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September 10, 2015

239184

VIA FEDEX

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street SW
Washington, DC 20024

ENTERED
Office of Proceedings
September 11, 2015
Part of
Public Record

Re: Reading, Blue Mountain & Northern Railroad Company -
Petition for Declaratory Order
STB Docket No. FD 35956

Dear Ms. Brown:

Enclosed for filing are the original and 10 copies of Volumes I and II of a Petition for Declaratory Order being filed on behalf of Reading, Blue Mountain & Northern Railroad Company. (Volume I is the Petition, and Volume II is the Exhibits). Also enclosed is a check in the amount of \$1,400.00 representing the filing fee for this Petition.

Please time stamp the extra copy of the Petition provided herewith to indicate receipt of the foregoing, and return it to me in the stamped self-addressed envelope provided for your convenience.

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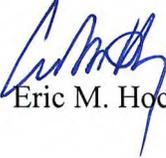
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September 10, 2015
Page 2

Please let me know if there are any questions regarding this filing.

Respectfully,

CLARK HILL PLC



Eric M. Hocky

EMH/dml
Encls.

cc: All persons shown on Certificate of Service

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. FD 35956

**READING, BLUE MOUNTAIN & NORTHERN RAILROAD COMPANY –
PETITION FOR DECLARATORY ORDER**

VOLUME I

PETITION FOR DECLARATORY ORDER

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Dated: September 10, 2015

Attorneys for Reading, Blue Mountain &
Northern Railroad Company

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. FD 35956

**READING, BLUE MOUNTAIN & NORTHERN RAILROAD COMPANY –
PETITION FOR DECLARATORY ORDER**

PETITION

Reading, Blue Mountain & Northern Railroad Company (“RBMN”), a Class III railroad operating in northeastern Pennsylvania, requests that the Board exercise its discretion under 49 USC §721 and 5 USC §554(e) to remove uncertainty, and declare that the requirements of the Pennsylvania Municipal Authorities Act are *not* preempted by the provisions of the ICC Termination Act, 49 USC §10501(b).

BACKGROUND

RBMN is a privately-held, Class III carrier subject to the jurisdiction of the Board. It provides rail freight service to industries located in east central Pennsylvania, including along its rail lines in Schuylkill, Berks, Bradford, Carbon, Luzerne, Lackawanna, Northumberland, Columbia and Wyoming Counties. *See* map attached hereto as Exhibit A.¹ It has been operating as a common carrier railroad since 1990.

This proceeding involves two Pennsylvania entities formed pursuant to the Pennsylvania Municipal Authorities Act, 53 Pa.C.S.A. §§5601, *et seq.* (“MAA”) that own rail lines in the same region of Pennsylvania served by RBMN - Pennsylvania Northeast Regional Railroad Authority (“PNRRA”), and SEDA-COG Joint Rail Authority (“SEDA-COG”). RBMN currently has state

¹ All of the Exhibits are included in Volume II of this Petition. Some of the state court pleadings included as Exhibits have been edited as marked to delete exhibits and/or to include only selected sections. The selected sections include the arguments on preemption made in the state courts.

court litigation pending against each authority contending that the authority is in breach of the MAA requirements requiring competitive bidding and prohibiting direct competition with a private business.

PNRRA and the PNRRA Litigation.

PNRRA was formed in 2006 and owns rail lines in Lackawanna, Monroe, Wayne and Northampton Counties. It was created by the merger of two other municipal authorities, the Lackawanna County Railroad Authority (“LCRA”) and Monroe County Railroad Authority (“MCRA”). PNRRA’s rail lines are currently operated by The Delaware-Lackawanna Railroad Co., Inc. (“DL”), a Class III carrier. *See* map attached hereto as Exhibit A.

When LCRA first acquired rail lines in 1993, it issued a request for proposals (“RFP”), and ultimately contracted with a privately-owned railroad, DL, to operate and maintain the rail lines LCRA was acquiring from Conrail. Since 1993, neither LCRA nor its successor, PNRRA, has used an RFP to determine freight rail operator interest prior to entering a new contract with the DL or extending the DL’s operating agreements, or sought public sealed competitive bids for its rail freight business pursuant to the MAA. In June, 1994, MCRA, employing LCRA as a consultant, chose the DL to be MCRA’s freight rail operator. RBMN does not believe that MCRA used an RFP or sought competitive bidding prior to contracting with the DL. Once MCRA chose the DL as its freight rail operator, MCRA did not use RFPs prior to entering any new contract with the DL or extending the DL’s existing agreement, or seek public sealed competitive bids for its rail freight business.

As noted above PNRRA was formed in 2006 through the merger of LCRA and MCRA. In August, 2010, PNRRA re-leased its rail lines to DL without seeking any other bids, and the parties entered into a new Operating Agreement dated August 27, 2010 (the “PNRRA Operating

Agreement”). A copy of the Operating Agreement is attached as an exhibit to RBMN’s Second Amended Complaint attached hereto as Exhibit E. The initial term of the Operating Agreement was five years, giving it an expiration date of August 27, 2015, but the contract provided that PNRRA could extend the term for another five years. *Id.* PNRRA takes the position that it has the option to continue extending the term every five years in perpetuity without entering into a “new” contract.²

RBMN originally filed suit against PNRRA in December 2013, when, after RBMN wrote to PNRRA requesting an opportunity to submit a proposal to operate PNRRA’s rail lines and provide maintenance and other work for PNRRA, in anticipation of the expiration of PNRRA’s current operating agreement on August 27, 2015, the PNRRA Board responded by voting to extend the DL Operating Agreement without providing any bidding opportunity. An amended complaint was filed in January 2014. A copy of the Amended Complaint is attached hereto as Exhibit B. The Amended Complaint sought to void the Operating Agreement, and any extension, due to the failure of PNRRA to comply with the competitive bidding requirements of the MAA, and to require PNRRA to give other railroads the opportunity to bid. PNRRA’s preliminary objections (the state court equivalent to a motion to dismiss) included arguments that RBMN’s claims were barred under ICCTA. *See* PNRRA’s Preliminary Objections attached hereto as Exhibit C, at p. 5. The preliminary objections were summarily denied by the State Court. A copy of the State Court Order dated April 9, 2014, is attached hereto as Exhibit D.

² RBMN is not in this proceeding asking for a determination of whether DL, upon the extension of its operating rights, or the entry into its agreement(s) or any future agreements with PNRRA should have filed for authority under either 49 CFR PART 1180 (for extension and/or change of terms to an existing operating agreement), or 49 CFR 1150 Subpart E (as a new operating agreement by an existing Class III rail carrier).

After discovery revealed that PNRRA was actively taking direct actions to compete with RBMN for customers and for the limited state grants offered each year, RBMN further amended its complaint to add a claim that such direct competition with private railroads violates the MAA. A copy of the Second Amended Complaint is attached hereto as Exhibit E. Significantly, what RBMN has not sought in the state court litigation is for DL to discontinue its operations while the litigation is pending, or until PNRRA has complied with the bidding requirements for selecting an operator. Moreover, RBMN is not seeking to restrict DL in its current operations from competing with RBMN: rather RBMN is seeking merely to prevent PNRRA, as a non-operating owner of rail lines, from using its status as a municipal authority to unfairly compete with RBMN for state grants and to unfairly compete with RBMN in seeking customers to locate along its rail lines, and to prevent PNRRA from extending the PNRRA Operating Agreement without offering other railroads the opportunity to bid to provide the service. PNRRA again filed preliminary objections seeking to dismiss RBMN's claims on various grounds, including that they are barred by ICCTA. A copy of PNRRA's Preliminary Objections to Second Amended Complaint (including the preemption allegations at pp. 4-5) is attached hereto as Exhibit F. RBMN's Memorandum of Law in Opposition to the preliminary objections argues that RBMN's claims are not preempted. *See* RBMN's Memorandum of Law attached hereto as Exhibit G, at pp. 31-42. These preliminary objections are pending with the State Court.

In the meantime, PNRRA announced that with the current term of the PNRRA Operating Agreement set to expire in August, it was going to extend the existing PNRRA Operating Agreement with DL on or after May 19, 2015. RBMN responded on May 13, 2015, by seeking an injunction to prevent what it believed would be a violation of the MAA since PNRRA still had not offered other railroads the opportunity to bid. A copy of the RBMN's Emergency

Application for a Preliminary Injunction is attached as Exhibit H. PNRRA defended against the injunction in part on the grounds that RBMN's claims were preempted by ICCTA. *See* PNRRA's Pre-Hearing Brief in Opposition attached hereto as Exhibit I, at pp. 48-60. The State Court denied the injunction, but refused to address RBMN's argument that the relief requested by RBMN is not preempted by ICCTA. *See* State Court Opinion denying the injunction attached hereto as Exhibit J, at p. 8. This despite the earlier State Court Order (Exhibit D) by another member of the Court denying a preliminary objection on this very issue. RBMN has appealed the denial of the injunction. RBMN understands that PNRRA and DL have entered into an extension of the PNRRA Operating Agreement; RBMN does not know if other changes were made to the PNRRA Operating Agreement.³

SEDA-COG and the SEDA-COG Litigation.

SEDA-COG Joint Rail Authority ("SEDA-COG") owns and/or has authority to operate rail lines in Centre, Clinton, Lycoming, Montour, Columbia, Northumberland, Mifflin and Union Counties. The rail lines are operated by North Shore Railroad Company, and its affiliated carriers in the Susquehanna Union Railroad Company family (for ease of reference, referred to collectively herein as "North Shore Railroads"). *See* map attached hereto as Exhibit A.

In June, 2015, RBMN filed an action against SEDA-COG in Common Pleas Court in Northumberland County, PA, seeking a declaration that SEDA-COG has violated the MAA by directly competing with the business of RBMN, and by not complying with competitive bidding

³ DL has not filed with the Board for authority to operate under the extension of the Operating Agreement

requirements.⁴ A copy of the RBMN Complaint against SEDA-COG is attached hereto as Exhibit K.

SEDA-COG responded on or about July 22, 2015, by filing preliminary objections on various grounds, including that RBMN's claims are preempted by 49 USC §10501(b) (*see* Preliminary Objections, Section II.B, ¶¶ 30-41), apparently based on the general argument that RBMN's action would interfere with transportation by a rail carrier, or with the operation of rail lines. A copy of SEDA-COG's Preliminary Objections are attached hereto as Exhibit L. Briefing on the SEDA-COG preliminary objections is scheduled for October. *See* State Court Briefing Order attached hereto as Exhibit M.

Again, in the state court litigation, RBMN is not seeking to interfere with the operations of the North Shore Railroads or any future privately-owned operator of the SEDA-COG rail lines selected by SEDA-COG. Rather, RBMN seeks only to be able to compete on a level playing field both in terms of being able to bid for the future operations of the lines, and to prevent SEDA-COG, as a non-operating owner, from using its status as a municipal authority to unfairly compete with RBMN for state grants and to unfairly compete with RBMN in seeking customers to locate along its rail lines.

Purpose of this Petition.

The purpose of this Petition is to have the Board declare that the provisions of ICCTA do not preempt the provisions of the MAA, and in particular to do not prevent RBMN from seeking

⁴ SEDA-COG has put the operation of its lines out to bid although RBMN does not believe the process has been fair or in compliance with the MAA. RBMN was the only bidder that was eliminated by SEDA-COG in the first round of bidding.

relief in the state courts for violations of the MAA.⁵ In doing so, the Board will prevent different judges and different state courts in Pennsylvania from reaching different conclusions on this issue, allowing for uniformity of regulation.

LEGAL DISCUSSION

A. Requirements of the Pennsylvania Municipal Authorities Act.

In Pennsylvania, any municipality or group of municipalities can form a “municipal authority” by incorporating in accordance with the MMA. 53 Pa.C.S.A. §5603.⁶ The allowable public and quasi-public purposes and powers of a municipal authority in furtherance of those purposes are specified in the statute. 53 Pa.C.S.A. §5607. Municipal authorities enjoy certain benefits not available to private corporations, including that they are exempt from taxation and payments in lieu of taxes. 53 Pa.C.S.A. §5620. However, in return for such benefits, municipal authorities must comply with the requirements of the MMA. In particular, as relates to the claims of RBMN in the state court litigations, municipal authorities must (1) not use their powers to duplicate or compete with existing businesses providing substantially the same purposes (53 Pa.C.S.A. §5607(b)(2)), and (2) competitively bid certain contracts (53 Pa.C.S.A. §5614).

B. Preemption under ICCTA.

The preemption provisions of ICCTA, 49 USC §10501(b) are broad, but they do have limitations. The Board summarized the scope of preemption in *City of Milwaukie – Petition for Declaratory Order*, Docket No. FD 35625 (served March 25, 2013) (examining effect of ICCTA preemption on two municipal regulations):

⁵ RBMN is not asking the Board to determine if PNRRA or SEDA-COG have violated the terms of the MAA. Those issues would, of course, if not preempted, be determined by the Pennsylvania courts applying Pennsylvania state law.

⁶ For ease of reference, copies of the cited sections of the MAA are attached hereto as Exhibit N.

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, the Board has discretionary authority to issue a declaratory order to eliminate a controversy or remove uncertainty in a matter related to the Board's subject matter jurisdiction. Before we can reach the preemption issue presented here, however, it is appropriate for a state or municipal court to resolve the parties' property law dispute relating to Oregon's appropriation law. The court may also resolve the preemption issue in the first instance, by applying existing Board and court precedent on the § 10501(b) federal preemption provision. *Jie Ao & Xin Zhou—Petition for Declaratory Order (Ao Zhou)*, FD 35539, slip op. at 2, 8 (STB served June 6, 2012); *CSX Transp., Inc.—Petition for Declaratory Order*, FD 34662, slip op. at 8 (STB served May 3, 2005). *To assist the court, we will summarize existing law* with regard to the reach of § 10501(b).

General Preemption Precedent. The Interstate Commerce Act, as revised by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, vests in the Board broad jurisdiction over "transportation by rail carrier," 49 U.S.C. § 10501(a)(1), which extends to property, facilities, instrumentalities, or equipment of any kind related to that transportation, 49 U.S.C. § 10102(9). Moreover, the statute defines "railroad" broadly to include switch, spur, track, terminal, terminal facility, freight depot, yard, and ground, used or necessary for transportation. 49 U.S.C. § 10102(6). The preemption provision in the Board's governing statute states that "the remedies provided under [49 U.S.C. §§ 10101-11908] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." 49 U.S.C. § 10501(b).

While § 10501 is broad and far-reaching, there are, of course, limits. The Board and courts have recognized that federal law does not preempt all state and local regulation affecting transportation by rail carrier. N.Y. Susquehanna & W. Ry. v. Jackson (Jackson), 500 F.3d 238, 252 (3d Cir. 2007). Instead, it preempts "state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation." Id. (citation omitted). For example, § 10501(b) preemption does not apply to state or local actions under their retained police powers, as long as those actions do not unreasonably interfere with railroad operations or the Board's regulatory programs. See H.R. Rep. No. 104-311, at 95-96 (1995), reprinted in 1995 U.S.C.C.A.N. 793, 807-808; H.R. Conf. Rep. No. 104-422, at 167 (1995), reprinted in 1995 U.S.C.C.A.N. 793, 852. Docket No. FD 35625 Section 10501(b) preemption does, however, prevent states or localities from intruding into matters that are directly regulated by the Board (e.g., railroad rates, services, construction, abandonment, etc.). It also prevents states or localities from imposing requirements that, by their nature, could be used to deny a railroad the right to conduct rail operations or proceed with activities the Board has authorized. Thus, state or local permitting or preclearance requirements, including building permits, zoning ordinances, and environmental and land use permitting requirements are categorically preempted. Ao Zhou, slip op. at 4-5.

State and local actions not preempted on their face may be preempted “as applied”—that is, if the action would have the effect of unreasonably burdening or interfering with rail transportation, which involves a fact-specific determination. *See Franks Inv. Co. v. Union Pac. R.R.*, 593 F.3d 404, 414 (5th Cir. 2010) (en banc); *E. Ala. Ry.—Petition for Declaratory Order*, FD 35583, slip op. at 4 (STB served Mar. 9, 2012); *Borough of Riverdale—Petition for Declaratory Order*, FD 35299, slip op. at 2 (STB served August 5, 2010). The fact that a railroad is performing rail transportation authorized by the Board is not a license for railroads to take, or neglect to take, whatever actions they may want to take in performing their operations. *See Emerson v. Kan. City S. Ry.*, 503 F.3d 1126, 1132 (10th Cir. 2007) (regarding a railroad’s claim of preemption of a state tort law claim involving flooding allegedly caused by the railroad’s improper disposal of waste: “[T]he Railroad’s argument has no obvious limit, and if adopted would lead to absurd results. If the [Interstate Commerce Act] preempts a claim stemming from improperly dumped railroad ties, it is not a stretch to say that the Railroad could dispose of a dilapidated engine in the middle of Main Street.”). *Rather, the railroad must comply with generally applicable state laws to the extent they are not otherwise preempted.* *See id.* at 1130-31 (concluding that state law applies to a railroad’s property or actions unless specifically displaced); *Buddy & Holley Hatcher—Petition for Declaratory Order*, FD 35581, slip op. at 7 (STB served Sept. 21, 2012).

Emphasis added.

The relief that RBMN is seeking in the state court litigation would not interfere with any area of regulation that is within the Board’s exclusive jurisdiction. The relief requested would not interfere with the operations of any operating railroad or transportation facility. Accordingly, RBMN’s efforts to enforce the restrictions of the MMA are not preempted by 49 USC §10501(b).

C. MAA Requirements Are Not Preempted by ICCTA.

Section § 10501(b) provides for the exclusive jurisdiction of the Board, but only over the enumerated activities and facilities:

(b) The jurisdiction of the Board over –

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

Certainly, the Board has exclusive jurisdiction over the operations and activities of operating rail carriers such as DL, NSHR and RBMN, and over the tracks and railroad facilities over which they operate. However, the Board does not have exclusive jurisdiction over the restrictions imposed by the MMA on public authorities just because they happen to own railroad facilities and have some "residual" authority as railroads.

The counties that incorporated PNRRA and SEDA-COG voluntarily elected to form the authorities under the provisions of the MAA, and to take advantage of the benefits that the MAA offers. As such they agreed not only to receive the benefits of the state statutory form, but also to abide by its restrictions, including requirements that certain contracts be let only by public bidding, and that the authority not compete with private businesses. There is nothing in Section 10501(b) that gives the Board jurisdiction over the selection of a rail freight operator by a municipal authority, or how that may or may not be done, including whether the selection is subject to any competitive bidding requirement.⁷ Nor is there anything in Section 10501(b) that would allow the Board to override the statutorily-forbidden engagement by an authority in

⁷ Clearly there is nothing inherently unlawful about a municipal authority, even one that owns railroad lines, seeking an operator through competitive bidding. Without conceding that the bidding process used was in accordance with the MAA, both PNRRA's predecessor and SEDA-COG used public bidding processes when selecting DL and NHR as their respective railroad operators. Of course, the Board does have jurisdiction over any rail carrier selected to operate the rail lines owned by the authority, and any such rail carrier must obtain authority (or an exemption) from the Board to operate over the rail lines owned by a municipal authority.

activities that directly compete with private businesses. This prohibition does not affect the setting of rates, or the activities of the private rail carrier operators.

The relief sought by RBMN in the state court actions does not seek to supersede or infringe upon the Board's exclusive jurisdiction to authorize the ownership and operation of rail lines, or the discontinuance of rail service. While the relief requested includes the possible divestiture of rail lines by a municipal authority if it cannot or will not comply with the MAA's restrictions on competition, RBMN acknowledges that any acquirer of the rail lines would need Board authorization to complete the purchase. Similarly, any new operator would be required to obtain Board authority to operate. However, RBMN does not contend that the current operators DL or the North Shore Railroads can be required by the state courts to stop operating the lines they are currently authorized to operate. RBMN acknowledges that even were the state court to void the PNRRA Operating Agreement for violating the competitive bidding requirements, DL would continue to be required to operate until and unless DL were authorized by the Board to discontinue its operations. *See Thompson v. Texas Mexican Railway Co.*, 328 U.S. 134, 147 (1946) (holding operations must continue until abandonment is authorized).⁸ Moreover, if a new operator were selected, in addition to the new carrier obtaining authority to operate, it would be

⁸ In instances where a carrier continues to operate despite the expiration or termination of the underlying contract, the Board has the authority to set reasonable terms and conditions. *See North Carolina Railroad Company – Petition to Set Trackage Compensation and Other Terms and Conditions – Norfolk Southern Railway Company, Norfolk & Western Railway Company, and Atlantic and East Carolina Railway Company*, STB Finance Docket No. 33134 (served May 29, 1997) (Board as authority to prescribe compensation and other terms and conditions of a lease between rail carriers where lease has expired); *Toledo, Peoria & Western Railway Corp. – Trackage rights Compensation – Peoria and Pekin Union Railway*, ICC Finance Docket No. 26476 (Sub-No. 1) (served Sept. 20, 1994) (where trackage rights agreement was terminated, ICC had duty to prescribe trackage rights compensation when the parties were unable to agree).

up to either the authority or the new operator to get adverse discontinuance authority for the existing operator, if the displaced operator were not to seek such authority voluntarily.⁹

RBMN is not aware of any cases in which the Board has found that the provisions of an enabling state statute such as the MAA are preempted by Section 10501(b). In fact, the Board has made clear that its jurisdiction extends only to whether an entity meets the regulatory requirements to obtain authority to acquire or operate a rail line, but does not extend to the state law property or contractual rights of a party to exercise the regulatory authority. *See, e.g., Lackawanna County Railroad Authority – Acquisition Exemption – F&L Realty, Inc.*, STB Finance Docket No. 33905, and *Delaware-Lackawanna Railroad Co., Inc. – Operation Exemption – Lackawanna County Railroad Authority*, STB Docket No. 33906 (STB served Oct. 22, 2001). As stated by the Board in its decision (which involved PNRRA’s predecessor):

[t]he question of whether a party (or parties) have regulatory authority to operate over a particular segment of track is different from the question of whether the party (or parties) have the necessary property interest or contractual right under applicable agreements to exercise that authority. In exercising our licensing authority, we look to whether the statutory standards are satisfied, not to whether the applicant or petition will be able to exercise the authority sought.

Id. at 6.

The respective counties that formed PNRRA and SEDA-COG choose to incorporate under the MAA as opposed to Pennsylvania’s general corporate statute with knowledge of the benefits and restrictions that came with that choice. They chose to incorporate under the MAA knowing that they planned to acquire lines of railroad and to hold residual common carrier authority. Where railroads have agreed to be bound by certain restrictions (such as those in the

⁹ Even in instances where abandonment or discontinuance subject to the Board’s plenary jurisdiction is involved, the Board does not “allow its jurisdiction to be used as a bar to state law remedies in the absence of an overriding federal interest.” *Paulsboro Refining Co., LLC*, STB Docket No. 1095 (Sub-No. 1) (S.T.B. Nov. 25, 2014).

