Exhibit A at § 8.1(b).

– CONFIDENTIAL INFORMATION –

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<sup>2</sup> *See also* Notice of Consummation, *BNSF Ry. Corp. – Abandonment Exemption – In King County, WA*, STB Docket No. AB-6 (Sub-No. 465X) (Filed Feb. 5, 2010) (“Subdivision Notice of NITU Consummation”).

BNSF ultimately accepted GNP's proposal, and BNSF conveyed the freight easement to GNP. *See* Verified Petition for Exemption Pursuant to 49 U.S.C. 10502, STB Finance Docket No. 35731 (filed April 3, 2013), at Exhibit B p. 2 (verified statement of Byron Cole).

In conjunction with acquiring the reserved freight easement over the Freight Segment, GNP entered into a Railroad Right of Way License ("License") regarding its use of the Subdivision. The County was identified as a third-party beneficiary to the License, with full rights to enforce the terms of the License. Railroad Right-of-Way License between Port of Seattle and GNP Rly, Inc., at Section 13.9, attached hereto as Exhibit 5. The License limited GNP's operations beyond the Freight Segment to excursion service over only a short portion of the railbanked Redmond Spur, and by limiting head and tail freight operations to an even shorter portion of the Spur.<sup>3</sup> *Id.* 1.6, 1.7, 2.1 and 2.2 ("[n]otwithstanding the foregoing, [GNP] is prohibited from using the Excursion Spur at any time for the purpose of setting out or picking up rail cars.") (License). As discussed in greater detail below, the Port rejected GNP's request to extend rights for excursion service south to Milepost 11.7 in Bellevue.

GNP and the Port understood that through the License GNP "proactively agreed with the Port not to operate [freight] service on the Lines." Port of Seattle Comment on GNP Rly Petition filed in Docket FD 35407 (Dec. 2, 2010) at p. 2, attached hereto as Exhibit 6. *See also*, Letter from GNP Rly to the Port of Seattle (Dec. 9, 2009) at p.2, attached hereto as Exhibit 7. ("[O]pportunities to expand the freight business on the line will be limited. This will reduce the amount of revenue from freight . . . GNP may reasonably expect.") GNP, in turn, entered into a

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<sup>3</sup> The other agreement was an Operations and Maintenance agreement regarding management of the Freight Segment of the Subdivision from MP 23.8 in Woodinville to MP 34.25 in Snohomish.

contract with BTR in January 2010 to allow BTR to provide freight rail service to the few remaining shippers on the Freight Segment. Exhibit 6 at pp. 1-2.

The Port subsequently conveyed various property interests in the railbanked portions of the Subdivision to other regional stakeholders as follows:

- King County acquired an easement over all of the railbanked portions of the Subdivision to permit King County to fulfill its trail use responsibilities. *See* Subdivision Notice of NITU Consummation at Exhibit A.<sup>4</sup>
- The City of Kirkland purchased the 5.75 mile segment of the Line that traverses Kirkland, subject to the County’s trail easement, for approximately \$5 million.
- The City of Redmond purchased the portion of the Spur from milepost 3.4 to milepost 7.3, subject to the County’s trail easement, for approximately \$10 million.
- Puget Sound Energy purchased a utility easement over the entire Subdivision (except for within the City of Redmond), subject to the County’s trail easement, for approximately \$13.5 million.
- Sound Transit purchased a 1.1-mile segment of the Subdivision in downtown Bellevue and a high capacity transportation easement over the remainder of the Subdivision, as well as the Spur from milepost 0.0 to 3.4, all subject to King County’s existing trail easement, for approximately \$15.75 million.
- King County purchased the Port’s remaining interest in the Subdivision from approximately MP 5.0 – MP 12.4 (between Renton and Bellevue) and MP 13.5 – MP 14.6 (between Bellevue and Kirkland), and from approximately MP 20.3 in Kirkland to MP 23.8 in Woodinville, as well as its remaining interest in the Spur from MP 0.0 to MP 3.4 and a trail easement over the Freight Segment from Milepost 23.8 to the Brightwater Treatment Plant in Snohomish County, for approximately \$15.8 million in cash, property, or a combination thereof. King County’s original trail easement remains in force on the Sound Transit-owned segment within the City of Bellevue, as well as within the City of Kirkland’s 5.75-mile segment.

## **B. Regional Planning Efforts to Develop Recreational and Other Public Uses of the Railbanked Portions of the Subdivision**

In 2013, in order to coordinate and promote the development of multiple public uses on the railbanked portions of the Subdivision, King County designated those portions as a “corridor of regional significance” and established a Regional Advisory Council to carry out a regional

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<sup>4</sup> This easement does not, however, include property rights necessary to operate freight rail service. Such rights would have to be acquired separately from the owner of the underlying fee simple and other applicable rights.

planning process for it. *See* Exhibit 8 at p. 5 recitals A, C (King County Motion 13801 (Dec. 11, 2012)). The Regional Advisory Council is composed of representatives from the City of Kirkland, the City of Redmond, King County, Sound Transit, and Puget Sound Energy, and is further charged to reach out to other stakeholders as well. *See id.* at p. 6 recital D, p. 7 recital J. The Regional Advisory Council and its technical support team have met regularly to carry out its mission and are in the process of preparing a final report, which contemplates further collaborative planning work (“RAC 2.0”).<sup>5</sup> In addition to the regional planning efforts coordinated by the County, the City of Kirkland, Sound Transit, and the City of Redmond all have begun projects to improve their respective portions of the Subdivision for use by the public.

### **1. Sound Transit**

Sound Transit is working towards construction of its 14-mile East Link light rail extension on portions of the Subdivision to provide a fast, frequent and reliable connection to and from the Eastside's biggest population and employment centers to downtown Seattle, Sea-Tac Airport and the University of Washington. Sound Transit has budgeted \$2.8 billion for the East Link project. An East Link track segment will be located on the Line just north of NE 8<sup>th</sup> Street in Bellevue. A major East Link station and related improvements will be located adjacent to, and partly on, the Line in that area. This elevated station will include a passenger drop-off, pedestrian access and bus connections, and provide important access to adjoining medical facilities and the “Spring District” area of Bellevue, which is slated for major re-development. See City of Bellevue’s Bel-Red Subarea Zoning Map, attached hereto as Exhibit 9.

East Link is presently in the final design stage, during which Sound Transit will complete

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<sup>5</sup> For Regional Advisory Council meeting notes, agendas, and materials, including the draft final report and its recommendations for further collaborative planning, see <http://www.kingcounty.gov/operations/erc-advisory-council.aspx> (visited September 25, 2013).

the design of the trackway, stations<sup>6</sup> and art installations as well as determine construction methods, including sequencing and mitigation. Sound Transit plans to start construction in 2015. The project is estimated to create more than 20,000 direct, construction-related jobs over the duration of the work and 34,000 to 42,000 indirect jobs as the stimulus spreads throughout the economy. Consistent with the regional planning effort, and recognizing that use of the right-of-way must allow for the possibility of restored rail service, Sound Transit is designing East Link to accommodate, future freight rail but not on the same alignment as the current tracks.

Based on lack of historic demand, the absence of freight operations in recent years, and the absence of industrially-zoned properties or customers on Sound Transit's right of way<sup>7</sup>, and the removal of the Wilburton Tunnel,<sup>8</sup> Sound Transit has assumed that there would be no freight rail operations on the existing tracks during construction. The resumption of freight operation prior to the completion of East Link would impose a substantial financial and logistical burden on Sound Transit.

## **2. The Cross-Kirkland Corridor**

The City of Kirkland has initiated a master planning process to develop a regional paved trail and a regional transit route on the Line within the City, which the City calls the Cross-Kirkland Corridor. While that planning process continues, Kirkland intends to use the Cross-Kirkland Corridor as a gravel surface recreational trail. Earlier in 2013, the City of Kirkland

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<sup>6</sup> Specifically, the "Hospital Station" will be located at NE 8th St in Bellevue, and the "Spring District Station" will be located at, in the new mixed use residential/retail/office area to the north and east of the Hospital Station. *See* Exhibit 9 (Bel-Red Subarea Zoning Map).

<sup>7</sup> While a portion of the area adjacent to Sound Transit's right of way was once zoned for industrial use, the City of Bellevue has rezoned all property adjacent to the right of way for hospital, medical, and related uses (to the west of the right of way) and for special residential/retail/office mixed use area known as the "Spring District." *See* Exhibit 9 (Bel-Red Subarea Zoning Map) The "Spring District Station" will be located in the heart of the Spring District. *Id.*

<sup>8</sup> *See* Note 1, *supra*. The abandonment of the Wilburton Tunnel eliminated any remaining through north-south freight transit over the Subdivision. While WSDOT has agreed to permit future rail or trail connections over and under the highway, there are no current plans or funding for such a project.

issued a contract to remove the rails and other railroad facilities in the Cross-Kirkland Corridor in order to develop the gravel trail on the existing rail bed. *See* Exhibit B to BTR’s Motion for Preliminary Injunction (“BTR Motion”) (excerpts of Declaration of City Manager Kurt Triplett).

As the interim trail user for the railbanked portions of the Subdivision outside the City of Redmond, King County is aware of and respects Kirkland’s plans as the owner of this segment of the Line to salvage the rail facilities that it acquired and then construct a gravel trail along the Cross-Kirkland Corridor consistent with the NITU Order. Through the Regional Advisory Council, King County is coordinating planning for development of the Subdivision along with the City of Kirkland, Sound Transit, the City of Redmond, and Puget Sound Energy, all of which own significant property interests in the Subdivision and Spur, and with other public entities.

**C. Eastside Community Rail and BTR’s Current Operations on the Freight Segment**

In 2011 creditors forced GNP into bankruptcy and the Board denied GNP’s Petition to establish freight rail service on the railbanked portion of the Redmond Spur on the grounds that GNP was not a bona fide petitioner. *GNP Rly, Inc. – Acquisition and Operation Exemption – Redmond Spur and Woodinville Subdivision*, STB Finance Docket No. 35407 (Service Date June 15, 2011). In addition to the bankruptcy, the Board noted other “significant questions” that would weigh against the conclusion that GNP was a bona fide petitioner, including the explicit terms of the License, which prevented GNP from operating freight on the Spur and the putative shippers’ lack of facilities for receiving freight. *Id.* at p.6. In late 2012 a new entity, Eastside Community Rail, LLC (“ECR”) acquired GNP’s assets from the bankruptcy trustee, including the freight rail easement, the License, and GNP’s Operations and Maintenance (“O&M”) Agreement with the Port. *See Eastside Community Rail, LLC -- Acquisition And Operation Exemption--GNP Rly, Inc.*, Notice of Exemption (STB Service Date Nov. 23, 2012) (notice of

exemption to authorize ECR, a non-carrier, to acquire GNP's assets). Doug Engle, formerly the Chief Financial Officer of bankrupt GNP, is the sole member and also the sole employee of ECR. Engle Dep., Exhibit 2 54:1-2, 117:11-17.

As the Petitions assert, BTR continues to provide rail service on the Freight Segment by agreement with ECR. At present it is unclear whether BTR is operating under a 2012 interim agreement authorized by the GNP bankruptcy trustee, or under some sort of oral agreement between Mr. Engle and Mr. Cole, or under a lease from ECR executed in late April 2013; the legal status of the April 2013 lease remains in question.<sup>9</sup> Mr. Engle and Mr. Cole are operating as though the lease were in effect. Engle Dep., Exhibit 2 at 159:22-23 ("I believe we are both acting as if it [the lease] is the lease agreement between us. We are simply waiting for the rubber stamp from the STB.").

Whatever the legal status of their lease, clearly ECR and BTR have a close relationship: Mr. Cole described himself and Doug Engle as having been "joined at the hip" for three years. See Excerpts of Deposition Upon Oral Examination of Byron Cole ("Cole Dep."), Exhibit 10, 157:10-12. Not only does BTR operate on the Freight Segment by virtue of the freight rail easement ECR acquired out of the GNP bankruptcy, BTR also appears to rely on ECR and Mr. Engle for critical activities such as hiring track inspectors, applying and lobbying for state grants or loans to rehabilitate the Freight Segment, and negotiating with neighboring local governments that wish to make improvements that might affect the Freight Segment. See, e.g., Cole Dep., Exhibit 10 at 72-73, 83:6-7, 85:1-3 ("saying we [BTR] have responsibility for the track doesn't

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<sup>9</sup> It is not certain that BTR has the authority to use the Freight Segment pursuant to a 5-year lease executed by BTR and ECR in April 2013. BTR needs the Port's approval to operate on the Freight Segment. See Decision in *Ballard Terminal R.R. Company LLC—Lease Exemption—Line of Eastside Community Rail, LLC*, STB Finance Docket No. 35750 (Service Date May 1, 2013). BTR and ECR are operating as though the lease is in effect, but it appears that the Port of Seattle has not yet approved the lease due to an ongoing insurance dispute with ECR. See, e.g., Engle Dep., Exhibit 2, 150:21-22 ("The Port of Seattle has issues with this agreement. Or with the O&M agreement"); 158- 159, 164. See also *Port of Seattle v. Eastside Community Rail, LLC, Arbitration Demand (Am. Arb. Ass'n date June 25, 2013)*, attached hereto as Exhibit 11.

relieve Doug [Engle] from the job of trying to find some money so that I can get the job done.”); 191:17-25, 192:1-9.

Currently, BTR serves just three customers: Spectrum Glass, a Boise Cascade distribution center, and Matheus Lumber. A fourth shipper went bankrupt a few years ago. Since BTR began serving the Freight Segment, freight volumes have declined by roughly ten percent each year, from 270 total cars in 2010 to 235 cars in 2011 and just 213 total cars in 2012. *See* Cole Dep., Exhibit 10, at 46:11-25, 47:1-9.

– CONFIDENTIAL INFORMATION –

Indeed, BTR has relied, in varying degrees, on income from its Ballard and Meeker lines to underwrite operations on the Freight Segment. *See, e.g.*, Cole Dep., Confidential Exhibit 10, 33:15-25, 34:1-2; 84:1-8; 169:19-25, 170:1-6; 226:5-12.

Apparently recognizing the limited freight demand on the Freight Segment, BTR and ECR are relying on future excursion service to underwrite the cost of maintaining the Freight Segment. *See* ECR Business Plan (Feb. 19, 2013) at pp. 18-19, attached hereto as Exhibit 13. ECR’s conceptual business plan would allocate Freight Segment maintenance costs between BTR and a future excursion train on the Freight Segment and part of the Spur. *See* Engle Dep., Exhibit 2, pp. 59-61 and Eastside Community Rail, Corridor Alignment – Cost Sharing Example,

attached hereto as Exhibit 14. Moreover, ECR assumes that excursion service will account for 90% of revenues, with freight accounting for less than 10% of revenues. Exhibit 13 at p.2, p.15 (chart labeled “Revenue”).<sup>10</sup>

However, the future excursion train service on the Freight Segment is apparently dependent on ECR first obtaining a \$6.2-million-dollar direct subsidy from the Washington State Legislature. Engle Dep., Exhibit 2 133:13-25, 134:1-6, 189:2-5.<sup>11</sup> Moreover, BTR and GNP accepted the Freight Easement knowing that the Port, which owned the right-of-way at the time, had rejected GNP’s proposal to allow for excursion service south of Milepost 23.8 to Milepost 11.7 in Bellevue. *See* Correspondence between the Port of Seattle and GNP Rly dated November 25, 2009, December 9, 2009, and December 10, 2009, attached hereto as Exhibits 15, 7, and 16, respectively); *see also* Exhibit 5 at §§2.1, 2.8 and Exhibit 6. BTR and ECR would also have to obtain property rights from Kirkland, Sound Transit, and the County to operate as far south as Milepost 11.7 in Bellevue.<sup>12</sup>

In any event, neither ECR nor BTR have any passenger rail equipment or any funds or contracts to operate such a service. Exhibit 2, Engle Dep. 57:9-10 (“We expect that operation to

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<sup>10</sup> Page 15 of Exhibit 13 is labeled “confidential” but was provided to the City of Kirkland by ECR as part of a PDF attachment to Doug Engle’s March 11, 2013 email to Kirkland City Manager Kurt Triplett, as shown on the first page of Exhibit 13 itself. As a public record under Washington law (see generally RCW ch. 42.56), and pursuant to Section 2 of the agreed protective order the Board entered in this matter, p.15 of Exhibit 13 is not confidential. Protective Order in *BNSF Railway Co. – Abandonment Exemption – In King County, Wa. (Woodinville Subdivision)*, STB Docket No. AB-6 (Sub-No. 465X); *Ballard Terminal Railroad Co., LLC – Acquisition and Operation Exemption – Woodinville Subdivision – Verified Petition For Exemption Pursuant To 49 U.S.C. § 10502*, STB Finance Docket No. 35731 (STB Service Date August 21, 2013).

<sup>11</sup> There is a fundamental question whether such a subsidy is expressly forbidden by the Washington State Constitution. *See* Wash. Const. Art. VIII §5, attached hereto as Exhibit 17. (“The credit of the state shall not, in any manner be given or loaned to, or in aid of, any individual, association, company, or corporation.”). For further discussion of ECR’s desired legislative subsidy see Reply of King County, Washington and Central Puget Sound Regional Transit Authority to Ballard Terminal Railway’s Motion for Preliminary Injunction pp.15-16 (June 4, 2013), and previously filed with the Board in this matter.

<sup>12</sup> It also appears that ECR has failed to initiate excursion service in the time provided under the lease with the Port, Arbitration Demand, Exhibit 11, at ¶ 8, and would be required to obtain additional consent from the Port to initiate excursion service at this time.

be formed in the future[.]”); Exhibit 13 at 14 (ECR Business Plan) (Powerpoint slide showing organizational chart with separate cell labeled “Excursion B[ounty] of Wa[shington]”); Exhibit 10, Cole Dep., p. 171:20-22 (“We’re [Ballard] not going to fund, finance, build, acquire an excursion train and the pieces of power to run it[,] ever. It’s way too expensive for us.”). It is thus unclear how BTR and ECR will pay to maintain the existing Freight Segment, let alone any extension of freight service onto the Line.

**D. BTR and ECR Lack the Customers and the Property Rights Needed to Reactivate the Line**

**1. There Is No Freight Demand On the Line**

BTR’s petitions assert that there is demand for hauling construction spoils from, and aggregate materials to, various planned infrastructure and redevelopment projects in the greater Bellevue-Kirkland area. BTR’s petitions specifically assert that “a demand for rail service has developed on the Line” and that “two customers have come forward and asked Ballard to service them.” Exemption Petition at 4. The evidence developed in this case shows, however, that there is no such demand.

As a general matter, Mr. Engle repeatedly contacted some of the region’s biggest developers, but was unable to interest any of them in moving construction spoils out of Bellevue by rail. Exhibit 2, Engle Dep. 41-44. Beyond CalPortland and Wolford, Mr. Cole could not identify any *potential* shippers who had inquired about service on the Line. *See* Cole Dep., Exhibit 10, at pp. 108-110. As recently as late May, Mr. Engle’s sworn testimony confirmed that there are none. Engle Dep., Exhibit 2 at 44:10-14 (“Q. Other than CalPortland and [Wolford], are you aware of any entity that has expressed an interest in receiving freight service on the [L]ine? A. No.”).

The Wolford and CalPortland letters are general letters of support, not requests for service. The letters do not “ask[] Ballard to serve them.” At most, the letters identify potential future highway and construction projects that might be able to use rail service, but neither letter indicates that there is any current demand or need for rail service. Mr. Michael Skrivan, the author of the CalPortland letter, testified that he did not understand his letter to be a request for rail service. Excerpts from Deposition Upon Oral Examination of Michael Skrivan, Sr. attached hereto as Exhibit 18 (“Skrivan Dep.”) 27:13-16, 34:16-25. Mr. Skrivan also testified that when he wrote the letter, CalPortland had no current or foreseeable need for freight rail service on the Line. *Id.* at 34:23-25, 35:1-2.

For its part, Wolford Trucking and Demolition has operated directly adjacent to the Freight Segment without rail service for over 40 years. Exhibit 19 Wolford Dep., at 7:4-8, 130:9-18. Further, a company with whom Wolford subcontracts currently is undertaking a major highway project in the Bellevue-Kirkland area — apparently without any need for rail service on the Line. *Id.* at 94:17-25, 95:5-10.

In any case, both Wolford and CalPortland have made clear that they have no current contracts with Ballard or ECR for rail service. *See, e.g., Id.* at 44:1-4 (“Q. Does your company have any business dealings with Ballard Terminal Railway currently? A. Not now. We were going to put some ecology blocks and do some work for them but we never did.”); Skrivan Dep., Exhibit 18, 37:11-15 (“Q. My question was whether you had any contract with Eastside Community Rail. A. No. Q. Or with Ballard? A. No.”).

Byron Cole confirmed the absence of any agreements for service between BTR and either Wolford or CalPortland, or any other shippers regarding the Line. *See Cole Dep.*, Exhibit 10, at

126:10-13; 127:1, 22-25; 128:3-16 (shippers generally); *see also id.* at 141:15-19 (CalPortland); 146:14-19 (Wolford).

Moreover, neither Wolford nor CalPortland are located on the Line. Skrivan Dep., Exhibit 18, 52-53, 54:1-7; Wolford Dep., Exhibit 19, 66:10-18; Engle Dep., Exhibit 2, 173:13-18. Nor do they own, or have a current plan to obtain, any property rights in or on the Line. Skrivan Dep., Exhibit 18, 53-56; *see also* Wolford Dep., Exhibit 19, 103:12-25, 112:13-16. Their potential use of the Line depends on obtaining contracts from customers that might require the use of rail service, but neither Wolford nor CalPortland have such customers. Skrivan Dep., Exhibit 18, 62:7-11; *see also* Wolford Dep., Exhibit 19, 103:22-25.

Wolford's potential use of the Line would be to transport dirt and spoils from construction sites in Bellevue and deliver them to BTR for rail transport to an unspecified stretch of the Freight Segment for construction of a trail/maintenance of way road there. *See, e.g.,* Wolford Dep., Exhibit 19, 99:7-25, 100:1-5. But, Mr. Wolford testified that contracts to haul dirt from construction sites in Bellevue have not been let and invitations to bid have not yet been sent. *See, e.g., Id.* at 32:2-12; 34:8-23; 92:20-25, 93:1-9. ECR's business plan plainly states that "[t]here are no written plans, agreements or otherwise to move spoils from Bellevue to Snohomish County[.]". *See* Exhibit 13 at p. 8. Mr. Wolford also testified that Wolford has no contracts to *dispose* of construction spoils from Bellevue or Kirkland along the Freight Segment for a trail/maintenance of way road. *See* Wolford Dep., Exhibit 19, p. 99:22-25, 100:1-17. Mr. Engle confirmed that ECR has no contracts with Snohomish County or any other public agency to build a trail or maintenance of way road along the Freight Segment. *See* Exhibit 2 Engle Dep. 76:19-25, 77:1.