MAA), they are deemed to have determined that such restrictions will not unreasonably interfere with interstate commerce, and that the restrictions are not preempted. As such, the Board has held that the preemption provisions of Section 10501(b) cannot be used to shield a railroad (here PNRRA and SEDA-COG) from its own voluntary commitments. *Joint Petition for Declaratory Order – Boston and Maine Corporation and Town of Ayer, MA*, STB Finance Docket No. 33971 (served May 1, 2001), slip op. at 9; *Township of Woodbridge v Consolidated Rail Corporation*, STB Docket No. 42053 (served December 1, 2000), slip op at 5.¹⁰

The Board has made clear that not all state and local regulation is completely preempted by ICCTA, particularly where railroad has voluntarily committed to restrictions. *See Town of Ayer, supra; City of Milwaukie, supra*. In this instance, the Board should find that ICCTA does not preempt the provisions of the MAA that restrict competition with private businesses. The Board should also find that ICCTA does not require an authority to put its contracts to operate and maintain its lines out for competitive bidding even if the result might be a change in operators. Whether the authorities have complied with requirements of the MAA in entering into their respective operating agreements goes to the validity of the operating agreements, a subject that is outside the jurisdiction of the Board. It is clear that the Board does not have jurisdiction over private contracts even if one of those parties is a railroad. For example, in *PCS Phosphate Co., Inc. v. Norfolk Southern Corp.*, 559 F.3d 212 (4th Cir. 2009), the Fourth Circuit concluded:

Voluntary agreements between private parties . . . are not presumptively regulatory acts, and we are doubtful that most private contracts constitute the sort of “regulation” expressly preempted by the statute. If contracts were by definition “regulation,” then enforcement of every contract with

¹⁰ Although the situation in *Township of Woodbridge* involved an agreement between a town and the railroad, and a consent decree entered by a court, the election to form as a municipal authority under Pennsylvania law represents no less a voluntary commitment by PNRRA and SEDA-COG to abide by the restrictions in the MAA.

“rail transportation” as its subject would be preempted as a state law remedy “with respect to the regulation of rail transportation.”

Given the statutory definition of “transportation,” this would include all voluntary agreements about “equipment of any kind related to the movement of passengers or property, or both, by rail.” If enforcement of these agreements were preempted, the contracting parties’ only recourse would be the “exclusive” ICCTA remedies. But the ICCTA does not include a general contract remedy.

Such a broad reading of the preemption clause would make it virtually impossible to conduct business, and Congress surely would have spoken more clearly, and not used the word “regulation,” if it intended that result.

Id. at 218-19. Given the history and purpose of the ICCTA, the Fourth Circuit concluded that state courts, not the Board, are the proper forum for contract disputes. *Id.* at 220. *See also Pyco Indus., Inc.—Feeder Line Application—Lines of S. Plains Switching, Ltd.*, STB Docket No. FD 34890 (served Sept. 8, 2008), slip op. at 10 (finding that interpretation of the terms of a purchase and sale agreement was a matter for a court applying state contract law); *City of Peoria—Adverse Discontinuance—Pioneer Indus. Ry.*, STB Docket No. AB 878 (served Aug. 10, 2005), slip op. at 6 (the Board does not undertake to enforce contracts).

Certainly, the state courts have the jurisdiction to enforce in a nondiscriminatory manner the requirements of the MAA on all municipal authorities that are subject to the MAA, including those that happen to own railroad lines. The MAA does not seek to regulate economics of the business of any municipal authority, even one that owns railroad lines. Rather, the MAA is an enabling statute selected by the incorporators of PNRRA and SEDA-COG that limits the powers of a municipal authority formed under its auspices. In particular, the MAA requires that certain contracts be put out for proper competitive bidding, and restricts a municipal authority from engaging in competitive behavior against private businesses in doing so. RBMN’s lawsuits against PNRRA and SEDA-COG seek nothing more than to require these municipal authorities

to comply with their governing statute. The Board should find that the requirements of the MAA, and RBMN's actions to enforce its provisions are not preempted by ICCTA. Such a finding would provide clear guidance to the various judges in Pennsylvania that are handling the litigation there.

REQUESTED RELIEF

RBMN requests that the Board declare that neither the provisions of the MAA, nor RBMN's state law claims to enforce the provisions of the MAA against municipal authorities that own railroad lines, are preempted by ICCTA, and that the Board does not have jurisdiction over such claims.¹¹

Respectfully submitted,


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Dated: September 10, 2015

Attorneys for Reading, Blue Mountain and
Northern Railroad Company

¹¹ In order that the Board's processing of this Petition can be expedited, although not required, RBMN is serving copies of this Petition on the potentially affected parties as shown on the certificate of service attached hereto.

VERIFICATION

I, Wayne A. Michel, President of the Reading Blue Mountain & Northern Railroad Company, verify under penalty of perjury that statements contained in the foregoing Petition for Declaratory Order are true and correct to the best of my knowledge and belief. Further, I certify that I am qualified and authorized to file this Verification.

Executed on September 10, 2015.



Wayne A. Michel

CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, I caused a copy of the foregoing Petition for Declaratory Order to be served by FedEx upon the following parties and their anticipated counsel as follows:

Pennsylvania Northeast Regional Rail Authority
280 Cliff Street
Scranton, PA 18503

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Buchanan Ingersoll & Rooney, PC
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(Counsel for PNRRA in the state court proceeding)

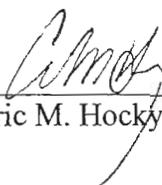
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Michael G. Crotty
Siana, Bellwoar & McAndrew, LLP
Ludwigs Corner Professional Center
941 Pottstown Pike, Suite 200
Chester Springs, PA 19425
(Counsel for SEDA-COG in the state court proceeding)

North Shore Railroads
356 Priestley Avenue
Northumberland, PA 17857

Dated: September 10, 2015


Eric M. Hocky

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. FD 35956



**READING BLUE MOUNTAIN & NORTHERN RAILROAD COMPANY –
PETITION FOR DECLARATORY ORDER**

VOLUME II

EXHIBITS

(Includes Color Copies)

ERIC M. HOCKY
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Dated: September 10, 2015

Attorneys for Reading Blue Mountain &
Northern Railroad Company

**READING BLUE MOUNTAIN & NORTHERN RAILROAD COMPANY –
PETITION FOR DECLARATORY ORDER**

INDEX TO EXHIBITS

Exhibit

- A Rail Map
- B RBMN Amended Complaint (without exhibit)
- C PNRRA Preliminary Objections to Amended Complaint
- D State Court Order Overruling Preliminary Objections to Amended Complaint
- E RBMN Second Amended Complaint v PNRRA
- F PNRRA Preliminary Objections to Second Amended Complaint (without exhibit)
- G RBMN Memorandum of Law in Support of Opposition to PNRRA Preliminary Objections to Second Amended Complaint (selected sections) (without exhibits)
- H RBMN Emergency Application for Preliminary Objection (without exhibits)
- I PNRRA Pre-hearing Brief in Opposition to Emergency Application (selected sections)
- J State Court Decision denying injunction
- K RBMN Complaint v SEDA-COG
- L SEDA-COG Preliminary Objections to Complaint (selected sections)
- M State Court Briefing Order on SEDA-COG Preliminary Objections
- N Pennsylvania Municipal Authorities Act (selected provisions)

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. FD 35956

**READING BLUE MOUNTAIN & NORTHERN RAILROAD COMPANY –
PETITION FOR DECLARATORY ORDER**

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- N Pennsylvania Municipal Authorities Act, selected provisions

EXHIBIT "A"

PENNSYLVANIA



EXHIBIT "B"

IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY
CIVIL DIVISION - LAW

READING, BLUE MOUNTAIN &
NORTHERN RAILROAD

No. 13-06796

Plaintiff

v.

PENNSYLVANIA NORTHEAST
REGIONAL RAIL AUTHORITY and
BOARD OF THE PENNSYLVANIA
NORTHEAST REGIONAL RAIL
AUTHORITY,

Defendants

2011 JUN 29 AM 10:18
MARY FERVALDI
LACKAWANNA COUNTY

AMENDED COMPLAINT

Plaintiff Reading, Blue Mountain & Northern Railroad, by and through its counsel, Frederick J. Fanelli, Esquire, brings this Amended Complaint for injunctive and declaratory relief and a writ of mandamus against Defendants Pennsylvania Northeast Regional Rail Authority and the Board of the Pennsylvania Northeast Regional Rail Authority, and in support thereof, avers as follows:

THE PARTIES

1. Plaintiff Reading, Blue Mountain & Northern Railroad ("RBM&N") is a Pennsylvania corporation with a registered office address of 1 Railroad Boulevard, P.O. Box 218, Port Clinton, Pennsylvania, 19549.
2. RBM&N owns rail lines located within Lackawanna County and is bringing this action as a landowner within the county and as a taxpayer of the Commonwealth of Pennsylvania, and on behalf of itself and all other taxpayers.

3. Defendant Pennsylvania Northeast Regional Rail Authority (“PNRRA”) is a municipal authority formed pursuant to the Municipality Authorities Act of 1945, Act of May 2, 1945, P.L. 382, as amended, now codified at 53 Pa. C.S. §§ 5601 et seq. (2013), located at 280 Cliff Street, Scranton, Lackawanna County, Pennsylvania, 18503.

4. PNRRA is operated by the Defendant Board of the PNRRA (“Board”), which consists of eight members, four appointed by Lackawanna County and four appointed by Monroe County, and which holds meetings to conduct the business of the PNRRA, in accordance with its bylaws.

JURISDICTION AND VENUE

5. Jurisdiction is based on the Pennsylvania Constitution, Article 5, Section 5; and 42 Pa.C.S.A. § 931(a), both of which confer broad original jurisdiction upon the Court of Common Pleas.

6. Venue in the Lackawanna County Court of Common Pleas is based upon 42 Pa.C.S.A. § 931(c) and Pa.R.C.P. 1006(c)(1), in that the written contract on which this action is based was entered into in Lackawanna County, and the PNRRA is located within Lackawanna County, Pennsylvania.

7. This Court has jurisdiction over this matter which involves the interpretation and application of the Municipality Authorities Act (“MAA”), 53 Pa. C.S. §§ 5301 et seq. and the competitive sealed bidding and proposal provisions for contracts for public works of 62 Pa. C.S. § 3901 et seq., rather than the Surface Transportation Board, which routinely declines to exercise jurisdiction over disputes involving state statutory and contractual matters. See, e.g., Lackawanna County Railroad Authority – Acquisition Exemption – F&L Realty, Inc., STB

Finance Docket No. 33905, and Delaware-Lackawanna Railroad Co., Inc. – Operation Exemption – Lackawanna County Railroad Authority, STB Docket No. 33906 (STB served Oct. 22, 2001); Indiana Northeastern Railroad Company – Change in Operators – Branch and St. Joseph Counties Rail Users Association, Inc., in Branch County, Michigan, STB Finance Docket No. 33760 (STB served Sept. 1, 1999).

FACTUAL BACKGROUND

8. PNRRA owns nearly 100 miles of rail lines located in Lackawanna, Monroe, Wayne and Northampton Counties, from Carbondale to Scranton through the Pocono region all the way to Delaware Water Gap, on which it provides freight service in four counties via a private common carrier rail operator, under contract to PNRRA.

9. PNRRA was formed for the purpose of acquiring, holding, constructing, improving, maintaining, operating, owning and leasing, either as a lessor or lessee, rights-of-way, trackage, sidings and other related rail transport facilities and to accept grants and borrow money from any authority, corporation or agency of the United States or from the Commonwealth of Pennsylvania for the purpose of acquiring and preserving rail transport facilities within the Commonwealth of Pennsylvania.

10. As a municipal agency, PNRRA is subject to the requirements of the Municipality Authorities Act (“MAA”), 53 Pa. C.S. §§ 5301 et seq. and the competitive sealed bidding and proposal provisions for contracts for public works of 62 Pa. C.S. § 3901 et seq.

11. The Delaware-Lackawanna Railroad Company, Inc. (“the DL”) is a Pennsylvania corporation with a registered business address of Suite 800 Connell Building, 129 North

Washington Avenue, Scranton, Lackawanna County, Pennsylvania, 18503 and a mailing address of 280 Cliff Street, Scranton, Lackawanna County, Pennsylvania, 18503.

12. On August 27, 2010, PNRRA through its Board entered into a contractual operating agreement with the DL ("DL Operating Agreement"), for the DL to operate and provide rail freight service on railroad lines known as the Carbondale Mainline, the Pocono Mainline, and the Laurel Line Mainline, including the Minooka Industrial Track. A true and correct copy of the DL Operating Agreement is attached hereto as Exhibit "A".

13. The term of the DL Operating Agreement is five years and it expires on August 27, 2015. DL Operating Agreement, Ex. A at 2.

14. It is believed and therefore averred that PNRRA and its Board did not subject this operating agreement to a public bidding process as required by the MAA and 62 Pa. C.S. §§ 3901 et seq. prior to awarding the operating agreement to DL. In fact, the Board last sought any type of public bidding for the awarding of the Operating Agreement in 1993. Since 1993, the Board has not solicited any public bids or Request For Proposals before awarding the Operating Agreement.

15. On November 6, 2013, RBM&N sent a letter to PNRRA and its Board, asking for an opportunity to submit a bid to operate their rail lines, in anticipation of the August 27, 2015 expiration of the current DL Operating Agreement.

16. In that letter, RBM&N stated that it believed that it could offer superior service to PNRRA than is currently being offered under the existing DL Operating Agreement.

17. It is believed and therefore averred that in response to RBM&N's letter, PNRRA, through its Board, at its next regularly scheduled meeting on November 19, 2013, went into

executive session to discuss topics currently unknown. The Board emerged from the executive session and voted to extend the current DL Operating Agreement for an additional five years, although the current DL Operating Agreement is not set to expire for another year and a half.

18. It is believed and therefore averred that PNRRA, through its Board, voted to extend the current DL Operational Agreement for another five years without any form of competitive bidding.

19. Subsequent to the meeting of November 19, 2013, RBMN, through its counsel, wrote to PNRRA and indicated that RBMN could offer a significant increase in fees paid to PNRRA if given an opportunity to bid or submit a proposal for the Operating Agreement.

20. The purpose and intent of the Pennsylvania Legislature in enacting the MMA is to benefit the people of the Commonwealth by, among other things, increasing their commerce, health, safety and prosperity, and to permit the authority to benefit the people. 53 Pa. C.S. § 5607(b)(2), (3).

21. One of the powers granted to the Authority in the MMA is the power to enter into contracts. 53 Pa. C.S. § 5607(d)(13), (14).

22. PNRRA's DL Operating Agreement is a contract subject to the requirements of 53 Pa. C.S. § 5614, in that it is a contract for work, including for the maintenance of those lines in an FRA Class I and Class II condition; for the maintenance of PNRRA's structures and related facilities and equipment located on the rail lines; for the repair or replacement of same; for the provision of working capital as well as a escrowed reserve; for the removal, replacement or improvement of the track and structures on the railroad lines; for security along the rail lines;

for marketing and sales work; for the provision of hirail inspection services; and any other work provided for in the DL Operating Agreement. DL Operating Agreement, Ex. A.

23. PNRRA's DL Operating Agreement is a contract subject to the requirements of 62 Pa. C.S. §§ 3901 et seq.

24. PNRRA's DL Operating Agreement exceeds \$18,500 in value and should have been subject to competitive bidding pursuant to 53 Pa. C.S. § 5614(a), which provides:

§ 5614. Competition in award of contracts.

(a) *Services.*

(1) Except as set forth in paragraph (2), all construction, reconstruction, repair or work of any nature made by an authority if the entire cost, value or amount, including labor and materials, exceeds a base amount of \$ 18,500, subject to adjustment under subsection (c.1), shall be done only under contract to be entered into by the authority with the lowest responsible bidder upon proper terms after public notice asking for competitive bids as provided in this section.

(2) Paragraph (1) does not apply to construction, reconstruction, repair or work done by employees of the authority or by labor supplied under agreement with a Federal or State agency with supplies and materials purchased as provided in this section.

53 Pa. C.S. § 5614(a) (2013).

25. To the extent that PNRRA seeks to avoid competitive bidding by asserting that the DL Operating Agreement is some sort of "special services" contract, it is noted that there is nothing unusual, peculiar, or special about providing rail freight contractor services over properties owned by a different entity.

26. As opposed to being a "special services" contract, these agreements/contracts are common. For example, numerous other freight railroads provide services for entities similar to PNRRA, such as North Shore Railroad over SEDA-COG, C&S and RBM&N Railroad over

Carbon County, DL Railroad over PNRRA and Genessee and Wyoming Railroad over Luzerne County Redevelopment Authority.

COUNT 1 – INJUNCTION

27. The averments of paragraphs 1 through 24 are incorporated herein as if set forth at length.

28. RBM&N has a clear right to equitable relief in having the opportunity to submit a bid to operate PNRRA's rail line, which PNRRA has avoided by renewing the DL Operating Agreement without public notice or seeking other bids, in violation of 53 Pa. C.S. § 5614(a) and 62 Pa. C.S. §§ 3901 et seq.

29. An injunction of PNRRA's renewal of the DL Operating Agreement is necessary to avoid an injury that cannot be compensated by damages, in that RBM&N will not have an opportunity to have its bid considered by PNRRA without an injunction preventing the renewed contract from becoming effective.

30. Greater injury will result if the Court does not grant an injunction, than if it does, because RBM&N will not have the opportunity to have its bid considered if an injunction does not issue; if this Court issues an injunction, PNRRA, will not suffer any harm and the status quo will be maintained until PNRRA gives public notice and accepts bids according to the requirements of 53 Pa. C.S. § 5614(a) and 62 Pa. C.S. §§ 3901 et seq. The current contract does expire until August 27, 2015, approximately eighteen months from now, giving PNRRA ample time to accept and consider competitive bids.

WHEREFORE, Plaintiff Reading, Blue Mountain & Northern Railroad respectfully requests that this Court enjoin Defendants Pennsylvania Northeast Regional Railroad Authority and its Board from acting upon or implementing the renewal of the existing DL Operating Agreement until the Defendant follows the public bidding requirements pursuant to 53 Pa. C.S. § 5614(a) and 62 Pa. C.S. §§ 3901 et seq., and award any other relief that this Court deems just and proper.

COUNT II – DECLARATORY ACTION

31. The averments of paragraphs 1 through 28 are incorporated herein as if set forth at length.

32. The Declaratory Judgments Act, 42 Pa. C.S. §§ 7531 et seq., provides in part:

Courts of record, within their respective jurisdictions, shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree.

42 Pa. C.S. § 7532.

33. It also provides:

Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder.

42 Pa. C.S. § 7533.

34. PNRRA is a municipal authority subject to the provisions of the MAA and 62 Pa. C.S. §§ 3901 et seq.

35. Any contract for the operation of PNRRA's rail lines must be subjected to a public bidding process pursuant to 53 Pa. C.S. § 5614(a) and 62 Pa. C.S. §§ 3901 et seq.

36. Any contract entered into by PNRRA for the operation of its rail lines without having been subjected to a public competitive bidding process should be declared by this Court to be null and void.

WHEREFORE, Plaintiff Reading, Blue Mountain & Northern Railroad respectfully requests that this Court grant relief to Plaintiff and declare that Defendants Pennsylvania Northeast Regional Railroad Authority and its Board must follow the public notice and competitive bidding requirements of 53 Pa. C.S. § 5614(a) and 62 Pa. C.S. §§ 3901 et seq. for the operation of its rail lines, and that any operation agreements entered into by PNRRA and its Board without having been subjected to the competitive bidding requirements of 53 Pa.C.S. § 5614(a) and 62 Pa. C.S. §§ 3901 et seq. are deemed null and void, and award any other relief that this Court deems just and proper. .

COUNT III – MANDAMUS

37. The averments of paragraphs 1 through 34 are incorporated herein as if set forth at length.

38. RBM&N has a beneficial interest in the competitive bidding process and in submitting a bid for the right to contract to operate PNRRA's rail lines that is distinct from the general public.

39. PNRRA and its Board are presumed to act and make decisions for the public good.

40. The MAA requires PNRRA and its Board to act to the benefit of the public, the taxpayers. 53 Pa. C.S. § 5607.

41. The MAA requires an authority to use a public competitive bidding process for service contracts over \$18,500 in value. 53 Pa. C.S. § 5614(a).

42. Despite request by RBM&N to submit a bid for consideration by PNRRA, PNRRA and its Board rejected RBM&N's request by renewing the DL Operational Agreement one and a half years in advance, without soliciting or accepting other alternative bids for the work.

43. The renewal of the DL Operational Agreement and the failure to solicit or accept competitive bids was a violation of RBM&N's rights as well as a violation of the Board's duty to act in the best interests of the public's welfare.

44. RBM&N has a clear legal right to submit a bid for the operation of PNRRA's rail lines pursuant to 53 Pa. C.S. § 5614(a) and 62 Pa. C.S. §§ 3901 et seq.

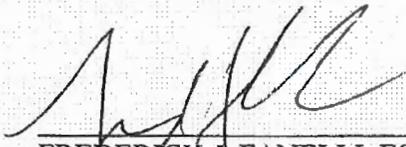
45. PNRRA is subject to and has a duty to following the competitive bidding requirements of 53 Pa. C.S. § 5614(a) and 62 Pa. C.S. §§ 3901 et seq.

46. A writ of mandamus is required because there is no other appropriate and adequate remedy.

47. To the extent that PNRRA's actions through its Board are discretionary, PNRRA and its Board acted in an arbitrary or fraudulent manner, or with an erroneous legal basis, and abused its discretion in failing to follow the competitive bid requirements of 53 Pa. C.S. § 5614(a) and in renewing the DL Operational Agreement without considering other, possibly better and more competitive, bids.

WHEREFORE, Plaintiff Reading, Blue Mountain & Northern Railroad respectfully requests that this Court declare that Defendant Pennsylvania Northeast Regional Railroad Authority and its Board must follow the public notice and competitive bidding requirements of 53 Pa. C.S. § 5614(a) and 62 Pa. C.S. §§ 3901 et seq. for the operation of its rail lines and that any operation agreements entered into by PNRRA without having been subjected to the competitive bidding requirements of 53 Pa.C.S. § 5614(a) and 62 Pa. C.S. §§ 3901 et seq. are deemed null and void.

Respectfully submitted by:



FREDERICK J. FANELLI, ESQUIRE
Attorney I.D. #36672
Fanelli, Evans & Patel, P.C.
The Necho Allen
No. 1 Mahantongo Street
Pottsville, PA 17901
(570) 622-2455

IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY
CIVIL DIVISION - LAW

READING, BLUE MOUNTAIN &
NORTHERN RAILROAD

No. 13 - 06796

Plaintiff

v.

PENNSYLVANIA NORTHEAST
REGIONAL RAIL AUTHORITY and
BOARD OF THE PENNSYLVANIA
NORTHEAST REGIONAL RAIL
AUTHORITY,

Defendants

HARRY F. RINALDI
LACKAWANNA COUNTY
2014 JUN 29 A 10:19
CLERK OF JUDICIAL
RECORDS CIVIL DIVISION

CERTIFICATE OF SERVICE

I, FREDERICK J. FANELLI, Esquire, hereby certify that a true and correct copy of the foregoing Amended Complaint was mailed by United States Mail, first class mail and email, postage prepaid upon the following parties:

Jack M. Stover, Esquire
Buchanan Ingersoll & Rooney, PC
409 North Second Street, Ste 500
Harrisburg, PA 17101

Dated:

1-28-14


FREDERICK J. FANELLI, ESQUIRE

EXHIBIT "C"

Jack M. Stover
717 237 4837
jack.stover@bipc.com

409 North Second Street
Suite 500
Harrisburg, PA 17101-1357
T 717 237 4800
F 717 233 0852
www.buchananingersoll.com

February 10, 2014

VIA UPS OVERNIGHT

Ronald C. Mackay, Court Administrator
Lackawanna County Courthouse
200 N. Washington Avenue
Scranton, PA 18503

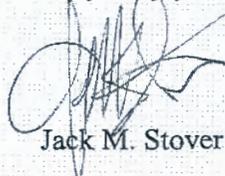
**Re: Reading, Blue Mountain & Northern Railroad v.
Pennsylvania Northeast Regional Railroad Authority , et al
Lackawanna County Civil No. 13-6796**

Dear Mr. Mackay:

We enclose herewith a copy of the Preliminary Objections of Defendants Pennsylvania Northeast Regional Rail Authority and Board of Pennsylvania Northeast Regional Rail Authority to Plaintiff's Amended Complaint as well as a Praecipe for Assignment which have also been overnighted to Mary F. Rinaldi, Clerk of Judicial Records, for filing.

Thank you for your assistance.

Very truly yours,



Jack M. Stover

JMS/skm
Attachment
cc: Frederick J. Fanelli, Esquire

READING, BLUE MOUNTAIN &
NORTHERN RAILROAD,

Plaintiff,

v.

PENNSYLVANIA NORTHEAST
REGIONAL RAIL AUTHORITY and
BOARD OF THE PENNSYLVANIA
NORTHEAST REGIONAL
RAIL AUTHORITY,

Defendants

: IN THE COURT OF COMMON PLEAS
: OF LACKAWANNA COUNTY,
: PENNSYLVANIA

: NO. 13-06796

PRAECIPE FOR ASSIGNMENT

TO: Lackawanna County Court Administrator:

Please be advised that Defendants Pennsylvania Northeast Regional Rail Authority ("PNRRA") and the Board of PNRRA have filed Preliminary Objections to the Amended Complaint in the above-captioned case.

The undersigned counsel has conferred with Plaintiff's counsel regarding the necessity of oral argument on Defendants' Preliminary Objections, as required by Lackawanna Local Rule 211(b).

Please schedule this matter for oral argument.

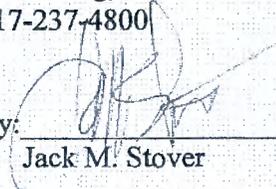
Attorney for Plaintiff

Frederick J. Fanelli
Fanelli, Evans & Patel, P.C.
The Necho Allen
No. 1 Mahantongo Street
Pottsville, PA 17901
570-622-2455

Date: February 10, 2014

Attorneys for Defendants

Jack M. Stover
Kyle J. Meyer
Buchanan Ingersoll & Rooney PC
409 North Second Street, Suite 500
Harrisburg, PA 17101
717-237-4800

By: 

Jack M. Stover

CERTIFICATE OF SERVICE

I, Jack M. Stover, certify that I am this day serving a copy of the foregoing document upon the persons below by First Class U.S. Mail, which service satisfies the requirements of the Pennsylvania Rules of Civil Procedure as follows:

Frederick J. Fanelli, Esquire
Fanelli, Evans & Patel, P.C.
The Necho Allen
No. 1 Mahantongo Street
Pottsville, PA, 17901



Jack M. Stover

DATE: February 10, 2014

**READING, BLUE MOUNTAIN &
NORTHERN RAILROAD,**

Plaintiff,

v.

**PENNSYLVANIA NORTHEAST
REGIONAL RAIL AUTHORITY and
BOARD OF THE PENNSYLVANIA
NORTHEAST REGIONAL
RAIL AUTHORITY,**

Defendants

**IN THE COURT OF COMMON PLEAS
OF LACKAWANNA COUNTY,
PENNSYLVANIA**

NO. 13-06796

**PRELIMINARY OBJECTIONS OF DEFENDANTS PENNSYLVANIA
NORTHEAST REGIONAL RAILROAD AUTHORITY AND BOARD OF
PENNSYLVANIA NORTHEAST REGIONAL RAILROAD AUTHORITY
TO PLAINTIFF'S AMENDED COMPLAINT**

Defendants Pennsylvania Northeast Regional Railroad Authority (incorrectly captioned as "Pennsylvania Northeast Regional Rail Authority") ("PNRRA") and the Board of PNRRA ("Board") (collectively "Defendants"), by their undersigned counsel, Buchanan Ingersoll & Rooney PC, hereby preliminarily object to the Amended Complaint filed by Plaintiff Reading, Blue Mountain & Northern Railroad ("Plaintiff") pursuant to Rule 1028 of the Pennsylvania Rules of Civil Procedure. In support of these Preliminary Objections, Defendants state as follows:

1. Plaintiff commenced this action by filing a Complaint on December 12, 2013, which was served on Defendants on December 23, 2013.
2. Defendants filed timely Preliminary Objections to Plaintiff's Complaint on January 10, 2014.
3. Plaintiff filed an Amended Complaint on January 29, 2014.

4. The Amended Complaint avers, *inter alia*, the following:
- (a) PNRRA is a municipal authority that owns rail lines in Lackawanna, Monroe, Wayne and Northampton Counties. (Am. Compl., ¶¶ 3, 8.)
 - (b) PNRRA, through its Board, has contracted with Delaware-Lackawanna Railroad Company, Inc. (“DLRC”) through an Operating Agreement (“the “Operating Agreement”) to operate and provide common carrier rail freight service on PNRRA-owned rail lines. (See Am. Compl., ¶¶ 4, 8, 11-12; Ex. A to Am. Compl.)
 - (c) Pursuant to the Operating Agreement, PNRRA provides DLRC access to and use of rail lines and DLRC has the “right to use the lines of railroad for exclusive railroad freight service and to establish, operate and maintain freight rail service thereon” (Ex. A to Am. Compl. at 1.)
 - (d) At a regularly scheduled meeting held November 19, 2013, the Board voted to extend the Operating Agreement with DLRC for an additional five-year term pursuant to a renewal option set forth in Paragraph 2, subparagraph (iv) of the Operating Agreement. (See Am. Compl., ¶¶ 17-18; Ex. A to Am. Compl. at 2.)

5. Plaintiff’s three counts averred in the Amended Complaint all relate to Plaintiff’s allegation that the Operating Agreement between PNRRA and DLRC is subject to competitive bidding pursuant to Section 5614(a)(1) of the Municipality Authorities Act (“MAA”), 53 Pa. C.S. § 5614(a)(1), as supplemented by the provisions of 62 Pa. C.S. § 3901, *et seq.* Section 5614(a)(1) provides:

- (1) Except as set forth in paragraph (2), all construction, reconstruction, repair or work of any nature made by an authority

if the entire cost, value or amount, including labor and materials, exceeds a base amount of \$18,500, subject to adjustment under subsection (c.1), shall be done only under contract to be entered into by the authority with the lowest responsible bidder upon proper terms after public notice asking for competitive bids as provided in this section.

(See Am. Compl., ¶¶ 10, 23-24.)

6. In Count I of the Amended Complaint, Plaintiff seeks injunctive relief, requesting that this Court enjoin PNRRA's renewal of the Operating Agreement with DLRC "until PNRRA gives public notice and accepts bids according to the requirements of 53 Pa. C.S. § 5614(a) and 62 Pa. C.S. §§ 3901 *et seq.*" (Am. Compl., ¶ 30.)

7. In Count II of the Amended Complaint, Plaintiff seeks declaratory relief, requesting this Court to declare that "[a]ny contract for the operation of PNRRA's rail lines must be subjected to a public bidding process pursuant to 53 Pa. C.S. § 5614(a) and 62 Pa. C.S. §§ 3901 *et seq.*," and that "[a]ny contract entered into by PNRRA for the operation of its rail lines without having been subjected to a public competitive bidding process" is null and void. (Am. Compl., ¶¶ 35-36.)

8. Finally, in Count III of the Amended Complaint, Plaintiff seeks a writ of mandamus from this Court compelling Defendants to submit any contract for the operation of PNRRA's rail lines to the public notice and competitive bidding process set forth under 53 Pa. C.S. § 5614(a), as supplemented by 62 Pa. C.S. §§ 3901 *et seq.*

9. For the reasons stated below, none of Plaintiff's purported causes of action are sustainable under applicable law.

DEFENDANTS' PRELIMINARY OBJECTIONS

I. Defendants' First Preliminary Objection Pursuant to Pa. R. Civ. P. 1028(a)(4) for Legal Insufficiency (Demurrer)

10. The averments of paragraphs 1 through 9 are incorporated herein by reference.

11. Pa. R. Civ. P. 1028(a)(4) authorizes a preliminary objection for "legal insufficiency of a pleading (demurrer)."

12. All of Plaintiff's asserted causes of action stem from Plaintiff's allegation that Defendants improperly renewed and extended the Operating Agreement between PNRRA and DLRC without competitive bidding in violation of 53 Pa. C.S. § 5614(a) and 62 Pa. C.S. §§ 3901 *et seq.*

13. The provisions of 53 Pa. C.S. § 5614(a) and 62 Pa. C.S. §§ 3901 *et seq.* have no application here because the Operating Agreement—which grants DLRC, in exchange for payment to PNRRA, "the right to use the lines of railroad for exclusive railroad freight service and to establish, operate and maintain freight rail service thereon," (Ex. A to Am. Compl. at 1)—does not fall under and/or is otherwise exempt from 53 Pa. C.S. § 5614(a)(1) and 62 Pa. C.S. §§ 3901 *et seq.*

14. Because the provisions of 53 Pa. C.S. § 5614(a) and 62 Pa. C.S. §§ 3901 *et seq.* do not apply to the Operating Agreement, Plaintiff's purported causes of action in Counts I, II and III of the Amended Complaint have no cognizable basis under Pennsylvania law.

WHEREFORE, Defendants respectfully request that the Court sustain its Preliminary Objection and dismiss Counts I, II and III of the Amended Complaint pursuant to Pa. R. Civ. P. 1028(a)(4) with prejudice.

II. Defendants' Second Preliminary Objection Pursuant to Pa. R. Civ. P. 1028(a)(1) and/or (a)(4) for Lack of Subject Matter Jurisdiction and/or Legal Insufficiency (Demurrer)

15. The averments of paragraphs 1 through 14 are incorporated herein by reference.

16. Pa. R. Civ. P. 1028(a)(1) authorizes a preliminary objection for lack of subject matter jurisdiction.

17. This Court lacks subject matter jurisdiction over Plaintiff's claims and/or Plaintiff's claims are legally insufficient because the competitive bidding requirements of 53 Pa. C.S. § 5614(a), as supplemented by 62 Pa. C.S. §§ 3901 *et seq.*, and/or the remedies Plaintiff seeks in the Amended Complaint are expressly preempted by Section 10501(b) of the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. § 10501(b), which provides:

(b) The jurisdiction of the [Surface Transportation] Board ["STB"] over—

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance or spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one state,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

WHEREFORE, Defendants respectfully request that the Court sustain its Preliminary Objection and dismiss Counts I, II and III of the Amended Complaint pursuant to Pa. R. Civ. P. 1028(a)(1) and/or (a)(4) with prejudice.

III. Defendants' Third Preliminary Objection Pursuant Pa. R. Civ. P. 1028(a)(5) for Lack of Standing

18. The averments of paragraphs 1 through 17 are incorporated herein by reference.

19. Pa. R. Civ. P. 1028(a)(5) authorizes a preliminary objection for lack of standing.

20. Plaintiff does not have standing to challenge award and/or renewal of the Operating Agreement based on its asserted statuses as (1) a taxpayer of the Commonwealth and (2) a landowner in Lackawanna County. (*See* Am. Compl., ¶ 2.)

21. Taxpayer standing does not apply here because the Operating Agreement does not provide for the expenditure of public funds.

22. In the alternative, even if public funds are expended under the Operating Agreement (which they are not), Plaintiff cannot establish taxpayer standing because Plaintiff has failed to allege that it is a taxpayer within the area serviced by the PNRRA, or that it otherwise has a substantial, direct and immediate interest greater than the common interest of all taxpaying citizens in any public funds expended. Plaintiff's status as a taxpayer of the Commonwealth is insufficient, by itself, to confer taxpayer standing.

23. Further, Plaintiff's status as a landowner in Lackawanna County, by itself, does not give rise to standing to challenge PNRRA's compliance with the purported competitive bidding requirements.

WHEREFORE, Defendants respectfully request that the Court sustain its Preliminary Objection and dismiss Counts I, II and III of the Amended Complaint pursuant to Pa. R. Civ. P. 1028(a)(5) with prejudice.

IV. Defendants' Fourth Preliminary Objection Pursuant to Pa. R. Civ. P 1028(a)(5) for Failure to Join a Necessary Party

24. The averments of paragraphs 1 through 23 are incorporated herein by reference.

25. Pa. R. Civ. P. 1028(a)(5) authorizes a preliminary objection for "nonjoinder of a necessary party."

26. "A party is generally regarded to be indispensable when his or her rights are so connected with the claims of the litigants that no decree can be made without impairing those rights." *HYK Construction Company, Inc. v. Smithfield Township*, 8 A.3d 1009, 1015 (Pa. Cmwlth. 2013) (quotations omitted). "The failure to join an indispensable party to a lawsuit deprives the court of subject matter jurisdiction." *Id.*

27. Despite attacking the validity and continued viability of the Operating Agreement between PNRRA and DLRC, Plaintiff has failed to name DLRC as a party defendant to this action.

28. Since the relief sought by Plaintiff would have a direct and immediate impact on DLRC's rights, DLRC is an indispensable party who must be joined by Plaintiff in order for this action to proceed.

WHEREFORE, Defendants respectfully request that this Court sustain its Preliminary Objection and dismiss Counts I, II and III of the Amended Complaint pursuant to Pa. R. Civ. P. 1028(a)(5) with prejudice.

Respectfully submitted,

BUCHANAN INGERSOLL & ROONEY PC

By: 

Jack M. Stover
PA I.D. #18051

By: 

Kyle J. Meyer
PA I.D. #307743

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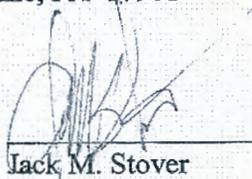
*Attorneys for Defendants Pennsylvania
Northeast Railroad Authority and the Board of
Pennsylvania Northeast Regional Railroad
Authority*

DATE: February 10, 2014

CERTIFICATE OF SERVICE

I, Jack M. Stover, certify that I am this day serving a copy of the foregoing document upon the persons below by First Class U.S. Mail, which service satisfies the requirements of the Pennsylvania Rules of Civil Procedure as follows:

Frederick J. Fanelli, Esquire
Fanelli, Evans & Patel, P.C.
The Necho Allen
No. 1 Mahantongo Street
Pottsville, PA 17901



Jack M. Stover

DATE: February 10, 2014

EXHIBIT "D"

IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY
CIVIL DIVISION - LAW

2014 APR -9 P 3:33

READING, BLUE MOUNTAIN & : No. 13-06796
NORTHERN RAILROAD :

Plaintiff

v.

PENNSYLVANIA NORTHEAST :
REGIONAL RAIL AUTHORITY and :
BOARD OF THE PENNSYLVANIA :
NORTHEAST REGIONAL RAIL :
AUTHORITY, :

Defendants

ORDER

AND NOW, this 9 day of April, 2014, upon consideration
of Plaintiff's Opposition to Defendant's Preliminary Objections and any response thereto, IT IS
HEREBY ORDERED and DECREED that the Preliminary Objections are OVERRULED and
Defendant must answer the Amended Complaint within 20 days hereof.

BY THE COURT:

Sutton S.J.

EXHIBIT "E"

**IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY
CIVIL DIVISION - LAW**

READING, BLUE MOUNTAIN & NORTHERN RAILROAD	:	No. 13-06796
	:	
Plaintiff	:	
v.	:	
	:	
PENNSYLVANIA NORTHEAST REGIONAL RAILROAD AUTHORITY and BOARD OF THE PENNSYLVANIA NORTHEAST REGIONAL RAILROAD AUTHORITY,	:	
	:	
Defendants	:	

SECOND AMENDED COMPLAINT

Plaintiff Reading, Blue Mountain & Northern Railroad, by and through its counsel, Frederick J. Fanelli, Esquire, brings this Second Amended Complaint for declaratory relief against Defendants Pennsylvania Northeast Regional Railroad Authority and the Board of the Pennsylvania Northeast Regional Railroad Authority, and in support thereof, avers as follows:

THE PARTIES

1. Plaintiff Reading, Blue Mountain & Northern Railroad ("RBM&N") is a Pennsylvania corporation with a registered office address of 1 Railroad Boulevard, P.O. Box 218, Port Clinton, Pennsylvania, 19549.
2. RBM&N owns land and rail lines located within Lackawanna County and is bringing this action as a landowner within the county and as a taxpayer of the Commonwealth of Pennsylvania and subject to the Public Utility Realty Tax Act, 72 P.S. §§ 8101 et seq., on behalf of itself and all other taxpayers.

3. RBM&N is in the business of, among other things, providing freight rail service to industries located in east central Pennsylvania, including along its rail lines in Schuylkill, Berks, Carbon, Luzerne, Lackawanna and Wyoming counties.

4. Rail freight service is a substantial part of RBM&N's business.

5. Defendant Pennsylvania Northeast Regional Rail Authority ("PNRRA") is a municipal authority formed pursuant to the Municipality Authorities Act of 1945, Act of May 2, 1945, P.L. 382, as amended, now codified at 53 Pa. C.S. §§ 5601 et seq. (2013), located at 280 Cliff Street, Scranton, Lackawanna County, Pennsylvania, 18503.

6. PNRRA's Board of Directors ("Board") consists of eight members, four appointed by Lackawanna County and four appointed by Monroe County, and holds regular meetings to conduct the business of the PNRRA, in accordance with its bylaws.

JURISDICTION AND VENUE

7. Jurisdiction is based on the Pennsylvania Constitution, Article 5, Section 5; and 42 Pa. C.S.A. § 931(a), both of which confer broad original jurisdiction upon the Court of Common Pleas.

8. Venue in the Lackawanna County Court of Common Pleas is based upon 42 Pa.C.S. § 931(c) and Pa.R.C.P. 1006(c)(1), in that the written contract on which this action is based was entered into in Lackawanna County, and PNRRA's principal office and some of its assets are located within Lackawanna County, Pennsylvania.

9. This Court has jurisdiction over this matter which involves the interpretation and application of the Municipality Authorities Act ("MAA"), 53 Pa. C.S. §§ 5301 et seq. and the

competitive sealed bidding and proposal provisions for contracts for public works of 62 Pa. C.S. § 3901 et seq., rather than the Surface Transportation Board, which routinely declines to exercise jurisdiction over disputes involving state statutory and contractual matters. See, e.g., Lackawanna County Railroad Authority – Acquisition Exemption – F&L Realty, Inc., STB Finance Docket No. 33905, and Delaware-Lackawanna Railroad Co., Inc. – Operation Exemption – Lackawanna County Railroad Authority, STB Docket No. 33906 (STB served Oct. 22, 2001); Indiana Northeastern Railroad Company – Change in Operators – Branch and St. Joseph Counties Rail Users Association, Inc., in Branch County, Michigan, STB Finance Docket No. 33760 (STB served Sept. 1, 1999).

FACTUAL BACKGROUND

10. PNRRA was formed in 2006 for the purpose of acquiring, holding, constructing, improving, maintaining, operating, owning and leasing, either as a lessor or lessee, rights-of-way, trackage, sidings and other related rail transport facilities and to accept grants and borrow money from any authority, corporation or agency of the United States or from the Commonwealth of Pennsylvania for the purpose of acquiring and preserving rail transport facilities within the Commonwealth of Pennsylvania.

11. PNRRA owns nearly 100 miles of rail lines located in Lackawanna, Monroe, Wayne and Northampton Counties, from Carbondale to Scranton through the Pocono region all the way to Slateford, Pennsylvania, on which it provides freight rail service in four counties via a private common carrier rail operator, under contract to PNRRA.

12. The Delaware-Lackawanna Railroad Company, Inc. ("the DL") is a Pennsylvania corporation with a registered business address of Suite 800 Connell Building, 129 North Washington Avenue, Scranton, Lackawanna County, Pennsylvania, 18503 and a mailing address of 280 Cliff Street, Scranton, Lackawanna County, Pennsylvania, 18503.

13. The DL is PNRRA's current rail freight operator on PNRRA's rail lines, and has provided freight service since 1993 to PNRRA and its predecessor authorities.

14. PNRRA and the DL share the same mailing address.

15. Through discovery, PNRRA's President and Chief Executive Officer, Lawrence C. Malski ("Malski") has admitted that PNRRA is a direct competitor of RBM&N, and that its rail lines parallel those of RBM&N's.

16. Both PNRRA and the DL apply for and receive state grant funding for various rail construction projects.

17. Wayne Michel, President of RBM&N, would agree with Malski that PNRRA and RBM&N are direct competitors, not only for rail customers, but for state grants, which are issued in a finite, limited amount each year.

18. Through discovery, PNRRA has admitted that its employees and board members actively work to develop new industry along its own rail lines to increase its freight rail business, in direct competition with RBM&N.

19. At his deposition, Malski testified that he routinely has business dinners and lunches with current and prospective rail shippers along with the owner of the DL, David J. Monte Verde, who Malski believes might have paid the bill for those meals.

20. Through discovery, PNRRA has admitted that Malski regularly collaborates with the DL on sales marketing, to target potential customers using all means possible and develop leads.

21. Through discovery, PNRRA has admitted that it competes with RBM&N and other freight rail operators for the same customers.

22. At his deposition, Malski testified that he has developed more than ten new customers for the DL and PNRRA and/or its predecessors.

23. Through discovery, PNRRA has admitted that it competes with RBM&N on pricing, and that the DL can offer better pricing because it uses PNRRA's rail lines.

24. Through discovery, PNRRA has admitted that it owns property along its rail lines which it can rent, lease or sell to a potential customer in order to attract that customer to locate along PNRRA's rail lines, or use PNRRA's facilities to load and unload freight.

25. As a municipal agency, PNRRA is subject to the requirements of the Municipality Authorities Act ("MAA"), 53 Pa. C.S. §§ 5301 et seq. and, for the contracts subject to competitive bidding under the MAA, to the competitive sealed bidding and proposal provisions for contracts for public works of 62 Pa. C.S. § 3901 et seq.

26. PNRRA was created by the merger of two rail authorities, the Lackawanna County Railroad Authority ("LCRA") and the Monroe County Railroad Authority ("MCRA"), both of which were municipal authorities created under and subject to the MAA, for the purpose of, among other things, acquiring abandoned and/or out of service rail lines and placing those rail lines back into service.

27. Discovery has revealed that PNRRA was formed to consolidate the resources of the two authorities and regionalize in order to pursue passenger rail service from Scranton to New York City, and that one entity would be more successful in obtaining rights of way and track, and in competing for freight rail business.

26. PNRRA and/or its predecessors used state grant monies and its own funds to buy additional rail lines.

28. Discovery in this matter has revealed that in 1993, LCRA issued a Request for Proposal ("RFP") to determine freight rail operator interest prior to hiring a freight rail operator to operate its rail lines; Malski was the executive director of LCRA and wrote the RFP for LCRA at its Board's request.

29. After utilizing an RFP, LCRA contracted with the DL in 1993 and DL became LCRA's freight rail operator.

30. Since 1993, neither LCRA nor its successor, PNRRA, has used an RFP to determine freight rail operator interest prior to entering a new contract with the DL or extending the DL's existing agreements, or sought public sealed competitive bids for its rail freight business pursuant to the MAA, based at least in part on Malski's advice to LCRA and PNRRA that none was required.

31. On June 20, 1994, MCRA, employing LCRA as a consultant, chose the DL to be MCRA's freight rail operator, and it is believed and therefore averred that MCRA did not use an RFP or seek competitive bidding prior to contracting with the DL.