CalPortland's use of the Line would be to deliver aggregate to customers. Skrivan Dep., Exhibit 18, 54:15-24. Mr. Skrivan testified that CalPortland does not presently have any contracts requiring aggregate to be moved by rail on the Line. *See, e.g., Id.* at 54:7-11. Mr. Skrivan testified that his primary interest is in selling aggregate to BTR or ECR for use as railroad ballast, but that he has no contract for even that work. *Id.* at 15:21-25, 16:1-3; 26:21-25, 27:1-2. Mr. Skrivan confirmed, moreover, that there is no need for CalPortland to use rail service for the potential projects that CalPortland is targeting. *Id.* at 38:7-17.

Similarly, Mr. Cole explained that the people he talked to would not see a lot of difference between receiving service on the Freight Segment in Woodinville, or receiving service on the Line in Bellevue; given the short distances involved, they could transload just as easily using the current Freight Segment as the Line. Cole Dep., Exhibit 10 126:16-19. ECR's Business Plan flatly states that "[n]o other freight has been identified in Bellevue." Exhibit 13 at 8.

In an attempt to overcome the lack of substance to its asserted "demand," BTR recently offered additional evidence purporting to show shipper demand on the Line. *See Ballard Terminal Railroad Co.'s Petition For Reconsideration*, STB Docket Nos. AB 6 (Sub-No. 465X, FD 35731 (Filed Aug. 22, 2013) ("Reconsideration Petition"). However, none of that evidence demonstrates actual demand.

First, BTR claims that General Mills is about to request service to a Safeway bakery located on the Line. Reconsideration Petition, Tab 1 at 3. But BTR provides no documentary evidence of this impending request and does not even suggest that a request for service has in fact been made. Given that Safeway voluntarily stopped receiving shipments by rail in Bellevue prior to BNSF's abandonment, *BNSF Ry. Co. – Abandonment Exemption – In King County, WA*,

AB-6 (Sub-No. 465X), slip op. at 3 (STB served Nov. 28, 2008) (“NITU Order”), Mr. Engle’s assertion is difficult to accept at face value. In any event, his assertion rests on undocumented speculation that does not establish the existence of shipper demand.

Second, BTR asserts that RJB Wholesale has expressed an interest in receiving shipments of pipe and other material to its facility in Kirkland. Reconsideration Petition, Tab 3. However, the existence of possible interest in service amounting to 2-3 cars per month hardly demonstrates evidence of adequate demand to justify reactivation. It is also difficult to accept this as a genuine request for service when RJB has never before requested service, despite having been located on the Line for many years.

Moreover, there is no spur onto RJB Wholesale’s property. Based on the map attached to the Reconsideration Petition at Tab 3, p. 4, RJB Wholesale appears to have only a small frontage on the Line, raising the question of whether a spur could be constructed, whether RJB Wholesale or BTR would have to acquire more property, or whether the costs of construction would make economic sense. The Board has previously noted that a purported shipper’s access to a line is a material consideration in evaluating alleged shipper demand in the reactivation context. *See GNP Ry., Inc. – Acquisition and Operation Exemption – Redmond Spur and Woodinville Subdivision*, FD 35407, slip op. at 6, n.6 (STB served June 15, 2011) (lack of existing industrial track and switches to putative shippers supported a finding that the railroad was not a bona fide petitioner for reactivation purposes). Finally, even if RJB Wholesale is a genuine potential shipper, it would not make BTR a bona fide Petitioner because the small volume RJB Wholesale suggests it might ship would not generate enough revenue to undermine the Board’s well-founded conclusions that (1) BTR cannot afford the “substantial” cost of acquiring the necessary interest in the right-of-way and (2) BTR lacks the financial means to initiate and carry out its

proposed service.

Third, BTR claims that CT Sales would like to use rail to ship building supplies to possible future customers in Bellevue. Reconsideration Petition, Tab 1 at 3. CT Sales is not located on the Line; it is located on the Freight Segment of the Woodinville Subdivision, well north of the Line.<sup>13</sup> There does not appear to be a spur or siding giving CT Sales access to the Line. More fundamentally, CT Sales' anticipated use appears to depend entirely on it obtaining future contracts to sell construction materials for use in unidentified future projects. There is no current demand or need for service. CT Sales is no different than any other putative shipper on the Freight Segment, like Wolford Trucking, which the Board already found to be insufficient.

Fourth, BTR proffers a letter from Snohomish County Public Works generally describing a need for fill material for a project in Snohomish County, many miles from the Line. Reconsideration Petition, Tab 1, Attachment E. The letter speculates that such fill could come from construction projects in Bellevue and could be hauled by rail. But the letter makes clear that (1) fill from Bellevue may not meet Snohomish County's technical standards for fill material and (2) that any decision to ship any potential fill would be made solely by an as-yet unknown entity who may win an as-yet unannounced potential future public bidding process. By its own terms, the letter is not a request for service and the letter makes clear the speculative nature of any future deliveries of fill to Snohomish County from any area near the Line.

**2. Neither BTR Nor ECR Have Any Property Interest in, or Contractual Right to Use, the Line**

Neither BTR nor ECR has any property interests in the Subdivision south of MP 23.8, including specifically the Line and the Cross-Kirkland Corridor. Exhibit 10, Cole Dep. 216:2-4

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<sup>13</sup> CT Sales' postal address is 7227 West Bostian Road, Woodinville, WA 98072, which is on the Freight Segment, in the Maltby area of unincorporated Snohomish County, Washington, near Wolford Trucking and Demolition.

“Q. [D]oes Ballard own any property on the Woodinville Subdivision south of Woodinville? A. No.”). BTR does not lease any portion of the Line, nor does it have any contract or other rights to make any use of the Line. *Id.* at 95:17-22 (“Q. Does Ballard own any real property interest in the line? . . . A. No.”); *see also id.* at 100-103 (testifying that Ballard has not sought to acquire a freight rail easement from Kirkland, King County, or Sound Transit); *see also* Exhibit 2, Engle Dep. 138:13-18 (“Q. Has it [ECR] attempted to acquire title to any land . . . between Woodinville and Bellevue? A. No.”). Furthermore, the Port and GNP mutually understood the License to foreclose its holder (now, ECR) from operating either excursion or freight on the Line. Exhibit 7 at 2; Exhibit 6. Thus, not only do BTR and ECR lack the basic property and financial resources necessary to reactivate the Line; as successor in interest to the License that GNP negotiated and executed just over three years ago, BTR’s landlord ECR acquired its interests knowing full well that its predecessor agreed to forego freight and excursion rail on the Line.

#### **E. Procedural Background and Recent Developments**

At the time BTR filed the Petitions in this matter, it had also filed suit against Kirkland in Federal District Court seeking an injunction to prevent Kirkland from salvaging the rails and ties on the 5.75-mile section of the Line in Kirkland. After the Court denied that request and dismissed BTR’s case, BTR filed a Motion for Preliminary Injunction Pursuant to 49 U.S.C. § 721(b)(4) in these proceedings again seeking to enjoin Kirkland from salvaging the rails and ties. On August 1, 2013, the Board denied that Motion, finding that BTR had not met any of the standards for obtaining a preliminary injunction. August 1 Decision, slip op. at 5-7. Specifically, the Board found that BTR had not demonstrated a likelihood of success on the merits to be considered a “bona fide” petitioner because it lacked the financial resources to

reinstate service or acquire rights to use the Line and because there was no evidence of demand for the restoration of rail service on the Line. *Id.* at 5. The Board found that BTR would not be irreparably harmed in the absence of an injunction because BTR's lack of financial resources and shipper demand meant that it would be unable to restore or provide rail service even if the injunction were granted. *Id.* at 6. The Board found that Sound Transit, the County, Kirkland, and other interested parties would be harmed by the injunction because of financial and other losses caused by delay in pursuing their transportation and recreational plans for the Line. *Id.* Finally, the Board found that public interest consideration weighed against the injunction because the BTR's plan was not "a concrete, realistic proposal" that justified imposing the costs of delay on Kirkland. *Id.* at 7. The Board's August 1 Decision was effective on the date of service. *Id.*

Following the August 1 Decision, Kirkland's salvage contractor, A&K Railroad Materials, Inc., began to salvage the rails, ties, and other track material on the Line.<sup>14</sup> As Kirkland informed the Board by letter submitted in these dockets on October 17, 2013, all rails, ties, and other track material have been removed from the Kirkland portion of the Line (except track embedded in grade-crossings).

### **III. ARGUMENT**

BTR's Petitions seek, in summary, to vacate the NITU on the Line, authority to acquire the rail assets on the Line, authority to acquire an interest in the Line, operating authority on the Line, and authority to acquire the reactivation right for the Line. Furthermore, BTR seeks an exemption pursuant to 49 U.S.C. § 10502 for its Petitions. BTR frames the central issue posed by its Petitions as follows:

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<sup>14</sup> On August 22, 2013, BTR filed a Petition for Reconsideration seeking reconsideration of the August 1 Decision. The County and Sound Transit filed an Opposition on September 14, 2013. As of October 8, 2013, the Board has not ruled on the Petition.

Where the petitioning carrier does not own the right-of-way or hold the common carrier right to reactivate service, whether the Board must approve a request by an authorized rail carrier to restore to active common carrier service a rail line that has been converted to trail use under the National Trails System Act[.]

Exemption Petition at 4. The Board restated the question as “under what circumstances will the Board grant a carrier’s request to vacate a NITU to permit reactivation of rail service when the petitioning carrier does not own or have any other interest in the right of way?” 78 Fed. Reg. 24465 at 24466.

It is not necessary to reach that issue, however, because the Petitions are moot. BTR has admitted that its Petitions would be moot if the rails were removed from the Cross Kirkland Corridor. That has happened. There are no longer any rail assets for BTR to acquire and the cost to install new rails and ties is far more than BTR can afford. Therefore the Petitions are moot and should be dismissed.

Even if the Petitions are not moot, they are without merit because BTR is not a bona fide petitioner, and the Board should not vacate a NITU or award reactivation authority to a carrier without the property rights to use the Line, the financial capacity to secure those property rights and reinstate service, or demonstrated demand for rail service. Any other answer would be inconsistent with decades of Board and I.C.C. decisions, and with the express purpose of the Trails Act. For each of these reasons, BTR’s petitions should be denied.

**A. BTR’s Petitions are Moot**

A case or proceeding becomes moot when the underlying facts of a case develop such that it is no longer possible to provide the relief sought by the petitioner. *See, Nat’l Solid Wastes Mgmt. Ass’n—Pet. for Declaratory Order*, FD 34776, slip op. at 4 (STB served Mar. 10, 2006) (dismissing declaratory order petition seeking declaration as to railroad status of certain property as moot because facility had been permanently closed). The removal of the rails, ties, switches,

and other railroad infrastructure from the 5.75-mile section of the Line located in Kirkland has effectively made it impossible to provide BTR the relief it seeks. BTR itself has made it clear that its Petitions would be moot once the rails were removed: “The removal of the rails will effectively moot the new proceeding” and “the Board's proceeding on [BTR's] petitions will be rendered essentially meaningless.” BTR's Motion for Injunction Pursuant to 49 U.S.C. § 721(b)(4) at p. 9 (filed May 8, 2013). BTR estimates that the cost of installing new rails would be approximately \$10,000,000, which it described “as a sum so significant that it could ultimately preclude the restoration of rail service altogether.” *Id.* at 10. Similarly, in its earlier effort to obtain an injunction in Federal Court, BTR stated that removing the rails would cause it to lose “its opportunity to have the STB . . . render a decision.” *Ballard Terminal RR Co. v. City of Kirkland*, Case No. 2:13-cv-586, Plaintiff's Motion for Temporary Restraining Order at 2 (W.D. Wash. Filed April 1, 2013) (Exhibit 20).