32. It is believed and therefore averred that once MCRA chose the DL as its freight rail operator, MCRA did not use RFPs prior to entering any new contract with the DL or

extending the DL's existing agreement, or seek public sealed competitive bids for its rail freight business.

33. On August 27, 2010, PNRRA through its Board entered into the current contractual operating agreement with the DL ("Operating Agreement"), for the DL to operate and provide rail freight service on railroad lines known as the Carbondale Mainline, the Pocono Mainline, and the Laurel Line Mainline, including the Minooka Industrial Track. A true and correct copy of the DL Operating Agreement is attached hereto as Exhibit "A".

34. The initial term of the Operating Agreement is five years, giving it an expiration date of August 27, 2015, but the contract term can be extended by PNRRA for another five years. Operating Agreement, Ex. A at 2.

35. PNRRA and its Board did not subject the Operating Agreement to a public competitive bidding process as required by the MAA prior to awarding the current Operating Agreement to DL.

36. Malski testified at his deposition that obtaining the highest revenue for PNRRA from a rail freight operator is not the primary factor or purpose of the Operating Agreement; rather, its primary purpose is to simply provide rail service and economic and industrial development in northeast Pennsylvania.

37. PNRRA Board members have testified that they do not believe they need to consider any other rail providers because the DL is performing satisfactorily.

38. On November 6, 2013, RBM&N sent a letter to PNRRA and its Board, asking for an opportunity to submit a competitive bid to operate their rail lines, in anticipation of the August 27, 2015 expiration of the current five year term of the Operating Agreement.

39. In that letter, RBM&N stated that it believed that it could offer superior service to PNRRA than is currently being offered under the existing Operating Agreement.

40. It is believed and therefore averred that in response to RBM&N's letter, PNRRA, through its Board, at its next regularly scheduled meeting on November 19, 2013, went into executive session to discuss topics including the extension of the DL Operating Agreement. The Board emerged from the executive session and voted to extend the current Operating Agreement for an additional five years, although the current Operating Agreement term is not set to end for another year and a half.

41. PNRRA, through its Board, voted to extend the current Operating Agreement for another five years without any form of competitive bidding.

42. Discovery has revealed that PNRRA Board Chairperson, David Brojack ("Chairman Brojack"), who is also a rail freight customer of PNRRA's and the DL's, made the motion to extend the current Operating Agreement for another five years.

43. Chairman Brojack testified on June 24, 2014, that despite being a member of the Board for years, he has never read the entire current Operating Agreement.

44. Discovery has revealed that although Malski claims to have made the PNRRA Board aware of RBM&N's letter which was in fact emailed to each board member prior to the November 19, 2013 Board meeting, prior PNRRA Board Chairman Robert Hay testified that he could not remember any discussion about the RBM&N letter at the November 19, 2013 Board meeting, and current Chairman Brojack testified that he did not recall seeing RBM&N's letter prior to his deposition on June 24, 2014.

45. Discovery has revealed that in renewing or extending the current Operating Agreement, PNRRA did not negotiate with DL any new conditions or increased revenue for PNRRA.

46. Subsequent to the meeting of November 19, 2013, RBMN, through its counsel, wrote to PNRRA and indicated that RBMN could offer a significant increase in fees paid to PNRRA if given an opportunity to bid or submit a proposal for the Operating Agreement.

47. PNRRA did not agree to accept a bid or proposal from RBM&N, and this litigation ensued.

48. Discovery has revealed that the PNRRA Board now has a "litigation committee" composed of Malski, Hay and Chairman Brojack, which Chairman Brojack was unaware of as of the date of his deposition.

49. PNRRA is a municipal authority subject to the statutory requirements of the MAA.

50. The purpose and intent of the Pennsylvania Legislature in enacting the MAA is to benefit the people of the Commonwealth by, among other things, increasing their commerce, health, safety and prosperity, and to permit the authority to benefit the people. 53 Pa. C.S. § 5607(b)(2), (3).

51. One of the powers granted to the Authority in the MMA is the power to enter into contracts. 53 Pa. C.S. § 5607(d)(13), (14).

52. Competitive bidding invites competition and assures that contracts will be awarded free from any possible personal interests, bias or fraud and that the taxpayers receive the work for the best possible price.

53. PNRRA's Operating Agreement is a contract subject to the requirements of 53 Pa. C.S. § 5614, in that it is a contract for work, including for the maintenance of those lines in an FRA Class I and Class II condition; for the maintenance of PNRRA's structures and related facilities and equipment located on the rail lines; for the repair or replacement of same; for the provision of working capital as well as a escrowed reserve; for the removal, replacement or improvement of the track and structures on the railroad lines; for security along the rail lines; for marketing and sales work; for the provision of hirail inspection services; and any other work provided for in the Operating Agreement. Operating Agreement, Ex. A.

54. Because PNRRA's Operating Agreement is subject to the competitive bidding requirements of the MAA, it is also a contract subject to the sealed competitive bidding procedures of 62 Pa. C.S. §§ 3901 et seq.

55. Discovery has revealed that under the terms of the Operating Agreement, DL is required to expend 25% of its annual rail freight operating revenues on a rolling 3 year average on construction, reconstruction, repair and maintenance work as part of its negotiated contractual requirements to PNRRA. Operating Agreement, Ex. A at § 8.

56. According to PNRRA's 2012 Annual Report, the DL paid \$386,869 to PNRRA, or 10% of its annual revenue of \$3,868,690, under the terms of the Operating Agreement.

57. Based on these figures, it is believed and therefore averred that the DL expended approximately \$967,173 on construction, reconstruction, repair and maintenance work for PNRRA in 2012.

58. During his deposition, Board member and former Chairman Hay admitted that the DL expends more than \$18,500 on rail ties, ballast, raise, line surfacing and track each year, and

that the maintenance work performed by DL for PNRRA is an essential part of the Operating Agreement.

59. During discovery, Hay admitted that the Operating Agreement contains a requirement for DL to install a minimum of 3,000 ties per year and 1,500 track feet of rail line as well as stone ballast and raise.

60. During discovery, Malski admitted that the Operating Agreement provides that when the DL repairs or replaces rail, ties or other items of track structure or signaling equipment, the new property shall become the property of PNRRA.

61. Discovery has revealed that PNRRA applies for and receives state grant funding for the same or similar types of work that are required of the DL under the Operating Agreement.

62. During his deposition, Board member and former Chairman Hay testified that PNRRA received \$114,995 for a Section 130 Federal Highway Rail Safety Grant for the purchase and installation of new crossing lights, flashers, gates and bells at the 7th Avenue grade crossing in Carbondale, Pennsylvania, and that PNRRA awarded the contract to Diamond Back Signal, LLC which was the lowest bidder on the project.

63. It is believed and therefore averred that the DL performs similar work for PNRRA as part of the Operating Agreement.

64. During his deposition, Hay testified that PNRRA received \$298,000 for a PennDOT rail Freight Assistance grant for the installation of new ties and rails on its Pocono mainline rail line, and that state grant was placed out to competitive bidding by PNRRA.

65. At his deposition, Hay admitted that this grant was for the same type of work being performed by the DL for PNRRA under the Operating Agreement.

66. During discovery, Board member Hay admitted that the Operating Agreement contains a requirement for the DL to construct a public unloading facility as part of their contractual requirements to PNRRA.

67. Discovery has revealed that PNRRA places all of the work to be funded by the state grants out to competitive bidding, as required by the MAA.

68. Because PNRRA's Operating Agreement contains work including construction, reconstruction, repair, and other work in excess of \$18,500, it should have been subject to competitive bidding pursuant to 53 Pa. C.S. § 5614(a), which provides:

§ 5614. Competition in award of contracts.

(a) *Services.*

(1) Except as set forth in paragraph (2), all construction, reconstruction, repair or work of any nature made by an authority if the entire cost, value or amount, including labor and materials, exceeds a base amount of \$ 18,500, subject to adjustment under subsection (c.1), shall be done only under contract to be entered into by the authority with the lowest responsible bidder upon proper terms after public notice asking for competitive bids as provided in this section.

(2) Paragraph (1) does not apply to construction, reconstruction, repair or work done by employees of the authority or by labor supplied under agreement with a Federal or State agency with supplies and materials purchased as provided in this section.

53 Pa. C.S. § 5614(a) (2013).

69. To the extent that PNRRA seeks to avoid competitive bidding by asserting that the Operating Agreement is some sort of "special services" contract, it is noted that there is nothing unusual, peculiar, or special about providing rail freight contractor services over properties owned by a different entity.

70. As opposed to being a "special services" contract, these agreements/contracts are common. For example, numerous other freight railroads provide services for entities similar to PNRRA, such as North Shore Railroad over SEDA-COG, C&S and RBM&N Railroads over Carbon County, and the DL over PNRRA.

**COUNT 1 – DECLARATORY ACTION – VIOLATION OF MAA § 5607(b)(2) –
PROHIBITING DIRECT COMPETITION WITH PRIVATE ENTERPRISE**

71. The averments of paragraphs 1 through 70 are incorporated herein as if set forth at length.

72. The Declaratory Judgments Act, 42 Pa. C.S. §§ 7531 et seq., provides in part:

Courts of record, within their respective jurisdictions, shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree.

42 Pa. C.S. § 7532.

73. It also provides:

Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder.

42 Pa. C.S. § 7533.

74. PNRRA is a municipal authority subject to the provisions of the MAA and 62 Pa. C.S. §§ 3901 et seq.

75. PNRRA's powers are set forth under the MAA, including the specific powers set forth in section 5607(d), and the exercise of those powers are limited by the limitation provisions of section 5607(b). Dominion Products and Services v. Pittsburgh Water and Sewer Authority, 44 A.3d 697 (Pa. Cmwlth. 2011).

76. The MAA prohibits PNRRA from unnecessarily burdening or interfering with existing business by the establishment of enterprises which in whole or part duplicate or compete with existing enterprises serving substantially the same purpose. 53 Pa. C.S. § 5607(b)(2); Dominion Products and Services v. Pittsburgh Water and Sewer Authority, 44 A.3d 697 (Pa. Cmwlth. 2011).

77. PNRRA was established and is engaging in an enterprise that provides freight rail service in direct competition with privately owned rail freight operators such as the RBM&N, and to the exclusion of same, which PNRRA admitted during discovery.

78. PNRRA directly competes with RBM&N for state grant funding which PNRRA uses to enhance PNRRA's freight rail service in direct competition with other privately owned rail freight operators such as the RBM&N.

79. PNRRA directly competes with RBM&N through the DL's receipt of state grants, which the DL uses to construct, reconstruct, repair and/or maintain PNRRA's assets.

80. Neither the MAA nor any other statute authorizes or requires PNRRA to provide freight rail service or receive state grants which directly competes with privately owned freight rail businesses.

81. The Operating Agreement violates the MAA's express prohibition against interference and competition with existing business and otherwise exceeds the authority of PNRRA under the MAA, and is therefore void. Dominion Products and Services v. Pittsburgh Water and Sewer Authority, 44 A.3d 697 (Pa. Cmwlth. 2011).

WHEREFORE, Plaintiff Reading, Blue Mountain & Northern Railroad respectfully requests that this Court declare that Defendants Pennsylvania Northeast Regional Railroad Authority and its Board are in violation of MAA § 5607(b)(2), and must refrain from direct competition with private enterprise, either through divestiture of its rail freight business, and/or sale of the rights to freight traffic on its lines, declare PNRRA's Operating Agreement with the DL void, and grant any other relief that this Court deems just and proper.

COUNT II – DECLARATORY ACTION – FAILURE TO BID

82. The averments of paragraphs 1 through 80 are incorporated herein as if set forth at length.

83. This Count is asserted in the alternative to the relief sought in Count I.

84. The Operating Agreement contains provisions for construction, reconstruction, repair and other work in excess of \$18,500.00, for the same or similar work that PNRRA places out to competitive bidding when state grant funding is being utilized by PNRRA.

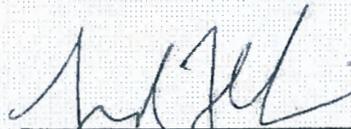
85. The Operating Agreement therefore must be subjected to a public competitive bidding process pursuant to 53 Pa. C.S. § 5614(a), which process is subject to the requirements of 62 Pa. C.S. §§ 3901 et seq.

86. Any contract entered into by PNRRA for the operation of its rail lines without having been subjected to a public competitive bidding process pursuant to these statutory provisions must be declared by this Court to be null and void.

87. PNRRA should be directed by this Court to submit all future operating agreements for freight rail service and any extensions thereto to competitive bidding.

WHEREFORE, Plaintiff Reading, Blue Mountain & Northern Railroad respectfully requests that this Court grant relief to Plaintiff and declare that Defendants Pennsylvania Northeast Regional Railroad Authority and its Board must follow the public notice and competitive bidding requirements of 53 Pa. C.S. § 5614(a) and 62 Pa. C.S. §§ 3901 et seq. for contracts for the operation of its rail lines, and that any operating agreements entered into by PNRRA and its Board without having been subjected to the competitive bidding requirements of 53 Pa.C.S. § 5614(a) and 62 Pa. C.S. §§ 3901 et seq. are deemed null and void, and award any other relief that this Court deems just and proper.

Respectfully submitted by:

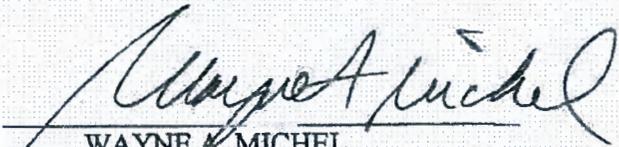


FREDERICK J. FANELLI, ESQUIRE
Attorney I.D. #36672
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The Necho Allen
No. 1 Mahantongo Street
Pottsville, PA 17901
(570) 622-2455

VERIFICATION

The language of the foregoing document is that of counsel and not necessarily my own; however, I have read the foregoing document and to the extent it is based upon information I have given to counsel, it is true and correct to the best of my knowledge, information and belief; to the extent that the content of the foregoing document is that of counsel, I have relied upon counsel in making this verification.

I understand that false statements herein are made subject to the penalties of 18 Pa.C.S.A Section 4904, relating to unsworn falsification to authorities.



WAYNE A. MICHEL
President of Reading, Blue Mountain
& Northern Railroad Company

EXHIBIT "A"

8/27/15

OPERATING AGREEMENT

THIS AGREEMENT made this 27th day of August 2010 by and between the Pennsylvania Northeast Regional Railroad Authority, hereinafter referred to as PNRRA and "the" Delaware-Lackawanna Railroad Co., Inc., hereinafter referred to as DL;

WITNESSETH

WHEREAS, the PNRRA owns a line of railroad known as the Scranton to Carbondale Line, aka Carbondale Mainline between M.P. 196.8 and M.P. 174.59 which was purchased from the Delaware and Hudson Railway Corporation in 1985; and

WHEREAS, the PNRRA owns a line of railroad known as the Scranton to Slatersford Line, aka Pocono Mainline between M.P. 134 and M.P. 74 and the Brady Lead Track which was purchased from the City of Scranton, Steamtown Foundation and Conrail in 1991; and

WHEREAS, the PNRRA owns a line of railroad known as the Laurel Line Mainline between M.P. 0 and M.P. 4.81, including the Minooka Industrial Track which was purchased in 1999; and

WHEREAS, the PNRRA has selected the proposal of DL to operate and provide rail freight service on these lines of railroad for the benefit of shippers and communities.

NOW, THEREFORE, the parties intending to be legally bound agree as follows:

AGREEMENT

1. Use of the Lines of Railroad.

PNRRA hereby agrees to provide DL access to and use of the lines of railroad which shall include, but not be limited to property of every kind and description, real, personal and mixed, including the right-of-way, roadbed, tracks, track materials, signals and other facilities, and appurtenances located in the Counties of Lackawanna, Wayne, Northampton and Monroe in the Commonwealth of Pennsylvania as is more fully described in Appendix A. DL shall have the right to use the lines of railroad for exclusive railroad freight service and to establish, operate and maintain freight rail service thereon during the term of this Agreement, or any extension, or renewal thereof, subject to the terms and conditions hereinafter contained. This Agreement shall not be construed as conveying any ownership interest to DL. The PNRRA hereby designates the DL to perform all passenger services with the exception of commuter and intercity passenger services on the lines of railroad owned by PNRRA and PNRRA reserves the right to award and contract for commuter and intercity passenger services on the lines of railroad owned by PNRRA with other parties. The PNRRA reserves the right to grant and contract with Norfolk Southern (NS) for

nonexclusive overhead trackage rights on and over the Pocono Mainline with NS and DL will pay PNRRA 5% any and all such overhead trackage rights revenue.

2. Term.

The term of this Operating Agreement shall be five (5) years from the effective date hereof unless terminated prior thereto in accordance with the provisions of this Agreement,

Provided that:

- (i) DL shall not be in default of any of its material obligations hereunder;
- (ii) PNRRA shall continue to own the lines of railroad;
- (iii) DL shall have the right, after giving written notice to PNRRA at least 180 days prior to the expiration date of the initial term or any renewal term thereof, to terminate this Agreement or, to request a renewal term of this Agreement;
- (iv) PNRRA will have the option to extend the existing contract for another five (5) year term upon ninety (90) days written notice to DL prior to August 27, 2015.

3. Operating Fees and Other Payments.

- (A) Commencing on DL's operation and continuing through the term of this agreement, unless renegotiated pursuant to the terms of Section 15 of this Agreement, DL will pay PNRRA ten (10 %) percent of all DL rail freight operating revenues on cars originating and terminating on former Lackawanna County Railroad Authority owned lines and ten (10%) of all DL rail freight operating revenues or \$8,000.00 per month, whichever is greater on cars originating and terminating on former Monroe County Railroad Authority owned lines on a monthly basis for the use of the lines of railroad. DL will place 5% of all passenger revenues into a track fund each year to be used for maintenance of the railroad right of way and structures on the lines of railroad owned by PNRRA. Rail freight operating revenue shall include but not be limited to Horizon, CP, NS switching settlements, weighing, flagging and storage and 5% of all overhead freight traffic revenues handled over lines of railroad owned by PNRRA. DL will pay PNRRA one time \$125,000.00 cash towards the matching share of PNRRA's purchase of the NS trackage from Analomink to Slateford, PA per the following payment schedule: \$25,000.00 due by August 15, 2009; \$5,000 per month in September 2009 – July 2010; and \$45,000 on August 15, 2010. PNRRA and DL will continue to contribute to the local matching share on grants on a 50%/50% basis of a mutually agreed to grant amount. DL also will pay PNRRA 5% on any fuel surcharge payments received by DL during the term of this agreement. DL will pay 20% of all

investment tax credit payments received by DL to PNRRA. DL will pay PNRRA 5% on grain train power agreements.

- (B) DL shall also pay and discharge, on or before the last day on which payment may be made without penalty or interest, any tax, assessment, charge for public utilities, excise, license and permit fees, and other governmental impositions and charges which shall or may during the term hereof be charged, laid, assessed, imposed, become due and payable, become a lien upon, or arising in connection with the use or operation of the lines of railroad for freight service. DL shall have the right to contest any such taxes or other charges by appropriate legal proceedings, conducted at its own expense, providing the DL shall furnish to PNRRA a surety bond or other security satisfactory to cover the amount of the contested item or items, with interest and penalty for the period which such proceedings may be expected to take.
- (C) DL shall also pay, on or before the last day on which payment may be made without penalty or interest, all trackage rights fees or payments, all interchange agreement fees or payments, all track lease fees or payments, and any and all other fees or payments arising from or in connection with the common carrier obligations of providing freight service on the lines of the railroad.

4. Conditions of Railroad Premises.

DL has inspected the lines of railroad and accepts the same "as is, where is". PNRRA makes no representation or warranty as to the physical condition of the lines of railroad or the condition of legal title (other than for railroad purposes). DL shall maintain and return the lines of railroad to the PNRRA in no less than FRA Class I condition on the Scranton to Carbondale line of railroad and on the Brady Lead Track and no less than FRA Class II condition on the Laurel Line and the Pocono Mainline.

5. Provision of Additional Equipment and Facilities.

DL shall be responsible for providing all equipment and facilities required for operation of the lines of railroad and not part of the premises provided hereunder. Such equipment and facilities shall include, but shall not be limited to, locomotives, rolling stock, maintenance equipment, office space, a public unloading facility and such other facilities and equipment as are required to provide rail freight service over the lines of railroad as contemplated by this Agreement. Both parties agree that a public unloading facility is necessary for operation of freight service on the lines of railroad. DL agrees to cause such a facility to be constructed at its own expense and to amortize the cost thereof over the contract period.

6. DL Obligations.

DL agrees that it will at all times during the continuance of this Agreement:

- (A) Pay all charges herein requested to be paid by the PNRRA under Paragraph 3 at such time as the same are due and payable including, but not limited to, the rail freight operating revenue payment which will be due on the 15th of each month for the proceeding month's revenue;
- (B) Operate freight service in accordance with all federal, state, and local requirements and shall be responsible for obtaining all governmental approvals, authorizations, franchises, licenses and permits as may be prerequisites to the rendering of such service;
- (C) Observe and comply with any and all requirements of the constituted public authorities and with all federal, state and local statutes, ordinances, regulations and standards applicable to DL or its use of the lines of railroad;
- (D) Maintain and operate at its own expense the lines of railroad, including any structures or related facilities located thereon in good operating condition and repair in a manner consistent with sound, accepted engineering principles and maintain the track to FRA Class I Standards on the Scranton to Carbondale line of railroad and the Brady Lead Track and to FRA Class II Standards on the Laurel Line and Pocono Mainline;
- (E) Repair or replace at its own expense, any rail, ties and other items of track structures or signaling equipment as may be necessary to keep the lines of railroad in good operating condition. In the event of any such replacement at the expense of DL the new property shall become the property of the PNRRA;
- (F) Operate freight services on the lines of railroad at such levels, and at such frequency to be acceptable to PNRRA and the shippers and receivers of rail freight now or to be located on the lines of railroad;
- (G) Fully indemnify, defend and hold harmless PNRRA, its officers, agents, employees, successors and assigns, from and against all claims, suits, actions or judgments, based upon or arising out of damage, injuries or death to persons or property caused by the negligence of DL or its agents, employees, guests, invitees, contractors, suppliers of materials, or furnishers of services in the use and occupancy of the property and lines of railroad or CP Rail or Norfolk Southern property by the DL;
- (H) Be liable, defend and indemnify the PNRRA for any damages, harm or injury to the lines of railroad or CP Rail or Norfolk Southern property caused by the negligence of the DL, its agents or employees;
- (I) Maintain a policy or policies of liability insurance to insure itself against liability for injury or damage to persons or property, which policies will be in the minimum amounts set forth below:

<u>TYPE</u>	<u>LIMITS</u>
(i) Comprehensive General Liability	For all claims \$10,000,000 per Occurrence, \$50,000.00 deductible;
(ii) Federal Employer's Liability Act	Covered by blanket policy noted in (i);
(iii) Cargo Legal Liability	Covered by blanket policy noted in (i);
(iv) Foreign Rolling Stock	Covered by blanket policy noted in (i);
(v) Automobile Liability	Covered by blanket policy noted in (i);
(vi) Comprehensive Passenger General Liability	For all claims \$25,000,000.00 per occurrence on any and all NPS Trains operated by NPS over DL, With premium to be paid by NPS; otherwise \$10,000,000.00 per occurrence for other passenger services operated by DL;

- (J) Cause PNRRA to be named as an additional named insured under each such policy and furnish PNRRA with appropriate certificates of such insurance which shall specifically state that the insurance company shall furnish to PNRRA at least thirty (30) days notice of any lapse or material change in such insurance;
- (K) Peacefully deliver up and surrender possession of the lines of railroad to PNRRA at the expiration or other termination of this Agreement;
- (L) Provide unencumbered minimum working capital of fifty thousand (\$50,000.00) dollars;
- (M) Provide and maintain in escrow a reserve fifty thousand (\$50,000.00) dollars at all times in addition to the minimum working capital requirements of this section for the purpose of payment of liability claims not otherwise covered by insurance. The escrow may be reduced upon written approval by PNRRA. Any withdrawal from escrow by DL for payment of claims shall be matched by an equal deposit by DL within thirty (30) days thereafter;

- (N) DL shall be permitted only by written PNRRA approval, with such approval not to be unreasonably withheld, to remove, replace, or relay elements of the track or structures on the lines of railroad in the interest of cost and/or operating efficiency, provided that a continuous and useful, rail transportation facility is maintained as related to Part E of this Section. Improvements made by DL to the track, right of way, structures or related facilities shall become the property of the PNRRA;
- (O) DL shall allow officers of PNRRA the opportunity to inspect any portion of the lines of railroad including permission to ride any and all trains operated by DL, and DL will provide hirail inspection services to the PNRRA upon three days notice to DL;
- (P) DL will perform marketing and sales programs for the lines of railroad in order to increase the number of carloads per year on the lines of railroad and the DL will employ a marketing/sales employee, to be selected in consultation with PNRRA, to perform marketing and sales activities on lines of railroad owned by PNRRA in order to increase carloads and encourage economic and industrial development on lines of railroad owned by PNRRA;
- (Q) DL will provide security on the leased premises. If, and where outside contract security is deemed to be necessary PNRRA will split the costs associated with same with the DL on a 50%/50% basis of mutually agreed to costs. Security named in this paragraph will only be on property leased by the DL,
- (R) On the 27th day of August of each year this agreement is in effect, DL shall provide PNRRA with the following information: (1) a complete list of the names and addresses of all employees of DL, (2) a complete list of the names and addresses of all officers and directors of DL, and (3) a complete list of the names and addresses of all stockholders in DL and the total number of shares owned by each stockholder.
- (S) DL hereby covenants and agrees to provide one hundred twenty (120) days written notice of any proposed change in stock ownership which would change control of the DL. Upon receipt of such notice to PNRRA, PNRRA shall have the right to terminate the operating contract with DL upon thirty (30) days written notice to DL.