By BTR's own admission, granting its Petitions would be meaningless because the cost of installing new track is so prohibitive that BTR would never be able to exercise the authority it requests. This is even clearer in light of the Board's August 1, 2013 Decision, in which the Board found that BTR's financial condition made it an “unrealistic prospect” to believe that BTR could afford to reinstitute service on the Line, even assuming the rails were preserved. Adding approximately \$10,000,000 to the costs of reinstating service renders the probability that BTR could exercise any authority the Board granted, not just “unrealistic” but “impossible.” BTR's own financial records show that it cannot afford to acquire an interest in the right-of-way, install new track and other infrastructure, initiate service, and carry out service. Accordingly, the Petitions are moot and should be dismissed.<sup>15</sup>

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<sup>15</sup> Although it is worded vaguely, BTR appears to ask that the Board to somehow compel Kirkland to sell the rails and ties on the Line for “net liquidation value.” Exemption Petition at 8. But the Board cannot compel such a sale

## **B. Legal Framework for Reactivation of Rail Service on a Railbanked Line**

Even if the Board does not find the Petitions moot, the Petitions should be denied on the merits because BTR is not a bona fide petitioner and cannot satisfy any criterion for reinstating rail service on the Line.

### **1. Railbanking Pursuant To The Trails Act**

The Trails Act created a mechanism to simultaneously promote the creation of recreational trails and preserve rights-of-way for future use as rail corridors. 16 U.S.C. § 1247(d) (2006). Under the Trails Act, a line that would otherwise be abandoned is made subject to an interim trail use agreement, which allows an entity to use the line for trail and other recreational or public uses, provided that such trail or other uses be terminated upon a bona fide request to restore freight rail service on the line. *GNP Rly, Inc. – Acquisition and Operation Exemption – Redmond Spur and Woodinville Subdivision*, STB Finance Docket No. 35407, slip op. at 5 (Service Date June 15, 2011). A railbanked line is not abandoned, and remains part of the national rail network. *Id.*

Once railbanked, a right-of-way is subject to only limited Board authority. The “Board does not ‘regulate activities over the actual trail, and [has] no involvement in the type, level, or condition of the trail. . . .’” *National Trails System Act and R.R. Rights-of-Way*, STB Docket No. EP 702 at 5, Service Date Feb. 16, 2011 (quoting *Ga. Great Southern. Div. – Aban. & Discontinuance Exemption – Between Albany & Dawson, in Terrell, Lee, & Dougherty Counties, Ga.*, 6 STB 902, 907 (2003)). *See also* 49 C.F.R. § 1152.29(d)(1) (issuing a NITU authorizes removal of rails). The Trails Act requires only that a railbanked corridor be preserved in a condition that could accommodate the reactivation of rail service. “The Trails Act does not

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(see text at note 17, *infra*) and BTR cites no authority for the proposition. That request is also moot because the rails and ties have already been sold to Kirkland’s salvage contractor, A&K Railroad Materials, Inc.

prohibit a trail sponsor from removing track or making changes to the [right-of-way] . . . , so long as the *property* remains available for reactivation of rail service.” *GNP Rly, Inc. – Acquisition and Operation Exemption – Redmond Spur and Woodinville Subdivision*, STB Finance Docket No. 35407, slip op. at 5 (Service Date June 15, 2011) (emphasis added). Those changes are permissible “even if those structural changes were to make it difficult to return the line to freight operation. . . .” *The Baltimore and Ohio R.R. Co., Metro. Southern R.R. Co. and Washington and Western Maryland Ry. Co. – Abandonment and Discontinuance of Service – In Montgomery County, MD and the District of Columbia*, STB Docket No. AB 119 (Sub. No. 112) at 2 (Service Date Feb. 22, 1990). Conversely, the reactivating railroad must expect to bear the expense of reconstruction to allow for the reactivation of rail service. *See* 16 U.S.C. § 1247(d) (providing for restoration and or reconstruction of railbanked line by a railroad); *Georgia Great Southern Div., South Carolina Cent. R.R. Co. – Abandonment and Discontinuance Exemption – Between Albany and Dawson, in Terrell, Lee, and Dougherty Counties, GA.*, STB Docket No. AB-389 (Sub-No. 1X) (Service Date May 16, 2003) (matters relating to the use of a railbanked corridor are beyond Board’s authority; issues of obligations between railroads and trail users upon reactivation is purely contractual).

## **2. Reactivation of Railbanked Corridors**

Neither the Trails Act nor the Board’s regulations explicitly address how a railbanked line may be reactivated. The Act simply recognizes that “if [] interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule or law, as an abandonment of the use of such rights-of-way for railroad purposes.” *Id.* at § 1247(d). The Board’s regulations similarly require a “[Certificate of Interim Trail Use] [to] indicate that any interim trail use is subject to future restoration of rail service . . . .” 49 C.F.R. §§ 1152.29(c)(2) & 1152.29(d)(2) (2009). The regulations further

recognize that a Certificate of Interim Trail Use (“CITU”) or NITU will be vacated either when the trail sponsor decides to terminate trail use, *id.*, or “if an application to *construct* and operate a rail line over the right-of-way is authorized under 49 U.S.C. § 10901 and 49 C.F.R. Part 1150, or exempted therefrom under 49 U.S.C. § 10502,” *id.* at §§ 1152.29(c)(3) & 1152.29(d)(3) (emphasis added).

The Board and its predecessor agency, the Interstate Commerce Commission (“I.C.C.”) have determined that the abandoning railroad does not have to seek approval under Section 10901 in order to restore rail service on a railbanked line because the line had never been abandoned fully and the abandoning railroad already had operating authority. *Iowa Power, Inc. – Constr. Exemption – Council Bluffs, IA*, 8 I.C.C.2d 858, n.12 (Service Date Dec. 20, 1990). The Board explained this principle more fully in *Georgia Great S. Div., South Carolina Cent. R.R. Co. – Abandonment and Discontinuance Exemption – Between Albany and Dawson, in Terrell, Lee, and Dougherty Counties, GA.*, STB Docket AB-389 (Sub-No. 1X) (Service Date May 16, 2003), in which the Board approved the vacation of a NITU over the objections of the trail sponsor because the corporate successor to the abandoning railroad, and thus the holder of the reactivation right, decided to restore rail service. The Board held that

[N]o authority under 49 U.S.C. § 10901 is required to reactivate rail service where, as here, the carrier who would have been the abandoning railroad had there not been rail banking and interim trail use, or its successor, is the one who decides to restore active rail service. *See Iowa Power*. Because it could have performed the operations without seeking any additional regulatory approval prior to the interim trail use, the resumption of service by the same carrier or its successor does not trigger the licensing requirement of Section 10901, or require that its successor in interest seek concurrences from any other carrier.

*Id.* at 5 (citation omitted). The holder of the reactivation right had also retained the necessary property rights when the right-of-way was railbanked. *Id.*

When an entity other than the abandoning railroad proposes to reactivate a railbanked line, the Board has adopted a different standard, however, and requires the petitioner to demonstrate that it is a “bona fide” petitioner. *GNP Rly, Inc. – Acquisition and Operation Exemption – Redmond Spur and Woodinville Subdivision*, STB Finance Docket No. 35407, slip op. at 5 (Service Date June 15, 2011) (GNP Railway was not a “bona fide” petitioner because it was in bankruptcy and unable to meet any financial obligations of a carrier, and because its purported shippers lacked the facilities to receive rail service).

Recently, in its August 1 decision denying BTR’s request to enjoin Kirkland from removing the rails in Kirkland, the Board reaffirmed that rule and clarified that to be considered a “bona fide” petitioner one must “be in a financial position to reinstitute service,” “be able to pay appropriate compensation for the use of the right-of-way,” and demonstrate “that there is demand to reactivate rail service over the Line.” *BNSF Railway Co. – Abandonment Exemption – In King County, Wa. (Woodinville Subdivision)*, STB Docket No. AB-6 (Sub-No. 465X); *Ballard Terminal Railroad Co., LLC – Acquisition and Operation Exemption – Woodinville Subdivision – Verified Petition For Exemption Pursuant To 49 U.S.C. § 10502*, STB Finance Docket No. 35731 slip op. at 5 (STB Service Date August 1, 2013) (“August 1 Decision”).

This rule is consistent with earlier Board and I.C.C. decisions requiring that a non-abandoning railroad demonstrate that it is in a position to provide rail service before the Board will vacate a NITU and authorize reactivation. For example, in *Iowa Power*, the I.C.C. considered a request by a non-carrier to reactivate rail service over a railbanked line. *Iowa Power* at 867. The I.C.C. conditioned reactivation, and vacation of the NITU, on the petitioner (1) having obtained all necessary I.C.C. authority to operate on that line, (2) being in a position to provide active rail service, and (3) having obtained the consent of the abandoning railroad. *Id.*

at 867-68. *See also R.J. Corman R.R. Co. /Pennsylvania Lines, Inc. – Constr. and Operation Exemption – In Clearfield County, PA*, STB Finance Docket No. 35116, slip op. at 5 (Service Date July 27, 2009) (a Class III carrier may reactivate a railbanked line by obtaining authority to acquire the line pursuant to Section 10902 (or an exemption) and by terminating the trail use agreement). *See also BG & CM R.R., Inc. – Exemption from 49 U.S.C. Subtitle IV*, STB Finance Docket 34398, slip op. at 3 (Service Date Oct. 17, 2003) (new operator approved under Section 10502 after acquisition of property from abandoning railroad).

Whether phrased in terms of a “bona fide petitioner” or “being in a position to provide active rail service,” the Board will not vacate a NITU or authorize reactivation of a railbanked line unless the petitioner demonstrates that there is actual shipper demand for service on the line, that the petitioner owns, or is in a position to obtain, the property rights needed to use the line, and that the petitioner has the financial capacity to carry out its plan. In every case that the County and Sound Transit could identify, the Board vacated a NITU only when the Petitioner made those showings, as well as met the other *Iowa Power* standards.<sup>16</sup> Further, the Board has denied petitions to vacate a NITU when the petitioner lacks the financial capacity to carry out its

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<sup>16</sup> *See Georgia Great Southern Div., South Carolina Cent. R.R. Co. – Abandonment and Discontinuance Exemption – Between Albany and Dawson, in Terrell, Lee, and Dougherty Counties, GA.*, STB Docket No. AB-389 (Sub-No. 1X) (Service Date May 16, 2003) (vacating NITU on request of successor in interest to abandoning railroad that had acquired all property and railroad rights in the line and that had demonstrated demand for use of the line); *R.J. Corman R.R. Co. /Pennsylvania Lines, Inc. – Constr. and Operation Exemption – In Clearfield County, PA*, STB Finance Docket No. 35116, slip op. at 7 (Service Date July 27, 2009) (a Class III carrier may reactivate a railbanked line by obtaining authority to acquire the line pursuant to Section 10902 (or an exemption), by acquiring the line from its owner and then terminating the trail use agreement); *BG & CM R.R., Inc. – Exemption from 49 U.S.C. Subtitle IV*, STB Finance Docket No. 34398, slip op. at 2-3 (Service Date Oct. 17, 2003) (CITU vacated and operating authority granted when petitioner demonstrated it had already acquired the right of way and track assets and had actual shippers requesting service); *Missouri Pacific R.R. Co. – Abandonment Exemption – In St. Louis County, MO. (Carondelet Branch)*, STB Docket No. AB-3 (Sub-No. 98X) (Service Date April 25, 1997) (vacating NITU when railroad had executed a contract to acquire right-of-way and trackage and demonstrated demand from an active shipper); *Norfolk and Western Ry. Co. – Abandonment Between St. Mary’s and Minster in Auglaize County, OH*, STB Docket No. AB-290 (Sub-No. 68) (Service Date Oct. 15, 1993) (vacating a CITU only after proof of leasehold interest, new operator had obtained operating authority in separate proceeding, and consent of abandoning railroad).

plan. *GNP Rly, Inc. – Acquisition and Operation Exemption – Redmond Spur and Woodinville Subdivision*, STB Finance Docket No. 35407, slip op. at 5 (Service Date June 15, 2011).