7. Restrictions.

DL further agrees that it will not:

- (A) Occupy the lines of railroad in any way or for any purpose unrelated to the operation of the lines of railroad;
- (B) Assign, mortgage, pledge or encumber the lines of railroad, or any part thereof or assign its obligation under this Agreement without prior written consent of PNRRA; or

- (C) Handle hazardous, toxic or noxious commodities without requisite insurance and written approval of the PNRRA which will not be reasonably withheld.

8. Relationship between DL and PNRRA.

The DL and PNRRA shall meet at least monthly to review and discuss revenue, costs, operations, marketing, maintenance and service concerns. DL shall inform the PNRRA and affected shippers of any major action or event related to the lines of railroad which may affect rail freight service to those shippers as soon as such action or event is known to DL. The PNRRA will inform DL of any problems or concerns related to the rail freight service. DL is a private corporation and is an independent contractor and is not an agent of the PNRRA. Whenever a written approval is required by DL from PNRRA, the signature of the Board Chairman and President will suffice to validate such written approval. The PNRRA will conduct an annual performance audit of marketing, operating, maintenance and other functions performed by the DL. The maintenance performance of DL will in part be analyzed by fulfillment of annual maintenance expenditures in the minimum of twenty-five (25%) percent of rail freight operating revenues on a rolling 3 year average, starting with calendar year 2010 with a minimum of 3,000 ties installed per year, the addition of stone ballast and raise, line and surfacing of at least 15 miles of railroad per year and the installation of a minimum of 1,500 track feet of new or good quality relay rail per year on the lines of railroad.

9. Rents from Non-Operating Properties.

PNRRA shall receive any and all rents arising from any leases of non-operating properties presently outstanding or to be negotiated on any portion of the lines of railroad and any renewals thereof, including, but not limited to, rents, license fees, and other revenues paid by any party occupying a portion of the lines of railroad including but not limited to rental sand fees for pipe and wire crossings, utility crossings and occupations, signboards, platform locations, driveways, storage facilities, side tracks, parking lots, water rights, land rents, building rents and water tank rents, among other things. PNRRA shall collect such monies as they become due. PNRRA will determine which properties are classified as non-operating.

10. Public Crossings.

During the term of this Agreement or any renewal thereof, DL shall assume and be responsible for any obligation flowing to PNRRA as a result of obligations formerly assigned to D&H or Conrail or any other predecessor railroad, or which may be imposed under the provisions of Pennsylvania Public Utility laws and any orders issued thereunder with respect to crossings of the lines of railroad by public highways, bridges or utilities.

11. Condemnation of the Lines of Railroad.

If the lines of railroad, or any portion thereof, are condemned or taken by any competent authority for public use, the award for payment of damages resulting therefrom, or any amount paid in settlement thereof, shall be paid to and retained by PNRRA, except as hereinafter provided. If the entire lines of railroad are taken or such substantial part thereof as shall materially impair or interfere with DL's proper use and enjoyment thereof, this Agreement shall automatically terminate as of the date of the taking. If only such portion of the lines of railroad is taken as shall not materially impair or interfere with the DL's proper use and enjoyment thereof, this Agreement shall continue in full force and effect, and all proceeds of the condemnation award or payment shall first be used by PNRRA as may be required for the restoration of the lines of railroad in such manner as will enable the continuing operation thereof by the DL as hereinabove provided.

12. Default.

If during the term of this Agreement there shall occur any of the following events ("Events of Default"):

- (A) DL shall fail to pay any payments or fees provided for in this Agreement at such times as they are due and payable;
- (B) DL shall fail to perform any of its other obligations hereunder, and shall not cure such default within thirty (30) days after written notice thereof shall have been given to DL by PNRRA or if such default cannot be cured within such period, shall not commence to cure within such period and thereafter diligently proceed to complete the same;
- (C) DL makes an assignment for the benefit of the creditors or files a voluntary petition under any bankruptcy or insolvency law or is adjudicated as bankrupt or insolvent in voluntary or involuntary proceedings or seeks reorganization or receivership, or similar relief, or
- (D) A proceeding against DL seeking reorganization or receivership or similar relief is not dismissed or vacated or stayed on appeal within sixty (60) days;
- (E) DL fails to maintain or operate the lines of railroad in accordance with the terms of this Agreement or fails to conduct its operation in a manner consistent with generally accepted railroad safety practices;
- (F) Any conduct of its operations in such a manner so as to commit intentional waste of the lines of railroad;
- (G) Fails to discharge any claims or liens for materials and services for with DL becomes obligated while providing freight rail transportation service under this

Agreement, then and at any time thereafter while such Event of Default is continuing and has not been cured by DL within thirty (30) days after notification by the PNRRA of such event, the PNRRA may in addition to its other remedies at law or equity or as provided for in this Agreement, by notice to DL specifying the Event of Default, terminate this Agreement.

All remedies given to PNRRA by this Agreement and all rights and remedies given to it by law or equity shall be cumulative and concurrent. No termination of this Agreement or recovery of the lines of railroad shall deprive PNRRA or any of its remedies or actions against DL for rent and all other sums due at the time of termination of this Agreement, nor shall any action for operating fees, breach of covenant or resort to any other remedies for recovery of operating fees be deemed or construed a waiver of the right to obtain possession of the lines of railroad.

13. Failure of Cure Default.

If DL shall fail to perform any of its obligations hereunder and shall fail to cure any default upon the giving of written notice and upon the time period specified in this Agreement or if DL shall not commence to comply within such period and thereafter complete with due diligence, PNRRA shall have the right, but not the obligation and in addition to all other remedies it may have hereunder, upon twenty-four hours written notice to DL to undertake the performance of such obligations and obtain reimbursement from DL thereof.

14. Financial Settlement on Termination and Termination Costs.

In any case of termination, each party shall bear its own expenses of termination.

15. Renegotiation.

Either party shall have the right to request renegotiation of this Agreement upon ninety (90) days' written notice to the other party. When notice of such request is served upon the other party, it shall specify the changes requested. Upon failure to reach agreement, either party may request arbitration pursuant to Section 22 or terminate the Agreement. During any period of negotiation, all existing terms shall remain in force. Any changes agreed upon will be retroactive to ninety (90) days from the date of this Notice for Renegotiation.

16. Waiver.

Any waiver by either party under this Agreement of any breach by the other party shall not effect similar rights subsequently arising nor operate as a waiver of subsequent breaches of the same or similar kinds nor as a waiver of the clause or condition under which said right arose or said breach occurred.

17. Notice.

Notice provided for herein shall be sufficient if sent by certified mail, postage prepaid, as follows:

To the PNRRA at:
Pennsylvania Northeast Regional Railroad Authority
280 Cliff Street
Scranton, PA 18503
ATTN: President

To the DL at:
"the" Delaware-Lackawanna Railroad Co., Inc.
280 Cliff Street
Scranton, PA 18503
ATTN: General Superintendent

And

Genesee Valley Transportation Company, Inc.
1 Mill Street, Suite 101
Batavia, NY 14020-3141
ATTN: President

or such other address as either party may, from time to time designate to the other in writing.

18. Regulatory Agency.

- (A) This Agreement is subject to the orders, rules and regulations of appropriate regulatory authorities having jurisdiction over DL.
- (B) If any portion of this Agreement is determined to be unduly burdensome by such authority, the parties shall make such modifications as may be necessary or reasonable.

19. Access to Records.

- (A) DL agrees to maintain and make available to PNRRA monthly carload and interchange records and reports and such other records and reports necessary to permit PNRRA to fully verify statements of traffic, revenue, and expenditures furnished by DL on a monthly basis.
- (B) PNRRA shall have full access to these records and reports during normal business hours upon 48 hours written notice, duly given to DL.

(C) DL will deliver to PNRRA a certified public audit of its financial reports to be performed by a certified public auditing firm no later than June 30th for the preceding year ending December 31. DL will also deliver to PNRRA quarterly non certified financial statements. All records, reports and summaries shall be held in confidence by PNRRA and shall not be disclosed to any other party to extent allowed by law.

20. Force Majeure.

Neither party hereto shall be held responsible or liable, either directly or indirectly, or be deemed in default or breach of this Agreement for any loss, damage, injury, delay, failure, or inability to meet all or any portion of its commitments hereunder caused by or arising from any cause which is unavoidable or beyond its reasonable control, including without limitation, war, hostilities, invasion, insurrection, riot, the order of any competent civil or military government, explosion, fire, strikes, lockouts, AAR service orders, actions of other carriers which materially effect DL's operations, labor disputes, perils of water including floods, ice, breakdowns, Acts of God including storms or other adverse weather conditions, derailments, wrecks or other causes of a similar or dissimilar nature which wholly or partially prevent the Parties or either of them from carrying out the terms of this Agreement; provided that the Party experiencing such force majeure or partial force majeure promptly gives to the other Party written notice that the disabling effect of such force majeure shall be eliminated as soon as and to the extent reasonably possible and that each Party shall have the right to determine and settle any strike, lockout and labor dispute in which that Party may be involved in its sole discretion. In the event that one Party's performance is suspended in whole or in part by force majeure, the other Party's obligation to perform hereunder shall be suspended or commensurately reduced for the duration of the force majeure and for such additional reasonable period as may be required because of the existence of the force majeure. In the event that one Party's performance hereunder is suspended by force majeure and cannot be resumed within a reasonable period of time, either Party shall have the right to terminate this Agreement.

21. Labor Conditions.

If during the term of this Agreement or subsequent renewal thereof, any labor protective conditions shall be imposed as a result of an ICC or STB order or pursuant to the Railway Labor Act, DL agrees to fully indemnify and hold harmless PNRRA from the costs of said protective conditions.

22. Arbitration.

Any claim or controversy arising out of or relating to this Agreement, shall be settled by arbitration in Scranton, Pennsylvania, in accordance with the Rules of the

American Arbitration Association, and judgment upon the award rendered by the arbitrator or arbitrators may be entered in any court having jurisdiction thereof.

23. Successors and Assigns.

This Agreement shall inure to the benefit of and shall be binding upon the parties hereto and their respective successors and assigns. However, this provision shall not be construed to confer on DL any right or authority to assign all or any part of this Agreement without the PNRRA's prior consent.

24. Entire Agreement.

This Agreement contains the entire understanding of the parties with respect to its subject matter. No oral statement or prior written matter shall have any force or effect. The parties hereby acknowledge that they are not relying on any representations or agreements other than those contained in this Agreement.

25. Severability.

If any term, covenant, condition or provision (or part thereof) of this Agreement or the application thereof to any person or circumstances shall, at any time or to any extent, be invalid or unenforceable, the remainder of this Agreement or the application of such term or provision (or remainder thereof) to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and each term, covenant, or condition and provision of this Agreement shall be valid and be enforced to the fullest extent permitted by law.

26. Anti-Discrimination.

DL and PNRRA will execute and comply with the non-discrimination clause attached hereto and incorporated herein as Appendix B.

27. Applicable Law.

This Agreement shall be construed in accordance with the laws of the Commonwealth of Pennsylvania.

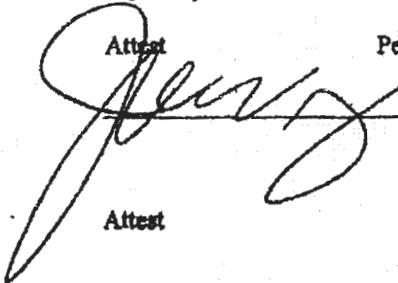
28. Extension of Terms and Conditions.

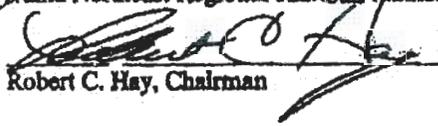
PNRRA shall have the option to extend the terms and conditions of this agreement to any other PNRRA owned or acquired lines of railroad which connect to these lines of railroad in order to avoid in whole or in part the duplication of existing activities performed by DL serving substantially the same purposes.

IN WITNESS WHEREOF, the parties hereto have caused this Operating Agreement to be executed by themselves or by their respective duly authorized officers as of the day and year first above written.

Attest

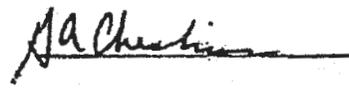
Pennsylvania Northeast Regional Railroad Authority




Robert C. Hay, Chairman

Attest

"the" Delaware-Lackawanna Railroad Co., Inc.




David J. Monte Verde, President

APPENDIX A

DESCRIPTION OF SCRANTON TO CARBONDALE RAIL LINE
(formerly owned by Lackawanna County Railroad Authority)

PARCEL 1. A tract, piece or parcel of land, with the buildings and improvements thereon, situate, lying and being in Fell Township, the City of Carbondale, Carbondale Township, the Boroughs of Mayfield, Jermyrn, Archbald, Jessup, Olyphant, and Dickson City, and the City of Scranton, County of Lackawanna, and Commonwealth of Pennsylvania, containing a line of railroad known as a portion of the former mainline of Delaware and Hudson Railway Company and extending between a line at right angles to the westerly line of this Parcel 1 and located at Mile Post A-174.59 in Fell Township on the north and two lines located at Mile Post A-191.42 in the City of Scranton on the south with the westerly of said two lines being located on the north line of Marion Street and the easterly of said two lines being located in the center line also being and northerly line of the Vine Street Branch, all being more particularly described in Exhibit D&H, attached hereto and made a part hereof.

PARCEL 2. A tract, piece parcel of land, with the buildings and improvements thereon, situate, lying, and being in the City of Scranton, County of Lackawanna, and Commonwealth of Pennsylvania, containing a line of railroad known as the Vine Street Branch of Delaware and Hudson Railway Company and extending between a line located at Mile Post A-191.42 in the center line of Marion Street on the north and a line which crosses the center line of Track at Mile Post A-192.63 as said line is shown on Exhibit VINE, Sheet 1 on the south, and being more particularly described in said Exhibit VINE, attached hereto and made a part hereof.

PARCEL 3. A tract, piece of parcel of land, with the buildings and improvements thereon, situate, lying, and being in the City of Scranton and the Borough of Moosic, county of Lackawanna, and Commonwealth of Pennsylvania, containing a line of railroad known as a portion of the former main line of the Delaware and Hudson Railway Company and extending between a line located at Mile Post A-191.42, said line being the north line of Marion Street, in the City of Scranton on the north and a line at right angles to the center line track in the borough of Moosic, on the south and being more particularly described in Exhibit NC&I, attached hereto and made a part hereof.

TOGETHER WITH all of the right, title and interest of the GRANTOR in and to the continuous lines of railroad trackage and facilities extending between the respective mile posts set forth respectively in the descriptions of Parcels 1, 2, and 3 above and in and to various rail, highway, and bridge crossings of the lines of railroad trackage and facilities as shown on said Exhibits D&H, VINE, AND NC&I.

EXCEPTING AND RESERVING to Delaware and Hudson Railway Company (D&H), its successors and assigns (1) all coal fill and coal finds located in, upon and under the above described Parcels 1, 2, and 3, together with the right to enter and come upon said premises themselves and/or with their contractors and/or subcontractors, with equipment,

for the purpose of removing said coal fill and coal fines; so long as such entry does not unreasonably interfere with the use of said premises by the successors in title of the said Delaware and Hudson Railway Company and so long as such entry and removal are preceded by reasonable notice to and consulting with the Chief Engineer of Lackawanna County Railroad Authority (LCRA) with respect to any portion of the said Parcels 1, 2, and 3 to which title is uninterruptedly held by LCRA from the date of transfer of title thereto from D&H to LCRA to the date of such entry and (2) a longitudinal easement, with crossings where necessary above, below and on the surface of the above described Parcels 1, 2 and 3 to which title shall have uninterruptedly remained in LCRA, as aforesaid.

ALSO EXCEPTING AND RESERVING to Delaware and Hudson Railway Company, its successors and assigns, those areas in Parcel 1 shown by diagonal shading on Exhibit D&E.

**DESCRIPTION OF SCRANTON TO MT. POCONO AND BRADY LEAD AND
CHAMBERLAIN LEAD LINES OF RAILROAD
(formerly owned by Lackawanna County Railroad Authority)**

APPROXIMATELY 0.2 of a mile of the former Conrail Scranton Branch from Mile Post 134.0 at the D&H Railway right of way line to Mile Post 133.8 at Cliff Street; and 0.7 of a mile of the Brady Industrial Lead from Mile Post 0.0 at Cedar Avenue to Mile Post 0.0 being the north abutment of the bridge over Roaring Brook; and 0.6 of a mile of the Brady Industrial Lead between Cliff Street and Cedar Avenue; and 0.5 of a mile of the Chamberlain Lead between Cliff Street and South Washington Avenue, all in the City of Scranton, Lackawanna County, Pennsylvania.

AS FURTHER DESCRIBED AS all that certain line of Railroad, being a portion of Consolidated Rail Corporation's Scranton Branch identified as line Code 6201 in the records of the United States Railway Association and also being a portion of the former Erie Lackawanna Railway Company's line of Railroad known as the Erie Lackawanna Main Line (Line Code 6201) and further identified in the Recorder's Office of Lackawanna County, Pennsylvania in Book 954 at Page 346; and beginning at about Railroad Mile Post 120.0 in the Township of Covington, County of Lackawanna and Commonwealth of Pennsylvania; and extending thence in a general northwesterly direction and passing through Covington township, the Borough of Moscow, Roaring Brook township, Borough of Elmhurst, Roaring Brook Township, Borough of Dummore and into the City of Scranton to a point of ENDING on the east line of Cliff Street, in the said City of Scranton, County of Lackawanna and Commonwealth of Pennsylvania, opposite Railroad Mile Post 133.8, all as indicated by "PS" on Consolidated Rail Corporation's Case Plan No. 67880, sheets 1 through 14(c), which sheets are the same sheets attached to the August 13, 1985 Deed between Consolidated Rail Corporation and the Grantor, and recorded in Deed Book 1145, pages 528 through 545 in the office aforesaid, and;

AS FURTHER DESCRIBED AS all that certain portion of right of way and the buildings and improvements, thereon erected, of railroad of Consolidated Rail Corporation (formerly Erie Lackawanna Railway Company) known as the Scranton Branch and identified as Line Code 6201 in the records of the United States Railway Administration, situate in the Townships of Coolbaugh, Pocono and Tobyhanna, County of Monroe, Pennsylvania; and further identified in the Monroe County, Pennsylvania Recorder's Office in Deed Book Volume 902 at Page 144, and also situated in the Township of Lehigh, County of Wayne; and further identified in the Wayne County, Pennsylvania Recorder's Office in Deed Book 351 at Page 688; and also situated in the Townships of Clifton and Covington, County of Lackawanna; and further identified in the Lackawanna County, Pennsylvania Recorder's Office in Deed Book 954 at Page 346; and beginning at Railroad Milepost 101 in said Township of Coolbaugh, Monroe County, Pennsylvania and extending thence in a general northwesterly direction through Wayne county, Pennsylvania to the ENDING at Mile Post 120 in said Township of Covington, Lackawanna County, Pennsylvania, all as indicated as "PS" on Grantors Case Plan No. 68388, sheets 1 through 22 and;

AS FURTHER DESCRIBED AS all that certain property of the Grantor, located at Mt. Pocono, with the improvements thereon, being adjacent to Grantor's former line of railroad known as the Scranton Branch and identified as Line Code 6201 in the Recorder's Office of Monroe County in Deed Book Volume 902 at Page 144, also formerly known as the Mt. Pocono Automobile Unloading Terminal, situate partly in the Townships of Pocono, Tobyhanna and Coolbaugh, County of Monroe and Commonwealth of Pennsylvania, all as indicated "PS" on Grantor's Case Plan No. 70139, dated September 4, 1991, being all that property at said location which lies northwest of said Scranton Branch and southeast of the westerly edge of the access road located within said property.

DESCRIPTION OF SCRANTON BRANCH, LINE CODE 6201
M.P. 84.6 TO M.P. 101
MONROE COUNTY, PENNSYLVANIA
(formerly owned by Monroe County Railroad Authority)

ALL THAT CERTAIN property of the Grantor, being a portion of the former line of railroad known as the Erie Lackawanna Main line (a.k.a. Scranton Branch), and identified as Line Code 6201 in the Recorder's Office of Monroe County, Pennsylvania in Volume 902 at page 144; being further described as follows:

BEGINNING at approximately Railroad M.P. 84.6, in the Township of Stroud, as indicated on sheet 1 of 17 of Exhibit "B"; thence extending in a general northeasterly direction, passing through the Townships of Pocono, Paradise and Barrett; thence turning in the Township of Barrett and extending in a general southwesterly direction, re-entering and passing through the Township of Paradise to Railroad Mile Post 101.0 at the end of Grantor's ownership in the Township of Coolbaugh the place of ENDING as indicated on sheet 17 of 17 of Exhibit "B".

BEING a part or portion of the same premises which Thomas F. Patton and Ralph S. Tyler, Jr., as Trustees of the Property of Erie Lackawanna Railway Company, Debtor, by Conveyance Document No. EJ-CRC-RP-62, dated March 31, 1976 and recorded on October 16, 1978, in the Recorder's Office of Monroe County, Pennsylvania, Deed Book Volume 902 at page 139&c.; granted and conveyed unto Consolidated Rail Corporation.

DESCRIPTION OF LINE OF RAILROAD PURCHASED FROM
NORFOLK SOUTHERN
PORTION OF STROUDSBURG SECONDARY

BEING all the land, right of way and track beginning at Milepost 84.6, approximately 550 feet south of the Route 191 highway bridge overpass, over the land and mainline tracks of the Pennsylvania Northeast Regional Railroad Authority in Stroud Township, Pennsylvania, to the north side of Courtland Street grade crossing in the Borough of East Stroudsburg, Pennsylvania, a distance of approximately 2 miles as more fully described by the copies of valuation maps shown as Exhibits A1 through A13 attached hereto and made a part hereof.

Also being a portion of the land, right of way and track conveyed by Consolidated Rail Corporation to Pennsylvania Lines LLC, predecessor of Norfolk Southern Railway Company, on May 19, 1999 in the Township of Stroud and the Borough of East Stroudsburg in Monroe County, Pennsylvania by deed recorded at Record Book 2082, page 6765 et seq. Pennsylvania Lines LLC was merged in to Norfolk Southern Railway Company on August 27, 2004.

DESCRIPTION OF LINE OF RAILROAD LEASED FROM
NORFOLK SOUTHERN

That portion of the Stroudsburg Secondary Track extending between M.P. 2.0, approximately old M.P. 74.4 (Slate) and M.P. 10.2, approximately old M.P. 82.6, located in Monroe and Northampton Counties.

DESCRIPTION OF LAUREL LINE MAINLINE AND MINOOKA INDUSTRIAL
TRACK

ALL that line of railroad beginning at the north side of Montage Road crossing in the Borough of Moosic and proceeding in a general northerly direction to the City of Scranton, all in Lackawanna County, Pennsylvania and comprising approximately 4.81 miles of rail line, also including the Minooka Industrial Track which is comprised of an approximately 2.1 mile spur track extending from a junction at Little Virginia on the Laurel Line main line to the end of track including the switches to service Compression Polymers in the Borough of Moosic.

APPENDIX B

COMMONWEALTH NONDISCRIMINATION CLAUSE

During the term of this contract, Contractor agrees as follows:

1. Contractor shall not discriminate against any employee, applicant for employment, independent contractor, or any other persons because of race, color, religious creed, ancestry, national origin, age or sex. Contractor shall take affirmative action to insure that applications are employed, and that employees or agents are treated during employment, without regard to their race, color, religious creed, ancestry, national origin, age or sex. Such affirmative action shall include, but is not limited to: employment, upgrading, demotion or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training. Contractor shall post in conspicuous places, available to employees, agents, applicants for employment, and other person, a notice to be provided by the contracting agency setting forth the provision of this nondiscrimination clause.
2. Contractor shall, in advertisements or requests for employment placed by it or on its behalf, state that all qualified applications will receive consideration for employment without regard to race, color, religious creed, ancestry, national origin, age or sex.
3. Contractor shall send each labor union or workers' representative with which it has a collective bargaining agreement or other contract or understanding, a notice advising said labor union or workers' representative of its commitment of this nondiscrimination clause. Similar notice shall be sent to every other source of recruitment regularly utilized by Contractor.
4. It shall be no defense to a finding of noncompliance with this nondiscrimination clause that Contractor had delegated some of its employment practices to any union, training program, or other source of recruitment which prevents it from meeting its obligations. However, if the evidence indicates that the contractor was not on notice of the third-party discrimination or made a good faith effort to correct it, such factor shall be considered in mitigation in determining appropriate sanctions.
5. Where the practices of a union or any training program or other source of recruitment will result in the exclusion of minority group persons, so that Contractor will be unable to meet its obligations under this nondiscrimination clause, Contractor shall then employ and fill vacancies through other non-discriminatory employment procedures.

6. Contractor shall comply with all state and federal laws prohibiting discrimination in hiring or employment opportunities. In the event of Contractor's noncompliance with the nondiscrimination clause of this contract or with any such laws, this contract may be terminated or suspended, in whole or in part, and Contractor may be declared temporarily ineligible.

EXHIBIT "F"

COPY

READING, BLUE MOUNTAIN &
NORTHERN RAILROAD,

Plaintiff,

v.

PENNSYLVANIA NORTHEAST
REGIONAL RAIL AUTHORITY and
BOARD OF THE PENNSYLVANIA
NORTHEAST REGIONAL
RAIL AUTHORITY,

Defendants

: IN THE COURT OF COMMON PLEAS
: OF LACKAWANNA COUNTY,
: PENNSYLVANIA

: NO. 13-06796

PRAECIPE FOR ASSIGNMENT

TO: Lackawanna County Court Administrator:

Please be advised that Defendants Pennsylvania Northeast Regional Rail Authority ("PNRRA") and the Board of PNRRA have filed Preliminary Objections to the Second Amended Complaint in the above-captioned case.

The undersigned counsel has conferred with Plaintiff's counsel regarding the necessity of oral argument, as required by Lackawanna Local Rule 211(b). Defendants believe oral argument is necessary and will be of assistance to the Court because of the complexity of the issues raised in Defendants' Preliminary Objections. Plaintiff does not believe oral argument is necessary.

Attorney for Plaintiff

Frederick J. Fanelli
Fanelli, Evans & Patel, P.C.
The Necho Allen
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Pottsville, PA 17901
570-622-2455

Date: December 31, 2014

Attorneys for Defendants

Jack M. Stover
Kyle J. Meyer
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409 North Second Street, Suite 500
Harrisburg, PA 17101
717-237-4800

By: 
Jack M. Stover

READING, BLUE MOUNTAIN &
NORTHERN RAILROAD,

Plaintiff,

v.

PENNSYLVANIA NORTHEAST
REGIONAL RAIL AUTHORITY and
BOARD OF THE PENNSYLVANIA
NORTHEAST REGIONAL
RAIL AUTHORITY,

Defendants

: IN THE COURT OF COMMON PLEAS
: LACKAWANNA COUNTY,
: PENNSYLVANIA

: NO. 13-06796

NOTICE TO PLEAD

TO: READING, BLUE MOUNTAIN & NORTHERN RAILROAD
c/o Frederick J. Fanelli, Esquire
Fanelli, Evans & Patel, P.C.
The Necho Allen
No. 1 Mahantongo Street
Pottsville, PA 17901

You are hereby notified to file a written response to the enclosed **Preliminary Objections to the Second Amended Complaint** within twenty (20) days from service hereof or a judgment may be entered against you.

BUCHANAN INGERSOLL & ROONEY PC

By: 

Jack M. Stover
PA I.D. #18051
Kyle J. Meyer
PA I.D. #307743
409 North Second Street, Suite 500
Harrisburg, PA 17101
717-237-4800

*Attorneys for Defendants Pennsylvania Northeast
Regional Railroad Authority and Board of the
Pennsylvania Northeast Regional Railroad Authority*

DATE: December 31, 2014

COPY

READING, BLUE MOUNTAIN &
NORTHERN RAILROAD,

Plaintiff,

v.

PENNSYLVANIA NORTHEAST
REGIONAL RAIL AUTHORITY and
BOARD OF THE PENNSYLVANIA
NORTHEAST REGIONAL
RAIL AUTHORITY,

Defendants

: IN THE COURT OF COMMON PLEAS
: LACKAWANNA COUNTY,
: PENNSYLVANIA

: NO. 13-06796

PROPOSED ORDER

AND NOW, this ____ day of _____, 2015, upon consideration of Defendants Pennsylvania Northeast Regional Railroad Authority and Board of the Pennsylvania Northeast Regional Railroad Authority's Preliminary Objections to RBM&N's Second Amended Complaint, and any response thereto, it is hereby **ORDERED** that said Preliminary Objections are **SUSTAINED**. Count I of RBM&N's Second Amended Complaint is hereby **DISMISSED** in its entirety as against Defendants with prejudice.

BY THE COURT:

J.

READING, BLUE MOUNTAIN &
NORTHERN RAILROAD,

Plaintiff,

v.

PENNSYLVANIA NORTHEAST
REGIONAL RAILROAD AUTHORITY
and BOARD OF THE PENNSYLVANIA
NORTHEAST REGIONAL
RAILROAD AUTHORITY,

Defendants

: IN THE COURT OF COMMON PLEAS
: OF LACKAWANNA COUNTY,
: PENNSYLVANIA

: NO. 13-06796

**PRELIMINARY OBJECTIONS OF DEFENDANTS PENNSYLVANIA
NORTHEAST REGIONAL RAILROAD AUTHORITY AND BOARD OF
PENNSYLVANIA NORTHEAST REGIONAL RAILROAD AUTHORITY
TO PLAINTIFF'S SECOND AMENDED COMPLAINT**

Defendants Pennsylvania Northeast Regional Railroad Authority (“PNRRA”) and the Board of PNRRA (“Board”) (collectively “Defendants”), by and through their undersigned counsel, Buchanan Ingersoll & Rooney PC, hereby preliminarily object to the Second Amended Complaint filed by Reading, Blue Mountain & Northern Railroad (“RBM&N”) pursuant to Rule 1028 of the Pennsylvania Rules of Civil Procedure. In support of these Preliminary Objections, Defendants state as follows:

1. RBM&N filed a Second Amended Complaint on December 19, 2014.
2. Plaintiff RBM&N specifically avers the following facts, *inter alia*, in the Second

Amended Complaint:

- (a) PNRRA is a municipal authority formed under Pennsylvania law. (2d Am. Compl., ¶ 5.)
- (b) “PNRRA was formed in 2006 for the purpose of acquiring, holding, constructing, improving, maintaining, operating, owning and leasing,

either as lessor or lessee, rights-of-way, trackage, sidings and other related rail transport facilities and to accept grants and borrow money from any authority, corporation or agency of the United States or from the Commonwealth of Pennsylvania for the purpose of acquiring and preserving rail transport facilities within the Commonwealth of Pennsylvania.” (2d Am. Compl., ¶ 10.)

- (c) “PNRRA owns nearly 100 miles of rail lines located in Lackawanna, Monroe, Wayne and Northampton Counties, from Carbondale to Scranton through the Pocono region all the way to Slateford, Pennsylvania, on which it provides freight rail service in four counties via a private common carrier rail operator, under contract to PNRRA.” (See 2d Am. Compl., ¶ 11.)
- (d) The Delaware-Lackawanna Railroad Company, Inc. (the “DL”) is a Pennsylvania corporation. (See 2d Am. Compl., ¶ 12.)
- (e) “On August 27, 2010, PNRRA through its Board entered into the current contractual operating agreement with the DL (“Operating Agreement”), for the DL to operate and provide rail freight service on railroad lines known as the Carbondale Mainline, the Pocono Mainline, and the Laurel Line Mainline, including the Minooka Industrial Track.” (See 2d Am. Compl., ¶ 33.)

3. RBM&N attached a copy of the Operating Agreement between PNRRA and the DL to the Second Amended Complaint as Exhibit “A.” (See 2d Am. Compl. ¶ 33.) A copy of

the Operating Agreement which RBM&N attached to its Second Amended Complaint is also attached to these Preliminary Objections as Exhibit "A."

4. Pursuant to the Operating Agreement, PNRRA provides the DL access to and use of rail lines and the DL has the "right to use the lines of railroad for exclusive railroad freight service and to establish, operate and maintain freight rail service thereon" (Ex. A to 2d Am. Compl., also attached hereto as Ex. A, at 1.)

5. The Second Amended Complaint alleges two Counts, both of which purportedly seek declaratory relief pursuant to the Declaratory Judgments Act, 42 Pa. C.S. §§ 7531 *et seq.*

6. Count I of the Second Amended Complaint seeks a declaration which, in specific part, demands relief from the Court in the form of a determination that:

- (a) PNRRA and its Board must divest "its rail freight business" and/or sell "the rights to freight traffic on its lines;" and
- (b) "[D]eclare PNRRA's Operating Agreement with the DL void."

7. These averments, among other allegations made by Plaintiff RBM&N in the Second Amended Complaint, make clear that the purpose of the Second Amended Complaint is the disruption of existing transportation operations by a common carrier rail operator on rail lines owned by PNRRA.

DEFENDANTS' PRELIMINARY OBJECTIONS

I. Defendants' First Preliminary Objection Pursuant to Pa. R. Civ. P. 1028(a)(1) and/or (a)(4) for Lack of Subject Matter Jurisdiction and/or Legal Insufficiency (Demurrer) as to Count I of the Second Amended Complaint

8. The averments of paragraphs 1 through 7 are incorporated herein by reference.
9. Pa. R. Civ. P. 1028(a)(1) authorizes a preliminary objection for lack of subject matter jurisdiction.

10. Pa. R. Civ. P. 1028(a)(4) authorizes a preliminary objection for legal insufficiency of a pleading (demurrer).

11. This Court lacks subject matter jurisdiction over RBM&N's claims and/or RBM&N's claims are legally insufficient because the averments on the face of RBM&N's Second Amended Complaint and/or the remedies RBM&N seeks in the Second Amended Complaint are expressly preempted by Section 10501(b) of the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. § 10501(b), which provides:

(b) The jurisdiction of the [Surface Transportation] Board ["STB"] over—

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one state,

is *exclusive*. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

(Emphasis added).

WHEREFORE, Defendants respectfully request that the Court sustain its Preliminary Objection and dismiss Count I of the Second Amended Complaint pursuant to Pa. R. Civ. P. 1028(a)(1) and/or (a)(4) with prejudice.

II. Defendants' Third Preliminary Objection Pursuant to Pa. R. Civ. P 1028(a)(4) for Legal Insufficiency (Demurrer) as to Count I

12. The averments of paragraphs 1 through 11 are incorporated herein by reference.

13. Plaintiff RBM&N has not stated any claim for mandatory or injunctive relief.

14. Section 7532 of the Declaratory Judgments Act, 42 Pa. C.S. § 7532, provides, in pertinent part, that “Courts of record, within their respective jurisdictions, shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.”

15. Under the Declaratory Judgments Act, “a litigant . . . obtain[s] a declaration of rights as to a particular controversy without any consequential relief being awarded.” *Fawber v. Cohen*, 532 A.2d 429, 434 (Pa. 1987). In other words, declaratory relief cannot “directly compel an affirmative act.” *Id.*

16. In Count I, Plaintiff RBM&N seeks an order from this Court to compel PNRRRA to divest of its rail freight business, and/or sell its rights to freight traffic on its lines. (2d Am. Compl. at p. 15.)

17. Relief in the form of an injunction and/or mandamus is not available through a declaratory judgment action or otherwise as pleaded by Plaintiff RBM&N, and RBM&N in the Second Amended Complaint has failed to state a claim for and/or demonstrate its entitlement to injunctive and/or mandatory relief.

WHEREFORE, Defendants respectfully request that this Court sustain its Preliminary Objection and dismiss Count I of the Second Amended Complaint pursuant to Pa. R. Civ. P. 1028(a)(4) with prejudice.

III. Defendants’ Second Preliminary Objection Pursuant to Pa. R. Civ. P 1028(a)(5) for Failure to Join a Necessary Party as to Count I

18. The averments of paragraphs 1 through 17 are incorporated herein by reference.

19. Pa. R. Civ. P. 1028(a)(5) authorizes a preliminary objection for “nonjoinder of a necessary party.”

20. In paragraph 81 of the Second Amended Complaint, RBM&N specifically avers that the “Operating Agreement,” which is a defined term in the Second Amended Complaint, between PNRRA and the DL is “void.”

21. RBM&N in its “WHEREFORE” clause to Count I also requests that this Court “declare PNRRA’s Operating Agreement with the DL *void . . .*” (2d Am. Compl. at p. 15 (emphasis added).)

22. “A party is generally regarded to be indispensable when his or her rights are so connected with the claims of the litigants that no decree can be made without impairing those rights.” *HYK Construction Company, Inc. v. Smithfield Township*, 8 A.3d 1009, 1015 (Pa. Cmwlth. 2013) (quotations omitted). “The failure to join an indispensable party to a lawsuit deprives the court of subject matter jurisdiction.” *Id.*

23. Further, Section 7540(a) of the Declaratory Judgments Act, 42 Pa. C.S. § 7540(a), provides: “When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.”

24. Despite attacking the validity of the current Operating Agreement between PNRRA and the DL and seeking an order from this Court declaring the current Operating Agreement as to which the DL is a party void (*see* ¶¶ 20-21 above), RBM&N in the Second Amended Complaint has failed to name the DL as a party defendant.

25. Since the relief sought by RBM&N in Count I of the Second Amended Complaint would have a direct and immediate impact on the DL’s rights under the Operating Agreement, the DL is an indispensable party that must be joined by RBM&N in order for this action to proceed.

WHEREFORE, Defendants respectfully request that this Court sustain its Preliminary Objection and dismiss Count I of the Second Amended Complaint pursuant to Pa. R. Civ. P. 1028(a)(5) with prejudice.

Respectfully submitted,

BUCHANAN INGERSOLL & ROONEY PC

By: 

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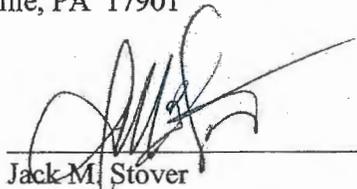
*Attorneys for Defendants Pennsylvania
Northeast Railroad Authority and the Board of
Pennsylvania Northeast Regional Railroad
Authority*

DATE: December 31, 2014

CERTIFICATE OF SERVICE

I, Jack M. Stover, certify that I am this day serving a copy of the foregoing document upon the persons below via U.S. Mail and electronic mail:

Frederick J. Fanelli, Esquire
Fanelli, Evans & Patel, P.C.
The Necho Allen
No. 1 Mahantongo Street
Pottsville, PA 17901



Jack M. Stover

DATE: December 31, 2014

EXHIBIT "G"

IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY
CIVIL DIVISION - LAW

READING, BLUE MOUNTAIN & NORTHERN RAILROAD	:	No. 13 - 06796
	:	
	:	
Plaintiff	:	
v.	:	
	:	
PENNSYLVANIA NORTHEAST REGIONAL RAIL AUTHORITY and BOARD OF THE PENNSYLVANIA NORTHEAST REGIONAL RAIL AUTHORITY,	:	
	:	
Defendants	:	

ORDER

AND NOW, this _____ day of _____, 2014, upon consideration of the Defendants' Preliminary Objections and Plaintiffs' Response thereto, it is hereby ORDERED that the Preliminary Objections are DENIED.

BY THE COURT,

_____ J.

IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY
CIVIL DIVISION - LAW

READING, BLUE MOUNTAIN &
NORTHERN RAILROAD

No. 13-06796

Plaintiff

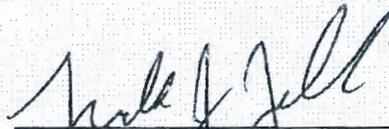
v.

PENNSYLVANIA NORTHEAST
REGIONAL RAIL AUTHORITY and
BOARD OF THE PENNSYLVANIA
NORTHEAST REGIONAL RAIL
AUTHORITY,

Defendants

**PLAINTIFF READING, BLUE MOUNTAIN & NORTHERN RAILROAD'S
MEMORANDUM OF LAW IN SUPPORT OF ITS OPPOSITION TO PRELIMINARY
OBJECTIONS OF DEFENDANTS PENNSYLVANIA NORTHEAST REGIONAL
RAILROAD AUTHORITY AND BOARD OF PENNSYLVANIA NORTHEAST
REGIONAL RAILROAD AUTHORITY TO PLAINTIFF'S AMENDED COMPLAINT**

FANELLI, EVANS & PATEL, P.C.



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*Counsel for Plaintiff, Reading, Blue Mountain &
Northern Railroad Company*

MARY F. RINALDI,
LACKAWANNA COUNTY,
2013 APR - 2 A 11:08J
CLERK OF JUDICIAL
RECORDS CIVIL DIVISION

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I. INTRODUCTORY STATEMENT

Plaintiff Reading, Blue Mountain & Northern Railroad ("Plaintiff"), by and through its counsel, Frederick J. Fanelli, Esquire, files the following Memorandum of Law in support of its opposition to the Preliminary Objections of the Defendants, Pennsylvania Northeast Regional Railroad Authority ("PNRRA") and the Board of the Pennsylvania Northeast Regional Rail Authority ("Board")(collectively "Defendants").

II. PROCEDURAL HISTORY

Plaintiff is in agreement with the procedural history set forth by the Defendants.

III. STATEMENT OF FACTS

Plaintiff is a Pennsylvania corporation with a registered address in Schuylkill County, Pennsylvania and which owns land in Lackawanna County, Pennsylvania. Amended Complaint at ¶¶ 1, 2. The Plaintiff is a taxpayer and is bringing this action to require a public governmental authority to submit a lease agreement for its publicly-owned rail lines to a competitive bidding process. PNRRA is a public municipal authority subject to the Municipal Authorities Act ("MAA"), 53 Pa. C.S. § 5601 et seq., that owns railroad lines in four counties. Amended Complaint at ¶¶ 3, 8, 9, 10. On August 27, 2010, PNRRA and its Board leased its rail lines to a privately-owned railroad, the Delaware-Lackawanna Railroad Company ("the DL"), presumably without seeking any other bids. Amended Complaint at ¶¶ 11, 12, 14; Operating Agreement dated August 27, 2010 between PNRRA and the DL ("Operating Agreement"), Exhibit A to the Amended Complaint.

As part of the Operating Agreement, the DL maintains the rail lines and performs other construction, reconstruction, repairs and other work for PNRRA. Amended Complaint at ¶¶ 22

and Exhibit A. The DL has the exclusive right to use the rail lines and the exclusive right to provide rail service to businesses located along PNRRA's rail lines. Operating Agreement, Exhibit A to Amended Complaint. The Operating Agreement contains significant requirements of the DL, including additional maintenance, a capital reserve, the construction of a building, and other requirements. Operating Agreement, Exhibit A to the Amended Complaint.

Prior to filing this lawsuit, Plaintiff contacted the Defendants by letter dated November 6, 2013 requesting an opportunity to submit a proposal to operate the PNRRA's rail lines and provide maintenance and other work for PNRRA, in anticipation of the expiration of PNRRA's current operating agreement on August 27, 2015. Amended Complaint at ¶ 15. Almost immediately after receiving the Plaintiff's letter, the PNRRA Board at its next regularly scheduled meeting on November 19, 2013, voted to extend its Operating Agreement with the DL for another five years beginning August 27, 2015. Amended Complaint at ¶ 17. The Board did not extend any opportunity to Plaintiff or we believe any other railroad to submit a proposal prior to renewing the Operating Agreement with the DL, which it chose to do twenty-one months prior to the expiration of the current Operating Agreement. Amended Complaint at ¶ 18. It is not known whether in doing so, the Defendants complied with the renewal requirements of the Operating Agreement. Operating Agreement, Exhibit A to Amended Complaint at 2 § 2.

The Plaintiff does not seek to invalidate the original Operating Agreement. Rather, the Plaintiff asks that when the Operating Agreement expires, other railroads should be able to have the opportunity to submit bids for PNRRA's consideration before PNRRA makes a decision.

The Plaintiff believes that the Board's actions were not in the taxpayers' best interests, and that the Board was not acting lawfully in renewing its Operating Agreement with the DL

without considering other bids. There is no assurance to the taxpayers that the DL is providing the best services at the best payment for PNRRA and the taxpayers if the Defendants do not consider proposals from other competitors who are as capable of providing the same service with the same quality at possibly a better payment for the taxpayer.