### **3. Transfer of the Reactivation Right**

The Board has permitted the transfer of the residual reactivation right from the abandoning railroad to another entity when the abandoning railroad expressly forswears its intent to reinstate service. *King Cnty., WA – Acquisition Exemption – BNSF Ry. Co.*, Finance Docket No. 35148 (Service Date Sept. 17, 2009). In approving that transfer, however, the Board made clear that the reacquisition right is not exclusive, and that “a bona fide petitioner, under appropriate circumstances, may request the NITU to be vacated to permit reactivation of the line for continued rail service.” *Id.* at 4. Moreover, the Board has suggested that seeking to acquire a reactivation right does not relieve a petitioner from its obligation to meet the *Iowa Power* factors. *See City of Coeur d’Alene – Acquisition and Operation Exemption – Union Pacific R.R. Co.*, Finance Docket No. 34980, slip op. at 1 (Service Date March 30, 2007) (denying a request by the City of Coeur d’Alene, Idaho for authorization to acquire the Union Pacific’s reactivation rights on a railbanked line because, *inter alia*, there was no evidence of an agreement between the City and the railroad, nor was there evidence that the Union Pacific was unwilling or unable to restore rail service in the future).

### **4. The Acquisition of Rail Rights-of-Way**

Despite the Board’s broad authority over matters relating to railroad operations, rail carrier activities and railroad facilities, the Board does not have jurisdiction to require the acquisition or transfer of railroad rights-of-way except in very limited circumstances not applicable here.<sup>17</sup> In general, the Board *authorizes* the purchase and sale of rail property, but it

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<sup>17</sup> See 49 U.S.C. § 10904(f) and 49 C.F.R. § 1152.27(g), (h) (Offer of Financial Assistance); 49 U.S.C. § 11102 (use by a rail carrier of terminal facilities owned by another); 49 U.S.C. § 11324(c) and 49 C.F.R. Part 1180

does not compel the transfer. *See In re Chicago, Milwaukee, St. Paul and Pacific R.R. Co.*, 882 F.2d 1188, 1191 (7th Cir. 1989) (affirming Board’s determination that its grant of authority to acquire and operate a line is “merely permissive,” does not require the transfer of the line, and does not affect the rights and remedies of the parties to the transaction in the event of a dispute). Even obtaining operating authority does not make one a rail carrier in itself, because a carrier needs the property rights to use the right-of-way in order to actually provide rail service. *See, e.g., Riffin*, Finance Docket No. 35245, slip op. at 6. The Board relies on private parties to reach private agreements on the transfer of property rights, *James Riffin – Petition for Declaratory Order*, STB Finance Docket No. 35245, slip op. at 6 (Service Date Sept. 15, 2009), *petition for review docketed*, No. 09-1277 (D.C. Cir. Nov. 12, 2009), based on which the Board can grant the appropriate authority pursuant to 49 U.S.C. §§ 10901, 10902 (2006). For example, in short line exemption petitions, the Board requires a petitioner to provide details about necessary private agreements in its petition so the Board can be assured that an agreement is, or will be, in place, before granting the requested authority. 49 C.F.R. § 1150.43(c).

**C. Under What Circumstances Will The Board Grant A Carrier’s Request To Vacate A NITU To Permit Reactivation Of Rail Service, When The Petitioning Carrier Does Not Own Or Have Any Other Interest In The Right Of Way?**

**1. Vacating a NITU Before the Petitioning Carrier Has Obtained the Necessary Property Rights to Use the Right-of-Way Is Contrary to Board Precedent, the Purpose of the Trail Act, and the National Rail Policy**

The direct answer to the Board’s question is “Under no circumstances.” As detailed above, Board precedent is clear that it will vacate a NITU and authorize reinstated service for a “bona fide” petitioner who can demonstrate that it can actually provide the proposed service by, *inter alia*, demonstrating actual shipper demand, ownership of, or demonstrated ability to obtain,

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(transfers of rights as a condition of approval of control, merger, acquisition, lease, trackage rights or other consolidation); and 49 U.S.C. § 24311(c) (Amtrak operating or ownership rights).

an interest in the right-of-way, and the financial capacity to acquire that interest, make the line operable, and ongoing provide service.

Vacating a NITU before a petitioner has demonstrated actual shipper demand, obtained the necessary property rights, or secured the financial capacity to execute its plan would not advance any of the purposes of the Trail Act or the national rail policy. Vacating a NITU would not in itself allow the reactivation of freight rail service because actual operation of rail service requires legal access to the line and actual shippers to use the line, neither of which the Board can mandate. Vacating the NITU would, obviously, destroy the right to use the right-of-way for trail and other public uses, and thereby undermine the goal of the Trails Act to provide for recreational trails and other public uses while preserving the right-of-way for potential future rail use.

Moreover, vacating the NITU without certainty that active rail service will be restored would raise substantial questions regarding the status of the corridor and its legal title. Where there is no trail use and no rail carrier has the property rights to operate rail service on the line, what is the status of the line? Would such a state of limbo allow reversionary property owners to assert their dormant rights? *See, e.g., Haggart v. United States*, 89 Fed. Cl. 523 (2009) (certifying a class of plaintiffs consisting of landowners who own reversionary rights to property along the Line and adjoining segments of the Woodinville Subdivision) (Court of Federal Claims Case No. 09-103L, pending). Litigation over title would not advance the national rail policy or the Trails Act, and could lead to a disposition of title that would eliminate both the railroad and trail character of the corridor. Vacating the NITU without assurance that bona fide freight rail use will occur could lead to the very situation the Trails Act was designed to avoid: loss of a potentially valuable freight rail corridor, loss of important public recreational and energy

efficient uses, and wasteful quiet title litigation. *Preseault v. I.C.C.*, 494 U.S. 1, 17 (1990) (purpose of Trails Act is to create recreational trails and to preserve freight rail corridors).

## **2. BTR Fails to Justify Creating a New Rule Permitting Vacation of a NITU Without Property Rights to Use the Right-of-Way**

In arguing that the NITU Petition should be granted, BTR advances a broad reading of the Board's statements that the Board will entertain requests to vacate a NITU from a bona fide petitioner under appropriate circumstances. *BNSF Ry. Co. – Abandonment Exemption – In King County, WA*, STB Docket No. AB-6 (Sub-No. 465X), slip op. at 6 (Service Date Nov. 28, 2008); *GNP Rly, Inc. – Acquisition and Operation Exemption – Redmond Spur and Woodinville Subdivision*, STB Finance Docket No. 35407, slip op. at 5 (Service Date June 15, 2011). BTR interprets that to mean that a NITU must be vacated whenever “any approved rail service provider” makes a request to restore service. Exemption Petition at 4 (citing and quoting *Georgia Great Southern* and *Iowa Power*). BTR's admitted “interpretation” finds no support in Board precedent, including the very decisions that BTR cites. Decades of I.C.C. and Board decisions make clear that the Board will not vacate a NITU simply because a railroad with an operating certificate appears before the Board claiming there is interest in restoring service.

First, as discussed above, the Board has made clear in these proceedings that a “bona fide petitioner” is one that has the financial resources to initiate and carry out its proposed service, including the ability to acquire necessary rights to use the right-of-way, and that has received a genuine demand for restored service. Board's precedent, including in particular, *GNP Ry.*, *Georgia Great Southern* and *Iowa Power*, teach that a NITU will not be vacated unless and until the petitioner (1) has received all Board authority, (2) is in a position to provide active rail service, and (3) has obtained the consent of the abandoning railroad or the successor holder of the reactivation right. *Supra*, 27-30. The Board has applied those factors to require a petitioner

to demonstrate that there is actual demand for service, that is has, or can obtain, the necessary property rights, and that it has the financial capacity to carry out its plan *before* it will vacate a NITU. For example, in both *Georgia Great Southern* and *Iowa Power* the petitioner *already* owned the necessary property rights *and* demonstrated that there was *immediate* demand for service.

Moreover, in *Iowa Power*, the Board underscored the importance of obtaining all necessary property and other rights *before* vacating a NITU. In *Iowa Power* the Board expressly conditioned vacating the NITU on the petitioner obtaining the consent of the abandoning railroad. Even though such consent appeared to be noncontroversial and readily obtainable, the Board did not assume that it would be obtained, and refused to vacate the NITU until consent actually had been obtained. Similarly, in *City of Coeur d'Alene – Acquisition and Operation Exemption – Union Pacific R.R. Co*, Finance Docket No. 34980, slip op. at 1 (Service Date Mar. 30, 2007), the Board denied a request by the City of Coeur d'Alene, Idaho for authorization to acquire the Union Pacific's reactivation rights on a railbanked line because, *inter alia*, there was no evidence of an agreement between the City and the railroad, nor was there evidence that the Union Pacific was unwilling or unable to restore rail service in the future.

Far from supporting BTR's theory that the Board will vacate a NITU upon the simple request of "any approved rail service provider," Board and I.C.C. precedent demonstrate that a NITU will not be vacated, and new operating authority will not be granted, unless and until a petitioner can demonstrate that it has already met all of the prerequisites detailed above.

Applying these standards, it is clear that BTR's request to vacate the NITU must be denied.

### **3. BTR Cannot Meet The Standard For Vacating The NITU**

#### **a. There Is No Actual Demand For Rail Service On The Line**

The linchpin of BTR's Petitions is its claim that demand for service has recently arisen on the Line. BTR's petitions claims that two shippers have submitted letters stating "they are ready, willing, and able to utilize the line once rail service is reinstated." BTR Motion for Preliminary Injunction at 5. The facts do not support BTR's claim, as the Board has already found.

Contrary to BTR's assertion, and as the Board determined in the August 1 Decision, the letters from CalPortland and Wolford Trucking and Demolition do not state, or even suggest, that they are "ready, willing, and able" to use the Line. At most, the letters indicate a general level of support for potential rail service without making any commitment to use it. Letters from private entities, even entities that could be a shipper on the line, expressing only general interest in, or support for, rail service are insufficient to show actual demand for rail service. *Norfolk Southern Ry. Co. – Petition for Exemption – In Baltimore City and Baltimore County, MD*, STB Docket No. AB 290 (Sub-No. 311X), slip op at 5 (Service Date May 4, 2010).

Moreover, the sworn testimony from the authors of those letters makes clear that neither CalPortland nor Wolford has requested rail service on the Line and that neither entity has any current need for rail service on the Line. *Supra*, 16-18. Both Wolford and CalPortland indicated that future projects in the Bellevue area had the potential to support rail service, but they also admitted that they had no contracts to work on those projects, no customers who needed to be served by the Line, and no current need to use the Line. *Id.* As with the businesses in *Norfolk Southern* and *GNP Rly*, CalPortland and Wolford appear to be interested in having the option to use rail service, but neither has an actual or foreseeable need for it. Further, as recently as May 2013 BTR had not received any expression of interest from any other entity. Cole Dep., Exhibit

10, at pp. 108-110; Engle Dep., Exhibit 2 at 44:10-14. In fact, when Mr. Cole raised the idea of transloading in Bellevue, potential shippers indicated that, due to the short distance between Woodinville and Bellevue, transloading in Woodinville was just as good as transloading in Bellevue, undercutting much of BTR's claimed "need" for the Line. Cole Dep., Exhibit 9, at 126:13-23.

The letters from public officials that BTR also submitted are of even less help. As a general matter, letters of support from public agencies are not evidence of shipper demand because local governments are not shippers. *Norfolk Southern Ry. Co. – Petition for Exemption – In Baltimore City and Baltimore County, MD*, STB Docket No. AB 290 (Sub-No. 311X), slip op at 5 (Service Date May 4, 2010). The letter from the Snohomish County Executive Office expresses only the most general support for the idea of freight service (outside his County), but is not a request for service. Moreover, Snohomish County's focus is on trail construction in Snohomish County and indirect economic benefits to Snohomish County, many miles from the Line itself. The letter from the City of Snohomish hardly mentions freight service on the Line at all, and seems entirely focused on upgrading the track north of Woodinville to accommodate passenger service. The letter from Woodinville is similarly general and vague, and certainly does not evidence any demand for rail service on the Line.

Finally, the evidence of additional potential shippers BTR presented in its Petition for Reconsideration does not change the Board's August 1 finding that there is no evidence of shipper demand to justify reactivation. As described above: there is no evidence that General Mills has in fact requested service; RJB Wholesale is interested in minimal service and lacks access to the Line; and neither CalPortland, Snohomish County, nor CT Sales are located on the Line or have current contracts that could be fulfilled through service on the Line. *Supra* at 18-

20. In addition to being speculative, the projected demand for service is insufficient to overcome the important public purposes for which the Line is to be used. *See Norfolk and Western Ry. Co.—Abandonment Exemption—In Cincinnati, Hamilton County, OH*, AB-290 (Sub-No. 184X), slip op. at 8-10 (STB served May 13, 1998) (rejecting exemption petition when “there exist overriding public purposes sufficient to justify our withdrawing our jurisdiction” and the claim of freight demand was “neither persuasive nor meritorious”); *Denver & Rio Grande Railway Historical Found.—Adverse Abandonment—In Mineral County, CO*, AB-1014, slip op. at 7-12 (STB served May 23, 2008) (after “closely” examining “alleged prospects for [freight] service” and finding such claims “to be unsubstantiated,” Board denied request in favor of other public projects).

**b. BTR Lacks The Property Rights It Needs To Use The Line**

From Milepost 23.8 south to Milepost 12.6 the fee interest in the Line is owned by King County, the City of Kirkland, and Sound Transit. *See Eastside Rail Corridor (ERC) Ownership* (Feb. 19, 2013), attached here to as Exhibit 21. Neither BTR nor ECR own or hold any right to use any portion of the Line for any purpose. The License that ECR inherited from GNP was expressly and specifically written to eliminate any privilege of or reference to freight or excursion rail on the Line, and GNP so understood it at the time. Exhibit 5 at §2.8; Exhibit 7. For its part, BTR owns nothing, leases nothing, and has no permission to use any part of the Line. Fundamentally, without a property or contract right to use the Line, BTR lacks the ability to hold itself out as a rail carrier on the Line and cannot provide rail service on the Line. *See Saratoga and North Creek Ry., LLC – Operation Exemption – Tahawus Line*, STB Finance Docket No. 35631, slip op. at 4 (Service Date Oct. 11, 2012) (noting that a carrier must have property rights to use a line, in addition to Board authority, to begin operations); *James Riffin –*

*Petition for Declaratory Order*, STB Finance Docket No. 35245, slip op. at 6 (Service Date Sept. 15, 2009), *petition for review docketed*, No. 09-1277 (D.C. Cir. Nov. 12, 2009) (failure to obtain a cognizable possessory interest in a line of railroad rendered him incapable of exercising the authority granted to him to acquire and operate the line). BTR’s legal right to operate on the adjoining Freight Segment also remains in question. *Supra*, n.9. BTR is thus unable to show that the appropriate circumstances exist to vacate the NITU or that it satisfies the *Iowa Power* test for vacating the NITU. *See also James Riffin d/b/a The Northern Cent. R.R. – Acquisition and Operation Exemption – In Baltimore City, MD*, STB Finance Docket No. 34982, slip op. at 3 (Service Date Oct. 9, 2007) (Board prevented use of, and revoked, a class exemption to operate on a dormant rail line when there were substantial doubts about an entity’s ability to obtain property rights).

Moreover, BTR has not identified any ongoing negotiations or other process by which it intends to obtain the necessary property rights. Any discussions with the County and Kirkland ended by late 2012. *See* Exemption Petition at 8. Neither BTR nor ECR made a genuine offer of money to acquire any interest in the Line, and it appears all but impossible that BTR would be able to afford to acquire such rights. August 1 Decision at 5. In short, BTR has no property rights to use the Line, and no plan to obtain such rights. Accordingly, BTR has failed to demonstrate that these are the “appropriate circumstances” in which to vacate the NITU and fails to meet the *Iowa Power* test for vacating a NITU.

**c. BTR Lacks the Financial Capacity to Carry Out Its Plan**

As the Board has recognized, an important threshold factor in considering a request to vacate a NITU is whether the petitioner is financially viable. *See GNP Rly, Inc. – Acquisition and Operation Exemption – Redmond Spur and Woodinville Subdivision*, STB Finance Docket

No. 35407 (Service Date June 15, 2011) (denying petition to vacate NITU and reactivate rail service because, *inter alia*, petitioner was in bankruptcy). Obviously, without sufficient financial capacity, a plan to restore rail service cannot be implemented and no purpose would be served by granting the petition.

Although BTR is not in bankruptcy as GNP was, the Board has already held that that BTR does not have the financial capacity to carry out its plan. August 1 Decision at 5. This finding remains correct, as demonstrated by the substantial financial information BTR itself has provided. BTR is not making money on the Freight Segment and does not appear to be able to afford to make any significant capital investments in new service. *Supra*, 12-15. BTR and ECR do not expect Freight Service on the Line to be a significant profit center or to cover the costs of acquisition and maintenance. *Supra*, 13-14. BTR admits it could not afford to acquire the necessary infrastructure to restore service, and presents no evidence that it can pay to acquire the real property interests it would need to initiate service. Indeed, BTR and its landlord, ECR, appear dependent on the hope of an outright gift from the Washington Legislature merely to afford upgrades on the Freight Segment. While BTR may not be in bankruptcy, as GNP was, and while BTR may be able to sustain its existing once- or twice-weekly service on the Freight Segment, BTR has not met its burden of showing that it is financially sound or able to construct the 5.75 miles of infrastructure now needed to provide freight service on the Line, or to acquire a property interest in the entire 11.2-mile Line, or to otherwise meet the obligations of owning and operating an additional 11.2 miles of track.

#### **4. BTR's Focus On The Reactivation Right Is A Red Herring**

BTR attempts to sidestep the Board's standards for vacating a NITU by focusing on BTR's request to acquire the reactivation right held by the County, apparently on the theory that acquiring the reactivation provides an easier route to vacating the NITU by avoiding inquiry into

BTR's business plan and property rights. This theory has already been rejected by the Board, however, and should not be revived here.

First, the Board has already addressed and rejected that argument. In *King County, All Aboard Washington* ("AAW") opposed allowing BNSF to transfer the reactivation right to King County because, AAW argued, King County did not intend to restore service. *King Cnty., WA – Acquisition Exemption – BNSF Ry. Co.*, Finance Docket No. 35148, slip op. at 3-4 (Service Date Sept. 17, 2009). The Board rejected that argument noting that the reactivation right was not exclusive and that any other qualified entity could seek operating authority. *Id.* As detailed herein, BTR cannot obtain such authority for numerous reasons, and attempting to directly acquire the County's reactivation right does not allow BTR to evade Board standards for conferring operating authority. Even if it were true (which it is not) that King County (or Sound Transit) is opposed to the restoration of rail service under the appropriate circumstances, that would not bar BTR from restoring service if it could demonstrate a need for such service.

Second, the reactivation right is a narrow "right" with limited meaning. In short, it is only the residual common-carrier obligation that an abandoning railroad retains when a line is railbanked. *See King County*, F.D. No. 35148 slip op. at 3. If demand were to arise, the holder of that right has the non-exclusive authority to meet that demand. But the reactivation right is not the property right to use the Line. Acquiring the reactivation right would not allow BTR to avoid the necessity of acquiring property rights, nor would it allow an applicant to avoid demonstrating that it is qualified to operate on the Line. At bottom, the reactivation right is neither necessary nor sufficient for BTR to provide service on the Line, and BTR's focus on the reactivation right is nothing more than an attempt to divert attention from the fundamental infirmities in BTR's plan.

## **5. BTR's Allegations of a "Fox in the Henhouse" Are Baseless**

Unable to meet any of the Board's standards for vacating a NITU or obtaining operating authority, BTR argues for a more relaxed standard on the theory that the County is opposed to restoring rail service and is the "fox guarding the hen house" which the Board must push aside in favor of BTR. Exemption Petition at 9. As an initial matter, the Board lacks the authority to displace property owners or compel the transfer of the reactivation right. *Supra* at note 17. More to the point, BTR's allegations are baseless.

As the County has repeated throughout these proceedings, and in the prior GNP proceedings, the County is fully aware of its obligations under the Trails Act, including the duty to "step aside" if a bona fide petitioner demonstrates that the appropriate circumstances exist, including but not limited to a genuine demand for freight rail service on the Line, a concrete plan to acquire the necessary property rights, and the financial wherewithal to do so. Sound Transit also recognizes what it means to use a railbanked corridor and is designing East Link to accommodate future freight rail service in the event there is bona fide demand. In turn, Kirkland acknowledged the railbanked status of the Line when it acquired the Cross-Kirkland Corridor subject to the County's reserved multipurpose easement. *See* Real Estate Purchase and Sale Agreement (Jan. 5, 2012) at p. 4 Section 4.2, attached hereto as Exhibit 22.

BTR's allegations appear to arise from a handful of meetings in which Kirkland and the County declined to embrace ECR's plans for excursion service. Exemption Petition at 8; Verified Statement of Byron Cole at 2 (Exhibit B to Exemption Petition). BTR's theory appears to be that it can appear at a meeting with property owners, state a desire to establish rail service, and, based on little more, expect the County, Sound Transit, and other property owners to simply "step aside" and blithely surrender property rights they spent tens of millions of dollars to acquire and to drop important, multi-jurisdictional plans for a variety of public uses of the

corridor. No statute, regulation, or Board decision requires such action. Moreover, the County and Sound Transit had no obligation to take any action, given the speculative and sketchy nature of BTR's plan, and the complete absence of a bona fide offer to acquire property rights.

Similarly, BTR asserts that King County Councilmember Jane Hague stated that reactivation of freight service on the Line was "a non-starter" and alleges that the County sought to dissuade a potential shipper from using the Line. BTR Reply to King County, Washington, City of Kirkland, Washington, and Central Puget Sound Transit Authority's Replies to Motion for Preliminary Injunction at 8 (filed June 24, 2013). But Councilmember Hague does not set County policy; only the full County Council can do that. See King County Charter §220.20.<sup>18</sup> And as Councilmember Hague clarifies in her Affidavit attached as Exhibit 23, what she actually said was that persuading the City of Kirkland to refrain from salvaging the rails and ties on the Cross-Kirkland Corridor was a non-starter *politically*, because the people of Kirkland had already voted to approve a plan requiring removal of the rails. Hague Affidavit at ¶¶ 8-9, 15. She did not make any attempt to dissuade Kemper Development Company from using the Line. *Id.* at ¶¶ 12-14. Councilmember Hague supports the County's policy to abide by its trail sponsor obligations, including the obligation to "step aside" as trail sponsor if so authorized by the Board. *Id.* at ¶¶ 4-6. BTR's speculative views about the County's position are baseless and incorrect.

BTR's problem here is not that the County, Sound Transit, or Kirkland stand in the way of rail service, like "foxes guarding the henhouse" – they are not. BTR's true problem is that there is no demand for rail service on the Line and BTR has no bona fide plan to provide rail service. Moreover, BTR has no property rights in the Line and has made no bona fide effort to

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<sup>18</sup> The King County Charter may be viewed online at [http://www.kingcounty.gov/council/legislation/kc\\_code.aspx](http://www.kingcounty.gov/council/legislation/kc_code.aspx) (visited September 26, 2013).

obtain them from the County and Kirkland. At bottom, BTR's petitions are doomed by its own failings, and there is no basis to compel the County and Sound Transit to "step aside" for BTR's non-existent operation.