IV. STATEMENT OF QUESTIONS INVOLVED

- A. WHETHER THE AMENDED COMPLAINT STATES A CAUSE OF ACTION AGAINST THE DEFENDANTS AS TO WHETHER THE OPERATING AGREEMENT SHOULD HAVE BEEN SUBJECTED TO A COMPETITIVE BIDDING PROCESS PURSUANT TO 53 PA. C.S. § 5614(a) AND 62 PA. C.S. §§ 3901 ET SEQ. AND THE DEFENDANTS' DEMURRER SHOULD THEREFORE BE OVERRULED?

SUGGESTED ANSWER: YES

- B. WHETHER THIS COURT, NOT THE FEDERAL SURFACE TRANSPORTATION BOARD, HAS JURISDICTION OVER THE INTERPRETATION AND APPLICATION OF A STATE STATUTE TO A STATE GOVERNMENTAL AUTHORITY?

SUGGESTED ANSWER: YES

- C. WHETHER PLAINTIFF, A TAXPAYER AND A LACKAWANNA COUNTY LANDOWNER, HAS STANDING TO REQUIRE THE DEFENDANTS TO OBEY THE LAW?

SUGGESTED ANSWER: YES

- D. WHETHER THE DL IS NOT AN INDISPENSABLE PARTY?

SUGGESTED ANSWER: YES

V. LEGAL ARGUMENT

A. STANDARD OF REVIEW FOR THE CONSIDERATION OF PRELIMINARY OBJECTIONS

This Court's standard of review of a preliminary objection consisting of legal insufficiency, or demurrer, is as follows:

“Preliminary objections in the nature of a demurrer test the legal sufficiency of the complaint. When considering preliminary objections, all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible therefrom. Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief. If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections.”

Feingold v. Hendrzak, 15 A.3d 937, 941 (Pa. Super. 2011)(quoting Haun v. Community Health Systems, Inc., 14 A.3d 120, 123 (Pa. Super. 2011)). Defendants' first and second preliminary objections are demurrers. Pa.R.C.P. 1028(a)(4) allows a defendant to file a preliminary objection to a complaint for legal insufficiency of a pleading. It is well settled that the Court's review of preliminary objections is limited to the pleadings, and if there is any uncertainty as to whether the law will permit recovery, the preliminary objections must be overruled. Corman v. National Collegiate Athletic Ass'n, 74 A.3d 1149, 1156 (Pa. Cmwlth. 2013).

A defendant may assert a preliminary objection for lack of subject matter jurisdiction pursuant to Pa.R.C.P. 1028(a)(1). The party asserting preemption of state court jurisdiction

by a federal statute bears the burden of proof on the issue. Heiple v. C.R. Motors, Inc., 446 Pa. Super. 310, 329, 666 A.2d 1066, 1075-76 (1995).

A defendant may assert a preliminary objection for lack of standing to bring a lawsuit pursuant to Pa.R.C.P. (a)(5). The same standard of review for a demurrer is applied to a preliminary objection for lack of standing because standing is a question of law. Feingold, 15 A.3d at 941; Petty v. Hospital Service Ass'n of Northeastern Pennsylvania, 967 A.2d 439, 443 (Pa. Cmwlth. 2009).

A defendant may assert a preliminary objection for failure to join a necessary party pursuant to Pa.R.C.P. 1028(a)(5). Likewise, this Court must accept all of the well-pled facts in the complaint as true, as well as all inferences reasonably deducted therefrom. Martin v. Rite Aid of Pennsylvania, Inc., 80 A.3d 813, 814 (Pa. Super. 2013).

A case is not tried at the preliminary objection phase of litigation. Podolak v. Tobyhanna Township Board of Supervisors, 37 A.3d 1283, 1288 (Pa. Cmwlth. 2012); Commonwealth, Dept. of Transportation v. Bethlehem Steel Corp., 33 Pa. Cmwlth. 1, 11, 380 A.2d 1308, 1313 (1977). A plaintiff is required by the Rules of Civil Procedure to plead material facts on which a cause of action is based in a concise and summary form. Pa.R.C.P. 1019(a). A defendant needs to know the facts necessary for the defendant to prepare a defense. Podolak, 37 A.3d at 1287; Bethlehem Steel, 33 Pa. Cmwlth. at 11, 380 A.2d at 1313.

A preliminary objection should only be sustained if the complaint shows on its face that it is devoid of merit. Greenberg v. Aetna Insurance Co., 427 Pa. 511, 518, 235 A.2d 576, 579 (1967), cert. denied, 392 U.S. 907, 88 S. Ct. 2063 (1968). A plaintiff is not required to produce evidence to support its allegations at this stage of the proceedings. Podolak, 37 A.3d at 1288. If

a lease of publicly owned assets; the government authority has a duty to employ competitive bidding to gain the most revenue and best terms for the taxpayer.

The Defendants have failed to show that it is clear and free from doubt, taking the averments of the Amended Complaint and attached Operating Agreement as true, that the Amended Complaint does not allege a cause of action pursuant to the competitive bidding requirements of 53 Pa. C.S. § 5614(a) and therefore to 63 Pa. C.S. §§ 3901 et seq. Given the absence of any controlling precedent to the contrary, or any precedent that applies to the within situation, this Court should overrule the Defendants' demurrer and require the Defendants to answer the Amended Complaint.

C. **THIS COURT, NOT THE SURFACE TRANSPORTATION BOARD, HAS JURISDICTION OVER THIS ISSUE OF STATE STATUTORY CONSTRUCTION REGARDING WHETHER PNRRRA AND ITS BOARD ARE REQUIRED TO USE A COMPETITIVE BIDDING PROCESS FOR THIS CONTRACT.**

Next, the Defendants assert a preliminary objection in the form of a subject matter jurisdiction challenge and/or legal insufficiency (demurrer) challenge, arguing that the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. § 10501(b), expressly preempts this Court's jurisdiction over this matter and places the case within the exclusive jurisdiction of the Surface Transportation Board ("STB"). The Defendants bear the burden of persuasion on this issue. Texas Central Business Lines Corp. v. City of Midlothian, 669 F.3d 525, 529 (5th Cir. 2012).

In their brief, the Defendants fail to provide any statutory or case law on point in support of preemption. Furthermore, we must note that it may be apparent to the Court that pages 6 through 22 of the Defendants' brief addressing whether or not the Operating Agreement is

subject to 53 Pa. C.S. § 5614(a) and 62 Pa. C.S. §§ 3901 et seq. are devoid of any case involving the jurisdiction of the STB, or any mention of the ICCTA. The issue of whether a state statute requires a state governmental authority to submit a contract to competitive bidding is a state court issue over which this Court clearly has jurisdiction. The issue has nothing to do with the STB, and the STB will decline to accept jurisdiction because it has repeatedly declined to address contract disputes.

“Federal preemption is a jurisdictional matter for a state court because it challenges subject matter jurisdiction and the competence of the court to reach the merits of the claims raised.” Kiak v. Crown Equipment Corp., 989 A.2d 385, 390 (Pa. Super. 2010). There are three types of federal preemption: express preemption, field or implied preemption and conflict preemption. Krentz v. Consolidated Rail Corp., 589 Pa. 576, 595, 910 A.2d 20, 32 (2006).

“Invariably, the critical question in any preemption analysis is whether Congress intended that the federal enactment supersede state law.” Id., 589 Pa. at 596, 910 A.2d at 32.

There is a strong presumption against federal preemption as well as an assumption that states’ powers are not to be superseded by a federal statute unless it is the clear and manifest purpose of Congress. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L.Ed.2d 700 (1996); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S. Ct. 1146 (1947); Kiak, 989 A.2d at 390-91. In the absence of express preemption, the state law must create an actual conflict with a federal law before it is impliedly preempted. Werner v. Plater-Zyberk, 799 A.2d 776, 788 (Pa. Super. 2002).

The first inquiry is whether Congress expressly intended the STB to have exclusive jurisdiction over the issue of whether a contract must be submitted to a public competitive

bidding process pursuant to 53 Pa. C.S. § 5614 and 62 Pa. C.S. §§ 3901 et seq. The STB is a statutorily created agency, a part of the United States Department of Transportation and the successor to the Interstate Commerce Commission ("ICC"). It was created by Congress for the purpose of making regulatory decisions when required concerning rail transportation in the United States. The rail transportation policy of the United States is outlined in the ICC Termination Act, 49 U.S.C. § 10101 ("ICCTA"). That policy does not include a policy to regulate whether municipal authorities owning rail lines must utilize a competitive bidding process to lease the rail lines in accordance with state law.

49 U.S.C. § 10501 provides for the general jurisdiction of the STB as follows:

§ 10501. General jurisdiction

(a)(1) Subject to this chapter, the Board has jurisdiction over transportation by rail carrier that is--

(A) only by railroad; or

(B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment.

(2) Jurisdiction under paragraph (1) applies only to transportation in the United States between a place in--

(A) a State and a place in the same or another State as part of the interstate rail network;

(B) a State and a place in a territory or possession of the United States;

(C) a territory or possession of the United States and a place in another such territory or possession;

(D) a territory or possession of the United States and another place in the same territory or possession;

(E) the United States and another place in the United States through a foreign country; or

(F) the United States and a place in a foreign country.

(b) The jurisdiction of the Board over--

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,
is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

(c)(1) In this subsection--

(A) the term "local governmental authority"--

(i) has the same meaning given that term by section 5302(a) of this title; and

(ii) includes a person or entity that contracts with the local governmental authority to provide transportation services; and

(B) the term "mass transportation" means transportation services described in section 5302(a) of this title that are provided by rail.

(2) Except as provided in paragraph (3), the Board does not have jurisdiction under this part over--

(A) mass transportation provided by a local government authority; or

(B) a solid waste rail transfer facility as defined in section 10908 of this title, except as provided under sections 10908 and 10909 of this title.

(3)(A) Notwithstanding paragraph (2) of this subsection, a local governmental authority, described in paragraph (2), is subject to applicable laws of the United States related to--

(i) safety;

(ii) the representation of employees for collective bargaining; and

(iii) employment, retirement, annuity, and unemployment systems or other provisions related to dealings between employees and employers.

(B) The Board has jurisdiction under sections 11102 and 11103 of this title over transportation provided by a local governmental authority only if the Board finds that such governmental authority meets all of the standards and requirements for being a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission that were in effect immediately before January 1, 1996. The enactment of the ICC Termination Act of 1995 shall neither expand

nor contract coverage of employees and employers by the Railway Labor Act, the Railroad Retirement Act of 1974, the Railroad Retirement Tax Act, and the Railroad Unemployment Insurance Act.

49 U.S.C. § 10501. Section 10501(a)(1) establishes that the STB has jurisdiction over rail carriers, such as the DL and Plaintiff. Section 10501(b) specifically defines the activities over which the STB has exclusive jurisdiction. None of those specific activities include the selection of a rail operator by an authority, or the right to contract, or any competitive bidding requirement. Rather, the STB's jurisdiction is over the actual operation of the railroad itself. That is clear from the statutory language. Without doubt, the STB regulates rates, routes, and other specific issues as stated in the statute above; we agree with the Defendants that the STB regulates railroad operations. However, a plain reading of § 10501(b) does not demonstrate that Congress expressly intended to give the STB exclusive jurisdiction over whether PNRRA is subjecting its operating agreements to public, competitive bidding according to state law. Whether or not an authority uses competitive bidding has nothing to do with the economic regulation of railroads or its operations.

Section 10501 also addresses local government authorities. Section 10501(3)(A) states that the state authority is subject to applicable laws of the United States related to safety, the representation of employees for collective bargaining, and employment, retirement, annuity, and unemployment systems or other provisions related to dealings between employees and employers. There is no mention that a local governmental authority's ability to contract with a rail operator is within the STB's exclusive jurisdiction.

Because there is no intention expressed by Congress for the STB to have exclusive jurisdiction in this matter, the inquiry then turns to whether Congress impliedly intended to give

the STB exclusive jurisdiction, which requires the existence of an actual conflict between this Court's jurisdiction and the Act. There is no actual conflict. While the STB is likely involved with regulating the activities of PNRRA's contracted rail service provider, it is not involved in regulating whether PNRRA is subjecting its Operating Agreement to public competitive bidding in accordance with Pennsylvania law, or it would have already been doing so in accordance with 49 U.S.C. § 10101. In fact, the STB routinely declines to exercise jurisdiction over disputes involving state statutory and contractual matters. See, e.g., Lackawanna County Railroad Authority – Acquisition Exemption – F&L Realty, Inc., STB Finance Docket No. 33905, and Delaware-Lackawanna Railroad Co., Inc. – Operation Exemption – Lackawanna County Railroad Authority, STB Docket No. 33906 (STB served Oct. 22, 2001); Indiana Northeastern Railroad Company – Change in Operators – Branch and St. Joseph Counties Rail Users Association, Inc., in Branch County, Michigan, STB Finance Docket No. 33760 (STB served Sept. 1, 1999) (cases attached hereto). The Defendants acknowledge that in these STB cases, the STB refused to exercise jurisdiction over contract issues because those types of issues are within the purview of state courts, not a federal regulatory agency. In doing so, the Defendants acknowledge that there are no contractual claims being litigated here.

Federal courts interpreting preemption under the ICCTA term the inquiry as two-step because the ICCTA only applies to rail transportation; first, whether the state law seeks to regulate transportation, and second, whether that transportation is a "rail carrier." Texas Central Business Lines Corp. v. City of Midlothian, 669 F.3d 525, 530 (5th Cir. 2012). This very simple inquiry clearly shows that the ICCTA will not preempt this Court from deciding this issue

because the Pennsylvania Legislature did not seek to regulate rail transportation in enacting or applying 53 Pa. C.S. § 5614(a) and 62 Pa. C.S. §§ 3901 et seq.

Pennsylvania courts interpreting 49 U.S.C. § 10501(b) have already concluded that the ICCTA was not intended to completely preempt states from making certain decisions concerning rail lines. See, e.g., Wheeling & Lake Erie Railway Co. v. Pennsylvania Public Utility Comm'n, 778 A.2d 785, 790-92 (Pa. Cmwlth. 2001)(states' traditional powers over public safety of highway railroad crossings not preempted by STB). The Defendants cite this case on page 27, n.17 of their brief, and acknowledge that state and local governments are not completely preempted by ICCTA, but in fact retain their police powers to regulate in relation to railroads in areas which do not interfere with or unreasonably burden railroad operations and which do not discriminate against railroads.

In arguing preemption, the Defendants would like this Court to focus on the contents of the Operating Agreement as the "activities at issue" making the Operating Agreement, through its contents involving the operations, payments, routes, etc. of a railroad subject to the ICCTA. Neither federal courts nor the STB agree with the Defendants that contracts that happen to involve rail transportation equate into automatic preemption by the ICCTA. In fact, in one of the cases relied on by the Defendants, the United States Court of Appeals for the Fourth Circuit held that actions involving contracts are *not expressly preempted* by the ICCTA. PCS Phosphate Co., Inc. v. Norfolk Southern Corp., 559 F.3d 212 (4th Cir. 2009). The Fourth Circuit concluded:

Voluntary agreements between private parties . . . are not presumptively regulatory acts, and we are doubtful that most private contracts constitute the sort of "regulation" expressly preempted by the statute. If contracts were by definition "regulation," then enforcement of every contract with "rail transportation" as its subject would be preempted as a state

law remedy “with respect to the regulation of rail transportation.” Given the statutory definition of “transportation,” this would include all voluntary agreements about “equipment of any kind related to the movement of passengers or property, or both, by rail.” If enforcement of these agreements were preempted, the contracting parties’ only recourse would be the “exclusive” ICCTA remedies. But the ICCTA does not include a general contract remedy. Such a broad reading of the preemption clause would make it virtually impossible to conduct business, and Congress surely would have spoken more clearly, and not used the word “regulation,” if it intended that result.

Id. at 218-19. Given the history and purpose of the ICCTA, the Fourth Circuit concluded that state courts, not the STB, are the proper forum for contract disputes. Id. at 220. The Fourth Circuit cites to three STB cases, additional to the ones cited above, in all of which the STB stated that contract disputes are under the jurisdiction of the state court, not the STB. Because they are repetitive, we will not include them here. They all say the same thing – the STB will not get involved in contractual disputes.

Other federal courts have recognized the STB’s consistency in declining to address contractual matters. The United States Court of Appeals for the District of Columbia upheld an STB decision that it should not use its authority to alter or interpret existing contractual terms in one party’s favor, consistent with its practice of not getting involved in contractual disputes. Commuter Rail Division of Regional Transportation Authority v. Surface Transportation Board, 608 F.3d 24, 32 (D.C. Cir. 2010). “[T]hese parties seek material changes to, or extensions of, existing contracts, or to compel new contractual commitments We are reluctant to use our conditioning power to compel resolution of differences between freight railroads and passenger agencies with respect to operating, dispatching, and compensation matters.” Id. (quoting CSX

Corp. – Control & Operating Leases/Agreements – Conrail, Inc., 3 S.T.B. 196, 297 (1998))(445 page opinion, not attached).

If the STB does not believe that it has exclusive jurisdiction over contractual disputes, it certainly is not going to exercise exclusive jurisdiction over whether that contract has to be competitively bid under state law.

The Defendants, nevertheless, try to boot-strap the fact that the STB regulates a railroad's operations into an argument that the ICCTA *preempts* state legislation mandating competitive bidding on public contracts. The Defendants' position is eviscerated by the Fourth Circuit in PCS Phosphate.

The Defendants rely on cases that are inapplicable to this case. While they all involve preemption, none involve preemption over the interpretation of a state statute mandating competitive bidding. Other than PCS Phosphate, none of the Defendants' cases involve contracts, or the application of state law to a contract. In cases where preemption was found, each claim involved cases where local or state government sought to impact or affect rail operations. For example, Texas Central Business Lines Corp. v. City of Midlothian, 669 F.3d 525 (5th Cir. 2012)(railroad's declaratory action that city ordinance affecting its transloading operations was preempted by ICCTA was affirmed in part on appeal); Elam v. Kansas City Southern Railway Co., 635 F.3d 796 (5th Cir. 2011)(ICCTA preempted plaintiff's per se negligence claim against railroad under a state "anti-road blocking" statute because the claim "fell squarely under § 10501(b)" because claim directly attempted to manage or govern a railroad's decision in the economic realm; simple negligence claim not preempted); Fayus Enterprises v. BNSF Railway Co., 602 F.3d 444 (D.C. Cir.), cert. denied, 121 S. Ct. 822 (2010)(claims including state antitrust,

consumer protection, unfair competition, and unjust enrichment by rail freight service against railroad preempted by ICCTA); Franks Investment Co. LLC v. Union Pacific Railroad Co., 593 F.3d 404 (5th Cir. 2010)(landowner's state possessory action over two private railroad crossings to that land and two other crossings that railroad threatened to remove preempted by ICCTA); Green Mountain Railroad Corp. v. Vermont, 404 F.3d 638 (2d Cir. 2005)(railroad's lawsuit seeking declaration that state's environmental land use law, blocking railroad's proposed construction of transloading facility on railroad's property, was preempted by ICCTA, was upheld by trial court and on appeal); Friberg v. Kansas City Southern Railway Co., 267 F.3d 439 (5th Cir. 2001)(business owner's suit for negligence and negligence per se based on railroad's repeatedly blocking primary road leading into business causing business to fail was preempted by ICCTA); City of Auburn v. United States, 154 F.3d 1025 (9th Cir. 1998)(Ninth Circuit agreed that STB had exclusive jurisdiction over re-opening of rail lines, and that local environmental review or permit requirements were preempted by STB decisions); CSX Transportation, Inc. v. Georgia Public Service Comm'n, 944 F.Supp. 1573 (N.D. Ga. 1996)(state public service commission's control over railroad's local business offices preempted by ICCTA).

In cases where preemption was not found, those cases involved local or state governments taking action which didn't directly or unreasonably impact rail services. For example, New York Susquehanna and Western Railway Corp. v. Jackson, 500 F.3d 238 (3d Cir. 2007)(state's regulations governing treatment of solid waste during transfer to rail cars was not unreasonably or per se burdensome to rail carriage and therefore was not preempted by ICCTA) Florida East Coast Railway Co. v. City of West Palm Beach, 266 F.3d 1324 (11th Cir. 2001)(city's zoning and occupational license ordinance was traditional exercise of local police power, entitled to

presumption of no preemption pursuant to Constitutional Supremacy Clause; application of zoning ordinance to railroad's lessee did not qualify as "regulation of rail transportation" and did not frustrate objectives of federal railroad policy).

The Defendants appear to argue that by making PNRRA place the Operating Agreement out to competitive bidding process, the Pennsylvania Legislature is conducting "economic regulation of rail transportation" because competitive bidding requirements will "dictate not only how and when PNRRA may contract for the provision of common carrier rail freight service on its rail lines, but with whom PNRRA may contract and at what price." Defendants' Brief at 29. The Defendants fail to cite any statutory law, legislative history or case law support for this proposition because there is none. This proposition is such a stretch that it should simply be ignored by this Court. As the Fourth Circuit stated in PCS Phosphate, to place every contract entered into by a railroad, let alone a governmental authority contracting with a railroad, under the exclusive jurisdiction of the STB would be madness.

Finally, the Defendants argue that even if the STB does not have exclusive jurisdiction over this issue, states cannot regulate in this area because Plaintiff's requested relief is still preempted by § 10501(b). In other words, there is no remedy, and any contract involving railroad operations is subject to neither state nor STB jurisdiction. We disagree for the reasons already stated.

Because there is no indication in the ICCTA that Congress intended either expressly or impliedly to federally preempt state court jurisdiction over the interpretation of state statutes mandating competitive bidding of contracts, this Court has jurisdiction over this matter. The Defendants have failed to show by a preponderance of the evidence that the ICCTA preempts

this Court's jurisdiction. The Defendants have failed to show that it is free and clear from doubt that their preliminary objection in the manner of subject matter jurisdiction and/or a legal demurrer should be sustained. If there is any doubt as to whether or not the Amended Complaint should be dismissed, the preliminary objection must be denied. Therefore, this Court should overrule this preliminary objection.

D. THE PLAINTIFF IS A TAXPAYER AND LANDOWNER IN LACKAWANNA COUNTY, WITHIN THE TERRITORY OF PNRRA; IT HAS STANDING TO MAINTAIN THIS ACTION

As their third preliminary objection, the Defendants assert that the Railroad lacks standing to challenge the Defendants' renewal of the Operating Agreement pursuant to Pa.R.C.P. 1028(a)(5). The Defendants maintain that a litigant challenging the award of public contracts under competitive bidding statutes must be a taxpayer. The Amended Complaint alleges that the Plaintiff is a Pennsylvania corporation and owns land in Lackawanna County. Amended Complaint at ¶¶ 1, 2. The Plaintiff is a taxpayer and therefore has standing to litigate this action.

The Defendant argues that even if Plaintiff is a taxpayer and has standing on that basis, it cannot have standing in any event because of the Defendants' position that the Operating Agreement does not provide for the expenditure of public funds in connection with the DL's maintenance and repair duties under Sections 6(D) and (E). The Defendants raise what is clearly a factual issue that cannot be determined at this stage of the proceedings and is improper. Although the Defendants couch this preliminary objection as one regarding standing, they are essentially asserting a speaking demurrer, which is not permitted; preliminary objections are limited to specific enumerated challenges which must be resolved solely on the basis of the

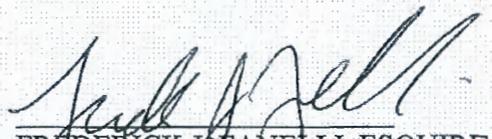
competitively bid was "unauthorized and void." Id., 422 Pa. at 333, 221 A.2d at 147. The third party, a private developer, was not a party to the lawsuit. It is the same case in this instance with the DL.