**D. BTR's Request For An Exemption From The Requirements Of 49 U.S.C. § 10902 Must Be Denied**

BTR seeks an exemption from the requirements of 49 U.S.C. § 10902 to acquire the Board authority to acquire the rail assets, to obtain operating authority, and to acquire the County's reactivation right. Exemption Petition at 1, 2. The standard for an exemption is set forth in 49 U.S.C. § 10502(a):

[T]he Board to the maximum extent consistent with this part, shall exempt a person . . . whenever the Board finds that the application in whole or in part of a provision of this part

(1) is not necessary to carry out the transportation policy of section 10101 of this title; and

(2) either –

(A) the transaction or service is of limited scope; or

(B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.

The Board will dismiss or revoke an exemption and require a full application if it is apparent that Board regulation is necessary to assure that the proposal is consistent with the national rail policy as set forth in Section 10101a. *Ozark Mountain R.R. – Constr. Exemption*, STB Finance Docket No. 32204, slip op. at 4-5 (Service Date Dec. 15, 1994). This is particularly true where, as here, substantial questions exist as to the financial viability of the project, there is substantial public opposition, the proposed service would provide only limited rail service and the proposed rail service would impair other important public purposes. *Id.* at 4-6 (revoking conditional exemption and directing petitioner to file full application under Section 10901 because the applicant failed to demonstrate its financial capacity to undertake the project,

or failed to demonstrate that the company or its principals had prior experience operating a railroad, and failed to provide credible support for the likelihood of success of its proposed rail operations, and because the project stirred up significant public controversy).

BTR asserts that these transactions are the kind of “minor” transactions that the exemption process was intended to encourage. But BTR’s Exemption Petition fails to set forth the minimum information required to even state a request for an exemption. Moreover, BTR’s proposal fails to advance the national rail policy and is contrary to the public interest. Finally, the Exemption Petition must be dismissed because BTR appears to seek an exemption not to advance freight rail service, for which no demands exists, but as a tactic to preserve the rails on the Line for the intrastate passenger excursion service ECR seeks to establish.

**1. BTR Failed To Provide Information Regarding Agreements Necessary to Consummate Its Proposed Transactions**

49 C.F.R. § 1150.43(c) requires that a notice of exemption from 49 U.S.C. § 10902 contain “[a] statement that an agreement has been reached or details about when an agreement will be reached.” Similarly, 49 C.F.R. § 1150.43(e)(2) requires that a notice contain “[a] brief summary of the proposed transaction, including: . . . (2) The proposed time schedule for consummation of the transaction. . . .” Although not strictly required in the context of a petition for exemption, the basic information required pursuant to Sections 1150.43(c) and (e) is relevant in a petition proceeding as well because it aids the Board to understand the transactions at issue, the role of the Board in exempting the transaction from regulation, and whether Board regulation is necessary to carry out the transportation policy of Section 10101. *See MCM Rail Service LLC – Petition for Retroactive Exemption – In Sparrows Point, MD*, STB FD Docket No. 35707, Slip Op at 3 (Service Date March 20, 2013) (initiating a proceeding for a Part 1121 exemption petition requiring, *inter alia*, “a statement that an operating agreement has been reached or

details about when it will be reached.”). Moreover, a transaction by agreement would be more naturally suitable for an exemption because it is less likely to be controversial and is part of an orderly transfer of rights.

Here, BTR does not, and cannot, provide any information about any agreement regarding BTR’s proposed use of the right-of-way because, as detailed above, BTR has reached no agreements and there are no negotiations to obtain such agreements. Similarly, BTR does not, and cannot, provide any information about ongoing negotiations because there are none, and BTR has no plan to complete the transactions necessary for it to provide service on the right-of-way.

These are not minor omissions. The Board’s requirement to provide this information is not a mere formality. Without evidence that an exemption will facilitate the provision of rail services, it is difficult to see how the Board could forgo its regulatory authority under Section 10902. The Board relies on applicants to resolve contractual matters on their own; the Board does not have jurisdiction to compel the transfer of property rights under circumstances such as these. *Supra* 30-31. Without an agreement to acquire property rights or to enter into contractual arrangements, there can be no transaction or agreement to exempt. Moreover, without evidence that there is, or soon will be, an agreement, the Board has no assurance that the transaction is the kind of “minor,” non-controversial transaction that is appropriate for an exemption. As discussed in detail throughout these Comments, BTR’s petitions gloss over its present lack of any right or interest in the right-of-way in an attempt to obscure BTR’s fundamental inability to carry out its proposal, and also to obscure the fact that BTR’s proposal is anything but “minor” or routine. BTR’s inability to present details of an agreement is a bright red flag that its proposal requires careful scrutiny, rather than a “free pass” under an exemption.

BTR's oblique references to "discussions" with Kirkland and the County imply that the County itself does not wish to restore rail service at the present time. Exemption Petition at 8. As demonstrated above, however, that purported excuse is insufficient because the County is under no obligation to restore freight service. The County's obligation as trail user is to permit reactivation of rail service in appropriate circumstances. As holder of the reactivation right, it has the authority but not an affirmative obligation to restore freight service. The is under no obligation to support BTR's proposal particularly given that BTR has no viable plan to restore service, lacks the financial resources to do so, lacks shipper demand, has made no bona fide offer to acquire any of the required property rights and lacks any plan to obtain them. *Supra*, at 11-21. The County's lack of enthusiasm stems from the unreality of BTR's vision, which does not present the appropriate circumstances for reactivation, rather than from any inherent antipathy toward entertaining a bona fide offer in the appropriate circumstances. To the contrary, the County fully embraces all of its Interim Trail Sponsor duties. The simple fact is that BTR's clumsy efforts to seize control of the Line without making a genuine offer warrants no serious consideration by the County or the Board.

**2. BTR's Petition for Exemption Must Be Denied Because It Will Not Advance The National Rail Policy And Is Contrary To The Public Interest**

The basic question posed by an exemption petition is whether the exemption would advance the national rail policy. 49 U.S.C. § 10502(a). The Board has recognized that if strong evidence of shipper demand is lacking, the national rail policy is not advanced by supporting speculative rail projects to the detriment of important public re-use of a railbanked corridor. *See BNSF Railway Company—Abandonment Exemption —In King County, Washington In the Matter of An Offer of Financial Assistance*, STB Docket No. AB-6 (Sub-No. 380) slip op. at 7-10 (Service Date August 5, 1998) (rejecting OFA where putative shippers had never used rail

service, lacked rail sidings and offered “perfunctory support statements” indicating only that they would consider using rail service if rates were reasonable and competitive with alternative modes of transportation); *Norfolk Southern Ry. Co. – Petition for Exemption – In Baltimore City and Baltimore County, MD*, STB Docket No. AB 290 (Sub-No. 311X, slip op. at 9 (Service Date May 4, 2010) (use of track for transit purposes outweighed potential freight service when there was no evidence of shipper demand); *Union Pac. R.R. Co. – Abandonment and Discontinuance of Trackage Rights Exemption – In Los Angeles Co., CA – In the Matter of An Offer of Financial Assistance*, STB Docket No. AB-33 (Sub-No. 265X) (Service Date May 7, 2008) (denying notice of intent to file an OFA where there was insufficient evidence of shipper demand and an important public purpose to use the line for transit purposes); *Norfolk and Western Ry. Co.-- Abandonment Exemption-- In Cincinnati, Hamilton County, OH*, STB Docket No. AB-290 (Sub-No. 184X), slip op. at 8-10 (Service Date May 13, 1998) (rejecting exemption petition when “there exist overriding public purposes sufficient to justify our withdrawing our jurisdiction” and the claim of freight demand was “neither persuasive nor meritorious”); *Roaring Fork Railroad Holding Authority – Abandonment Exemption - In Garfield, Eagle, and Pitkin Counties, CO*, 4 S.T.B. 116, 119-20 (1999) (“It would be inappropriate and unfair to wrest the right-of-way away from one person desiring to use it for a valid public purpose and give it to another person to be put to use for the identical public purpose” in the absence of demand for freight service), *aff’d sub nom. Kulmer v. Surface Transportation Board*, 236 F.3d 1255 (10th Cir. 2001); *Denver & Rio Grande Railway Historical Foundation –Adverse Abandonment-In Mineral County, CO*, STB Docket No. AB-I014, slip op. at 7-12 (Service Date May 23, 2008) (after “closely” examining “alleged prospects for [freight] service” and finding such claims “to be

unsubstantiated,” Board denied request in favor of other public projects); *Ozark Mountain R.R.*, STB Finance Docket No. 32204, slip op. at 4-5 (Service Date Dec. 15, 1994).

In this case, that balance weighs heavily against BTR. First, as detailed above, BTR has no likelihood of establishing rail service on the Line because, as detailed above, there is no demand or need for service, BTR has no plan or strategy to secure the property rights it needs to use the right-of-way, and BTR lacks the financial strength to carry out its plan. *Supra* 13 - 21. BTR’s concept for the Line simply does not advance the national rail policy.

Second, on the other side of the balance, there is a strong public interest in recreational trails and the rights of trail sponsors and property owners, including the ability to remove existing tracks to develop a trail and other public uses. 16 U.S.C. § 1247(d); 49 C.F.R. § 1152.29(d)(1). The County, Sound Transit, and Kirkland are all in various stages of actually implementing plans to use the Line for a recreational trail, for commuter rail, and for other important uses. These and other public entities have already invested tens of millions of dollars in this effort, and are poised to invest much more. These efforts are real, substantial, and happening now. BTR’s proposal would jeopardize those plans, and likely destroy important elements of the plan, including recreational trail and utility improvements, and add cost and complexity to other improvements such as Sound Transit’s commuter rail service.

Moreover, the mere uncertainty created by BTR’s attempts to establish rail service will effectively enjoin all regional stakeholders from further development of the corridor, placing at risk the value of the tens of millions of dollars public stakeholders have spent to acquire and develop the corridor. *See Norfolk Southern Ry. Co. – Petition for Exemption – In Baltimore City and Baltimore County, MD*, STB Docket No. AB 290 (Sub-No. 311X), slip op at 9 (Service Date May 4, 2010) (recognizing that imposing uncertainty over the use of a line based on speculative

proposals for future service is contrary to the public interest). Because of the substantial public investment in the coordinated development of the Subdivision, including the Line, the Board should acknowledge that BTR's petitions would introduce substantial uncertainty into the planning and development effort and thereby impose great harm on the County, Sound Transit, and other stakeholders.

Finally, granting the Petitions under these circumstances would establish a dangerous precedent. The decision would embolden other potential rail operators to pursue the same strategy as BTR. Trail sponsors across the country would be at constant risk of being ejected from trails any time a would-be operator felt it had a potential plan to restore rail service and that further trail development would impair that effort. The result would hamstring the Trails Act by introducing so much uncertainty into trail sponsorship rights that trail sponsors would be loath to invest in and develop trails. It would further disrupt the orderly, and entirely lawful, development of trails as contemplated in the Trails Act. While trail sponsors recognize that recreational trails must give way to restored rail service under the appropriate circumstances, trail sponsors are entitled to a measure of certainty that they can continue to develop and improve trails until a bona fide petitioner is able to introduce genuine rail service and the Board approves such activity. Because BTR's Petitions undermine the important objectives of the Trails Act without advancing the national rail policy, BTR's Petitions should be denied.

**3. BTR's Petitions Should Be Denied Because They Were Filed To Protect ECR's Projected Intrastate Excursion Service, Not To Advance The Speculative Freight Service**

Finally, the Board will "not allow its jurisdiction to be used to shield a line from the legitimate processes of state law where no overriding federal interest exists." *The City of Chicago, Ill. – Adverse Abandonment – Chicago Terminal R.R. in Chicago, ILL.*, STB Docket No. AB 1036, slip op. at 4, n.8 (Service Date June 16, 2010) (citing *Kansas City Pub. Serv.*

*Freight Operation – Exemption – Aban. in Jackson Cnty., MO*, 7 I.C.C.2d 216 (1990) and *CSX Corp. and CSX Transp., Inc. – Adverse Abandonment Application – Canadian Nat’l Ry. and Grand Trunk W. R.R.*, AB 31 (Sub-No. 38) (Service Date Feb. 1, 2002)). In the context of exemption proceedings, the Board has applied this principle to modify its usual standards to consider evidence that the proffered freight operation will not succeed “where the allegation is made, supported by evidence, that the exemption sought is for purposes other than for providing common carrier rail service,” in which case “the Board will not allow the exemption to go forward without considering that evidence and that argument.” *Saratoga and North Creek Ry., LLC – Operation Exemption – Tahawus Line*, STB Finance Docket No. 35559, slip op. at 2 (Service Date Nov. 23, 2011), *aff’d* (Full Board Service Date May 14, 2012). *See also See, e.g., The Land Conservancy of Seattle and King Cnty. – Acquisition and Operation Exemption – The Burlington N. and Santa Fe Ry. Co.*, STB Finance Docket No. 33389, slip op. at 13-14 (Service Date May 13, 1998) (affirming revocation of acquisition and operation authority where evidence demonstrated no intention to operate rail service).

Applying this rule, the Board should reject BTR’s Petitions because they appear to be an attempt to invoke Board jurisdiction to preserve the possibility of future intra-state passenger excursion service, not to establish freight rail service. As detailed above, there is no genuine demand for freight rail service on the Line. *Supra*, 15-20. The two putative shippers identified in BTR’s petitions, CalPortland and Wolford, expressly denied requesting service or having a need for service. *Supra*, 16-18. The additional support letters appended to BTR’s Petition for Reconsideration are equally flawed: none of them constitute a request for service, Snohomish County and CT Sales are not on the Line, RJB Wholesale lacks a spur, and there is no evidence that either CT Sales or RJB Wholesale has ever availed itself of rail service despite being located

adjacent to the Subdivision. *Supra*, at 18-20. For its part, BTR has not set aside any financial reserves to acquire an interest in the Line or establish operations on the Line, much less to construct the infrastructure now necessary to restore freight service in Kirkland. *Supra*, 11-15. BTR has not produced as part of its Petitions or in discovery any business plan, financial plan, or other document indicating that it has any bona fide plan to expand service on the Line.

Given the lack of demand for freight rail service on the Line, the lack of financial resources to serve the Line, and the lack of any coherent internal business strategy to expand onto the Line, the Board should consider carefully why BTR is seeking authority to operate on the Line and why it sought emergency relief to preserve the rails. Posed simply: Why would BTR expend so much of its scarce resources to gain access to a Line for which there is no present freight demand or need? The answer is that BTR is not spending resources to advance BTR's freight service goals; rather, Mr. Engle and ECR—each, a non-carrier—are spending ECR's resources using BTR (an authorized rail carrier) as a cat's paw to advance ECR's non-freight rail interests.

In fact, it is Mr. Engle and ECR who are the motivating force behind these Petitions. Mr. Engle attempted to recruit shippers for the Line, including CalPortland and Wolford. Skrivan Dep., Exhibit 18 at 20:4-5; Wolford Dep., Exhibit 19 at 43:6-12. Mr. Engle and his associate Mr. Ernie Wilson worked (unsuccessfully) with CalPortland to pursue a spur at CalPortland's Everett facility for interchange with BNSF. Skrivan Dep., Exhibit 18, 38:19-25, 39-41; Email Exchanges between Doug Engle and Michael Skrivan (April and May, 2013), attached hereto as Exhibit 24. Mr. Engle and his associates apparently initiated contact with Wolford and CalPortland about providing letters of support. Skrivan Dep., Exhibit 18 at 23:24-25, Wolford Dep., Exhibit 19, at 32:21-25. Those letters were drafted by Mr. Wilson and the legal counsel

hired by Mr. Engle. Skrivan Dep., Exhibit 18, 30:7-25, 31-33; Wolford Dep., Exhibit 19, at 32:21-25, 33. Neither Wolford nor CalPortland had any meaningful contact with anyone at BTR regarding potential service on the Line; their communications were with Mr. Engle and his associates at ECR. Skrivan Dep., Exhibit 18, at 13:9-13 (“Eastside Community Rail is the only one that I’ve really had communication with”); Wolford Dep., Exhibit 19, at 15:15-16 (“Our go-to guy was Ernie Wilson.”). Furthermore, Mr. Engle developed the cost estimate for replacing the rails and scouted out potential transloading locations on the Line. Cole Dep., Exhibit 10, at 157-158 (cost estimate); Wolford Dep., Exhibit 19, at 97:12-19, 99:1-6, 103:12-17 (transload locations). BTR and ECR have retained the same sets of lawyers to represent them in connection with these petitions, and they have jointly participated in attorney-client privileged communications regarding them. Engle Dep., Exhibit 2, at 232-33, 235-36. ECR and Mr. Engle consider themselves real parties in interest to these proceedings. Engle Dep., Exhibit 2, at 16:10-14 (“Q. Do you consider yourself to be a party in interest in the STB proceedings? A. Of course.”).

The reason for ECR’s keen interest in the Line is that ECR’s business plan depends on gaining access to the existing tracks on the Line in order to reach the larger Seattle market through Bellevue for passenger excursion service. “It is likely that “excursion train” profitability may not be obtained without Bellevue as an origin/end-point . . . The appropriate origin station is Bellevue. Snohomish and Woodinville are appropriate destinations.” Exhibit 4, at pp. 23-24 (emphasis in original). *See also* Letter from Douglas Engle to Richard Leahy (Feb. 19, 2013) at p. 3, attached hereto as Exhibit 13 (listing ECR’s goals as including “Re-establish [sic] 12-miles of service from Woodinville to north Bellevue with additional access to the Seattle market and cruise ship passengers[.]”). Cole Dep., Exhibit 10, at 175:5-8 (“He [Engle]’s got a huge amount

on his plate trying to find funding to put together an excursion train so he can make some serious money[.]”). *See also* Eastside Community Rail, “Bridging the Gap” (Oct. 2012), at 13, attached hereto as Exhibit 26 (“ECR’s policy is to fully support . . . regional trail development [ ] PROVIDED the existing track structure remains.”) (emphasis in original).

Mr. Engle anticipates that ECR will earn up to *ninety percent* of its revenue from excursion rail. *Id.* at 15 (chart showing “Revenue”). ECR’s revenue projections are more modest than GNP’s, but still forecast excursion revenue in millions of dollars. *Id.* Freight is projected to comprise a very small percentage of revenue and is not projected to grow over time. *Id.* Currently, ECR earns just \$10 per car from the existing freight business. Exhibit 10, Cole Dep. 174:4-11.

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In light of these financial projections, ECR was willing to drop the freight reactivation petitions if the City of Kirkland and King County would allow an excursion train to run to Bellevue. Engle Dep., Exhibit 2 197:19-25, 198:1-21. *See also* Email Exchange between Kurt Triplett and Doug Engle (Nov. 16, 2012), attached hereto as Exhibit 25. Although that proposal was not accepted, ECR continued to attempt to persuade Kirkland to leave its rails in place, and to hire ECR to build a trail alongside the existing tracks using anticipated construction spoils from Bellevue. *See, e.g.*, Memorandum to Eastside TRailway Alliance from Eastside Community Rail (Feb. 19, 2013), attached hereto as Exhibit 28; Letter from Douglas Engle to Eastside TRailway Alliance and Kirkland City Council (Feb. 22, 2013), attached hereto as Exhibit 29.

When those efforts failed, and when ECR and BTR realized in March 2013 that Kirkland intended to salvage the rails in the immediate future, in Byron Cole's words, "we were panicking[.]" Cole Dep., Exhibit 10, 121:3. As he put it,

In the last few weeks here, as we saw that nothing was stopping Kirkland, . . . we knew we had to do something *right now*. For crying out loud, the thing went within one day of [Kirkland's contractor] mobilizing and starting to rip up track . . . We barely got it stopped[.]

Cole Dep., Exhibit 10, 200:11-22 (emphasis added). Bobby Wolford had a similar recollection:

I went to a city council meeting and they said there that they asked, is there anything that would stop [Kirkland] from ripping this railroad out? And the guy said yes, an injunction. So at that point, we decided to get an injunction, or Doug Engle did.

Wolford Dep., Exhibit 19, 60:22-25, 61:1-3.

Mr. Wolford promptly loaned Mr. Engle \$22,000 for an attorney to seek an injunction to stop the City. Wolford Dep., Exhibit 19, at 61:16-18, 62:10-11, 122. By late March, 2013, Mr. Engle and ECR had secured the support letters from CalPortland and Wolford. Exhibit 18, Skrivan Dep. 30-33; Exhibit 19, Wolford Dep. 32-33. In filings dated March 29, 2013, BTR submitted its Petitions in these Dockets, and also filed papers in the U.S. District court for the Western District of Washington seeking to enjoin Kirkland from rail salvage during the pendency of these proceedings.

These facts make plain ECR's aggressive plan to initiate intrastate excursion service along the Line, contrary to the contractual obligations that ECR inherited from GNP in the License. Excursion service is the financial linchpin of their business model; freight service is neither necessary nor sufficient. Intrastate passenger excursion service is obviously outside the Board's jurisdiction. *See Fun Trains, Inc. – Operation Exemption – Lines of CSX Transp. Inc. and Fla. Dep't of Transp.*, STB Finance Docket No. 33472, slip op. at 2 (Service Date Mar. 5,

1998); *Napa Valley Wine Train, Inc. – Petition for Declaratory Order*, 7 I.C.C. 2d 954, 968-69 (1991); *Magner-O’Hara Scenic Ry. v. I.C.C.*, 692 F.2d 441, 444-45 (6th Cir. 1982).

Nonetheless, ECR and BTR are using the pretext of freight service to invoke the Board’s jurisdiction in order to preserve the possibility of establishing excursion service to Bellevue in contravention of the License. The Board should reject BTR’s petitions as an abuse of the Board’s jurisdiction intended to further an intrastate excursion rail plan.

#### **IV. CONCLUSION**

BTR has failed to demonstrate that it is entitled to any of the relief it seeks. The Petitions are moot because the rails and ties have been removed from the Line. BTR is not a bona fide petitioner presenting the appropriate circumstances in which to vacate a NITU because it lacks shipper demand for service, lacks the property rights to use the Line, and lacks the financial capacity to provide the service. The petitions are not suitable for an exemption proceeding and BTR has not provided the basic information necessary to support an exemption. BTR has failed to meet any of the criteria the Board has recognized as necessary to vacate a NITU, and has provided no basis for the Board to overrule that precedent. For these and all of the other reasons outlined in these Comments, the Board should deny BTR’s Petitions.

Respectfully submitted,



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Dated: October 17, 2013

**CERTIFICATE OF SERVICE**

I hereby certify that I am providing a copy of COMMENTS OF KING COUNTY, WASHINGTON AND CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY TO BALLARD TERMINAL RAILROAD COMPANY, LLC.'S PETITIONS upon the following parties of record by email and by overnight delivery, fees prepaid and properly addressed:

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Dated this 17<sup>th</sup> day of October, 2013