The Defendants have failed to show that the DL is an indispensable party and this Preliminary Objection should be overruled.

II. CONCLUSION

For these reasons, this Court should overrule the preliminary objections of the Defendants, PNRRA and its Board, and direct them to answer the Amended Complaint within twenty days.

Respectfully submitted by:



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IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY
CIVIL DIVISION - LAW

READING, BLUE MOUNTAIN & : No. 13 - 06796
NORTHERN RAILROAD :

Plaintiff :

v. :

PENNSYLVANIA NORTHEAST :
REGIONAL RAIL AUTHORITY and :
BOARD OF THE PENNSYLVANIA :
NORTHEAST REGIONAL RAIL :
AUTHORITY, :

Defendants :

CERTIFICATE OF SERVICE

I, FREDERICK J. FANELLI, Esquire, hereby certify that a true and correct copy of the foregoing Brief in Support of Opposition to Preliminary Objections was emailed upon the following party:

Jack M. Stover, Esquire
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Dated: 4-2-14

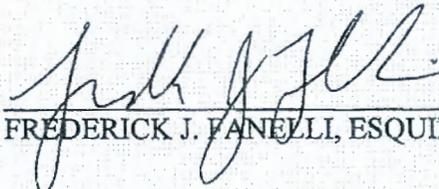

FREDERICK J. FANELLI, ESQUIRE

EXHIBIT "H"

IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY
CIVIL DIVISION - LAW

READING, BLUE MOUNTAIN &
NORTHERN RAILROAD

Plaintiff

v.

PENNSYLVANIA NORTHEAST
REGIONAL RAIL AUTHORITY and
BOARD OF THE PENNSYLVANIA
NORTHEAST REGIONAL RAIL
AUTHORITY,

Defendants

No. 13-06796

ORDER

AND NOW, this _____ day of _____, 2015, after hearing, the Court finding that the Plaintiff, Reading, Blue Mountain & Northern Railroad, established the probable validity of its claim and the potential of irreparable harm, it is hereby ORDERED and DECREED that the Emergency Application for a Preliminary Injunction is GRANTED and Defendants, the Pennsylvania Northeast Regional Railroad Authority and its Board, are ENJOINED from signing any extension of its current operating agreement until the merits of this controversy are decided. The current operating agreement shall remain in place until that time.

BY THE COURT:

J.

IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY
CIVIL DIVISION - LAW

READING, BLUE MOUNTAIN & :
NORTHERN RAILROAD :

No. 13-06796

Plaintiff

v.

PENNSYLVANIA NORTHEAST :
REGIONAL RAIL AUTHORITY and :
BOARD OF THE PENNSYLVANIA :
NORTHEAST REGIONAL RAIL :
AUTHORITY, :

Defendants

ORDER

AND NOW, this _____ day of _____, 2015, upon consideration of the filing of Plaintiff Reading, Blue Mountain & Northern Railroad's Emergency Application for a Preliminary Injunction, the Court shall hold a hearing on the ____ day of _____, 2015 in Courtroom _____.

BY THE COURT:

J.

**IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY
CIVIL DIVISION - LAW**

READING, BLUE MOUNTAIN & NORTHERN RAILROAD,	:	No. 13-06796
	:	
Plaintiff	:	
v.	:	
	:	
PENNSYLVANIA NORTHEAST REGIONAL RAIL AUTHORITY and BOARD OF THE PENNSYLVANIA NORTHEAST REGIONAL RAIL AUTHORITY,	:	
	:	
Defendants	:	

EMERGENCY APPLICATION FOR PRELIMINARY INJUNCTION

Plaintiff Reading, Blue Mountain & Northern Railroad, by and through its counsel, Frederick J. Fanelli, Esquire, brings this Emergency Application for Preliminary Injunction pursuant to Pa.R.C.P. 1531 and Lack. Co. R.C.P. 1531 seeking equitable relief against Defendants Pennsylvania Northeast Regional Railroad Authority and the Board of the Pennsylvania Northeast Regional Railroad Authority, and in support thereof, avers as follows:

1. Plaintiff Reading, Blue Mountain & Northern Railroad ("RBMN") is a Pennsylvania railroad which provides commercial rail freight service throughout northeastern Pennsylvania, is a landowner in Lackawanna County and as already ruled by this Court, has standing to maintain this action.
2. On December 12, 2013, RBMN instituted this action by filing a complaint seeking injunctive and declaratory relief and a writ of mandamus against the Defendant,

Pennsylvania Northeast Regional Railroad Authority (“PNRRA”), seeking, *inter alia*, to prevent PNRRA from renewing a contract for another five year term with the Delaware-Lackawanna Railroad Company (“the DL”) because the contract had not been subjected to public competitive bidding as required by the Municipality Authorities Act (“MAA”), 53 Pa. C.S. §§ 5301 et seq. and the competitive sealed bidding and proposal provisions for contracts for public works of 62 Pa. C.S. § 3901 et seq.

3. PNRRA is a municipal authority formed pursuant to the Municipality Authorities Act of 1945, Act of May 2, 1945, P.L. 382, as amended, now codified at 53 Pa. C.S. §§ 5601 et seq. (2013), located at 280 Cliff Street, Scranton, Lackawanna County, Pennsylvania, 18503.

4. PNRRA is operated by the Defendant Board of the PNRRA (“Board”), which consists of eight members, four appointed by Lackawanna County and four appointed by Monroe County, and which holds meetings to conduct the business of the PNRRA, in accordance with its bylaws.

5. PNRRA owns nearly 100 miles of rail lines located in Lackawanna, Monroe, Wayne and Northampton Counties, from Carbondale to Scranton through the Pocono region all the way to Delaware Water Gap, over which rail freight service is provided in four counties via a privately-owned common carrier rail operator, under contract to PNRRA.

6. PNRRA was formed for the purpose of acquiring, holding, constructing, improving, maintaining, operating, owning and leasing, either as a lessor or lessee, rights-of-way, trackage, sidings and other related rail transport facilities and to accept grants and borrow money from any authority, corporation or agency of the United States or from the

Commonwealth of Pennsylvania for the purpose of acquiring and preserving rail transport facilities within the Commonwealth of Pennsylvania.

7. As a municipal agency, PNRRA is subject to the requirements of the Municipality Authorities Act ("MAA"), 53 Pa. C.S. §§ 5301 et seq. and the competitive sealed bidding and proposal provisions for contracts for public works of 62 Pa. C.S. § 3901 et seq.

8. On August 27, 2010, PNRRA through its Board entered into a contractual operating agreement with the DL ("DL Operating Agreement"), for the DL to operate and provide rail freight service on railroad lines known as the Carbondale Mainline, the Pocono Mainline, and the Laurel Line Mainline, including the Minooka Industrial Track. A true and correct copy of the DL Operating Agreement is attached hereto as Exhibit "A".

9. The term of the DL Operating Agreement is five years and it expires on August 27, 2015. DL Operating Agreement, Ex. A at 2.

10. PNRRA and its Board did not subject this operating agreement to a public bidding process as required by the MAA prior to awarding the operating agreement to DL. In fact, the Board last sought any type of public bidding for the awarding of the Operating Agreement in 1993. Since 1993, the Board has not solicited any public bids or Request For Proposals before awarding the Operating Agreement.

11. On November 6, 2013, RBMN sent a letter to PNRRA and its Board, asking for an opportunity to submit a bid to operate their rail lines, in anticipation of the August 27, 2015 expiration of the current DL Operating Agreement.

12. In that letter, RBMN stated that it believed that it could offer superior service to PNRRA than is currently being offered under the existing DL Operating Agreement.

13. It is believed and therefore averred that in response to RBMN's letter, PNRRA, through its Board, at its next regularly scheduled meeting on November 19, 2013, went into executive session to discuss the renewal of the DL Operating Agreement. The Board emerged from the executive session and voted to extend the current DL Operating Agreement for an additional five years, although at the time, the current DL Operating Agreement was not set to expire for another year and a half.

14. PNRRA, through its Board, voted to extend the current DL Operational Agreement for another five years without any form of competitive bidding.

15. Subsequent to the meeting of November 19, 2013, RBMN, through its counsel, wrote to PNRRA and indicated that RBMN could offer a significant increase in fees paid to PNRRA if given an opportunity to bid or submit a proposal for the Operating Agreement.

16. When it became clear that PNRRA had no intention of giving any other railroad an opportunity to present a competitive bid or proposal, this lawsuit ensued by the filing of the original complaint described above in paragraph 2

17. During discovery, PNRRA admitted that it directly competes with RBMN and other private rail freight operators.

18. As a result, after receiving leave of Court to do so, RBMN filed a Second Amended Complaint on December 19, 2014, averring that PNRRA was also violating the MAA by engaging in an enterprise which directly competes with privately owned freight railroads. 53

Pa. C.S. § 5607(b)(2); Dominion Products and Services v. Pittsburgh Water and Sewer Authority, 44 A.3d 697 (Pa. Cmwlth. 2011).

19. On January 2, 2015, PNRRA filed preliminary objections to the new allegations in the Second Amended Complaint concerning 53 Pa. C.S. § 5607(b)(2), RBMN filed a reply on January 22, 2015, oral argument was held on February 27, 2015, and those preliminary objections remain pending. The remaining allegations of the Second Amended Complaint including those concerning 53 Pa. C.S. § 5614(a) regarding competitive bidding survived an earlier set of preliminary objections.

20. PNRRA has announced its intent to sign the five year extension on or after May 19, 2015, in flagrant disregard of this lawsuit, the judicial process and the MAA. Letter of Robert C. Hay, PNRRA Chairman, dated April 10, 2015, attached hereto as Exhibit B.”

21. This is the second time that RBMN has been required to file an Emergency Application for a Preliminary Injunction, based on an announcement by PNRRA that it intends to renew its contract with the DL. The first was filed on October 27, 2014, after PNRRA announced it intended to enter the contract on or after November 1, 2014. As a result of that motion, PNRRA stipulated that it would not sign the contract, and RBMN withdrew its Application.

22. Because PNRRA intends to sign the contract on or after May 19, 2015, regardless of this lawsuit, extraordinary and urgent circumstances exist which require an immediate hearing pursuant to Lack. Co. R.C.P. 1531.

23. RBMN is filing this Emergency Application for a Preliminary Injunction pursuant to Pa.R.C.P. 1531 to ask this Court to enjoin PNRRRA and its Board from signing the five year extension of the DL Operating Agreement until this matter is decided or resolved, and to require the current DL Operating Agreement to remain in place until then.

24. In order to sustain a preliminary injunction, “the plaintiff’s right to relief must be clear, the need for relief must be immediate, and the injury must be irreparable if the injunction is not granted.” Zebra v. School Dist. of City of Pittsburgh, 449 Pa. 432, 437, 296 A.2d 748, 750 (1972).

25. “The purpose of a preliminary injunction is to preserve the status quo as it exists or as it existed before the acts complained of, thereby preventing irreparable injury or gross injustice. The injunction should not issue unless there is urgent necessity to prevent injury not compensable by damages.” American Express Travel Related Services Co. v. Laughlin, 424 Pa. Super. 622, 626, 623 A.2d 854, 856 (1993).

26. “The purposes of a preliminary injunction are to preserve the status quo and prevent imminent and irreparable harm which might occur before the merits of the case can be heard and determined.” Soja v. Factoryville Sportsmen’s Club, 361 Pa. Super. 473, 477, 522 A.2d 1129, 1131 (1987).

27. In a situation like this where a plaintiff is seeking to require the defendant to comply with a statute, irreparable harm is presumed. “Our Supreme Court’s decision in Pennsylvania Public Utility Commission v. Israel, 356 Pa. 400, 52 A.2d 317 (1947), stands for the proposition that a party need not establish irreparable harm when a statute sets forth specific

conduct that is unlawful. In that case, the Court confirmed the proposition that “[w]hen the Legislature declares certain conduct to be unlawful it is tantamount in law to calling it injurious to the public. For one to continue such unlawful conduct constitutes irreparable injury.”” Philips Brothers Elec. Contractors, Inc. v. Valley Forge Sewer Auth., 999 A.2d 652, 657-58 (2010)(citing Israel, 356 Pa. at 406, 52 A.2d at 321).

28. Enjoining a municipality from entering into or performing on a public contract is an appropriate basis for a preliminary or permanent injunction, and this Court can also require the existing contract to continue in place until the merits of this action are decided. See, e.g., Smith v. Borough of East Stroudsburg, 694 A.2d 19, 22 (Pa. Cmwlth. 1997).

29. RBMN is likely to succeed on the merits and its right to relief is clear.

30. The purpose and intent of the Pennsylvania Legislature in enacting the MMA is to benefit the people of the Commonwealth by, among other things, increasing their commerce, health, safety and prosperity, and to permit the authority to benefit the people. 53 Pa. C.S. § 5607(b)(2), (3).

31. One of the powers granted to PNRRA in the MMA is the power to enter into contracts. 53 Pa. C.S. § 5607(d)(13), (14).

32. The DL Operating Agreement is a contract subject to the requirements of 53 Pa. C.S. § 5614, in that it is a contract for work, including for the maintenance of those lines in FRA Class I and Class II condition; for the maintenance of PNRRA’s structures and related facilities and equipment located on the rail lines; for the repair or replacement of same; for the provision of working capital as well as a escrowed reserve; for the removal, replacement or improvement

of the track and structures on the railroad lines; for security along the rail lines; for marketing and sales work; for the provision of hirail inspection services; and any other work provided for in the DL Operating Agreement. DL Operating Agreement, Ex. A.

33. PNRRA's DL Operating Agreement is a contract subject to the requirements of 62 Pa. C.S. §§ 3901 et seq.

34. PNRRA's DL Operating Agreement exceeds \$18,500 in value and should have been subject to competitive bidding pursuant to 53 Pa. C.S. § 5614(a), which provides:

§ 5614. Competition in award of contracts.

(a) *Services.*

(1) Except as set forth in paragraph (2), all construction, reconstruction, repair or work of any nature made by an authority if the entire cost, value or amount, including labor and materials, exceeds a base amount of \$ 18,500, subject to adjustment under subsection (c.1), shall be done only under contract to be entered into by the authority with the lowest responsible bidder upon proper terms after public notice asking for competitive bids as provided in this section.

(2) Paragraph (1) does not apply to construction, reconstruction, repair or work done by employees of the authority or by labor supplied under agreement with a Federal or State agency with supplies and materials purchased as provided in this section.

53 Pa. C.S. § 5614(a) (2013).

35. To the extent that PNRRA seeks to avoid competitive bidding by asserting that the DL Operating Agreement is some sort of "professional services" contract, it is noted that there is nothing unusual, peculiar, or special about providing rail freight contractor services over properties owned by a different entity.

36. As opposed to being a “professional services” contract, these agreements/contracts are common. For example, numerous other freight railroads provide services for entities similar to PNRRA, such as North Shore Railroad over SEDA-COG, C&S Railroad and RBMN over Carbon County, DL Railroad over PNRRA, Wellsboro & Corning Railroad over the GROW property in the Wellsboro area, and the Luzerne and Susquehanna Railroad over the Luzerne County Redevelopment Authority. There is no requirement for a potential freight rail operator to prove any professional qualifications when it is seeking authorization from the federal Surface Transportation Board to operate. The Surface Transportation Board is the only body in the United States with the power to authorize a party to be a freight railroad as part of the national system of railways, and the Surface Transportation Board does not require any particular qualifications other than a showing of financial responsibility.

37. RBMN has a clear right to equitable relief in having the opportunity to submit a bid to operate PNRRA’s rail line, which PNRRA has avoided by voting to renew the DL Operating Agreement without public notice or seeking other bids, in violation of 53 Pa. C.S. § 5614(a) and 62 Pa. C.S. §§ 3901 et seq., and which PNRRA intends to sign on or after May 19, 2015, to the detriment of the taxpayers of Lackawanna County.

38. RBMN also has a clear right to equitable relief based on the fact that PNRRA is directly engaging in competition with private enterprise, which the MAA specifically forbids in 53 Pa. C.S. § 5607(b)(2). During discovery, PNRRA’s President admitted that PNRRA directly competes with RBMN..

39. An injunction of PNRRA's renewal of the DL Operating Agreement is necessary to avoid an injury that cannot be compensated by damages.

40. Greater injury will result if the Court does not grant a preliminary injunction, than if it does. This lawsuit seeks to preclude PNRRA from engaging in direct competition with private industry; if the Court concludes that PNRRA is not directly engaging in such competition through its activities, then this lawsuit seeks to require PNRRA to submit its Operating Agreement to competitive bidding. RBMN and other railroads will not have the opportunity to have their bids considered for five more years if an injunction does not issue and PNRRA enters this contract as it plans on or after May 19, 2015. PNRRA will continue to violate the law, and the taxpayers will lose out on the opportunity for increased revenue.

41. DL, as PNRRA's current operator, is obligated to continue to provide rail service until and unless it is authorized by the Surface Transportation Board to discontinue operations, even if the current operating agreement expires. Thompson v. Texas Mexican Ry. Co., 328 U.S. 134 (1946). Thus, if this Court issues an injunction, rail service will not be affected, and neither PNRRA, DL nor any of the shippers on the PNRRA lines will suffer any harm and the status quo will be maintained.

42. Although harm is presumed in this type of lawsuit, if the preliminary injunction is not granted and PNRRA and its Board are permitted to execute the five year renewal of the DL Operating Agreement without competitive bidding, RBMN and other competitors will sustain significant prejudice by not being able to compete for this business for another five years, and

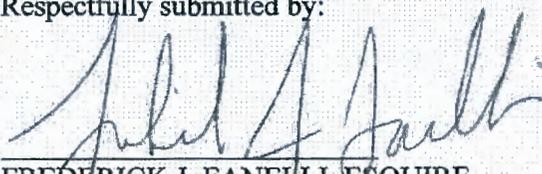
the taxpayers will be prejudiced by the loss of additional revenue from a high-paying operating agreement for half of a decade.

43. PNRRA will not suffer any prejudice if a preliminary injunction is entered because the current operator will continue to operate PNRRA's rail lines until the lawsuit is resolved and until a different operator receives regulatory approval from the Surface Transportation Board, if that is the outcome of this case.

44. This Court should enjoin PNRRA and its Board from signing the renewal of the DL Operating Agreement.

WHEREFORE, Plaintiff Reading, Blue Mountain & Northern Railroad respectfully requests that this Court schedule an immediate hearing, and after hearing, preliminarily enjoin Defendants Pennsylvania Northeast Regional Railroad Authority and its Board from executing the renewal of the existing DL Operating Agreement until the merits of this case are decided, and award any other relief that this Court deems just and proper.

Respectfully submitted by:



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EXHIBIT "I"

**READING, BLUE MOUNTAIN &
NORTHERN RAILROAD,**

Plaintiff,

v.

**PENNSYLVANIA NORTHEAST
REGIONAL RAIL AUTHORITY and
BOARD OF THE PENNSYLVANIA
NORTHEAST REGIONAL
RAIL AUTHORITY,**

Defendants

**IN THE COURT OF COMMON PLEAS
OF LACKAWANNA COUNTY,
PENNSYLVANIA**

NO. 13-06796

FILED
2015 MAY 18 AM 11:14
LACKAWANNA COUNTY

**DEFENDANTS' PRE-HEARING BRIEF IN OPPOSITION TO PLAINTIFF'S
EMERGENCY APPLICATION FOR PRELIMINARY INJUNCTION**

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DATE: May 18, 2015

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I. INTRODUCTION

Defendants Pennsylvania Northeast Regional Railroad Authority ("PNRRA") and the Board of the Pennsylvania Northeast Regional Railroad Authority ("Board") (collectively "Defendants"), by and through their undersigned counsel, submit this Brief in opposition to the Emergency Application for Preliminary Injunction ("Application") presented to the Court by Plaintiff Reading, Blue Mountain & Northern Railroad ("RBM&N") on May 13, 2015.

PNRRA is a municipal authority located in Scranton, Pennsylvania, which owns rail lines in Lackawanna, Monroe, Wayne and Northampton Counties for the purposes of maintaining federal common carrier rail transportation for business and industrial development along the rail lines. PNRRA and its predecessors came into being primarily as a result of private railroads abandoning and/or placing rail lines out of service. By stark contrast, RBM&N is a private for-profit railroad company which claims to be the third largest private railroad company in Pennsylvania. RBM&N has filed this lawsuit in a continuing effort to acquire control of PNRRA's rail lines to add to its for-profit business operations. Despite PNRRA's open and public existence since 1982, RBM&N only now seeks to challenge PNRRA's control and ownership of its rail lines because PNRRA's business and industrial development efforts over the past three decades have developed the rail lines into a valuable asset.

The current Application filed by RBM&N is intended to disrupt the ongoing contractual relationship (the "Operating Agreement") between PNRRA and its operator, the Delaware-Lackawanna Railroad Company, Inc. (the "DL"). RBM&N, however, cannot meet the standards required under Pennsylvania law for the type of relief it seeks in its Application for a multitude of reasons, including:

- RBM&N does not have a clear right to relief under 53 Pa. C.S. § 5614(a) because, *inter alia*: the Operating Agreement is not a contract for "construction, reconstruction, repair or work"; PNRRA is not expending public funds under the

Operating Agreement; the Operating Agreement cannot be awarded to the "lowest responsible bidder"; the Operating Agreement is exempt from Section 5614(a) as a professional service contract; and RBM&N lacks standing to assert any claim under that section;

- RBM&N does not have a clear right to relief under 53 Pa. C.S. § 5607(b)(2) because, *inter alia*: Section 5607(b)(2) does not apply to PNRRA or the Operating Agreement; PNRRA's existence and activities predate the RBM&N; PNRRA does not serve substantially the same purpose as RBM&N; RBM&N's claim is barred by the statute of limitations; RBM&N's claim is barred by the doctrine of laches; and PNRRA is exempt from Section 5607(b)(2) under a specific exemption.
- This Court lacks subject matter jurisdiction to grant the Application because RBM&N has failed to join an indispensable party, the DL, whose rights would be directly impaired by RBM&N's requested injunctive relief;
- This Court lacks subject matter jurisdiction to grant the Application because RBM&N's claims based on two state statutes and its requested relief, as applied to PNRRA, are expressly preempted by federal law;
- RBM&N cannot demonstrate immediate and irreparable harm;
- Greater injury will result from granting RBM&N's requested injunctive relief than from denying it;
- RBM&N's requested injunctive relief adversely affects the public interest; and
- RBM&N's requested injunctive relief alters the status quo.

Accordingly, the Application must be denied.

II. COUNTER-STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

A. BACKGROUND

PNRRA was formed on April 12, 1982. At the time of its formation, PNRRA was named the Monroe County Railroad Authority ("MCRA"). The project for which PNRRA was formed was acquiring, holding, constructing, improving, maintaining, operating, owning and leasing, either as a lessor or lessee, rights-of-way, trackage, sidings and other related rail transport facilities...for the purpose of acquiring and preserving [such] rail transport facilities within the

Commonwealth of Pennsylvania.” (2d Am. Compl. at ¶ 10; *see also* Appl. at ¶ 6.) In 2006, the Lackawanna County Railroad Authority (“LCRA”), which had been formed in 1984, joined into the MCRA and the MCRA changed its name to the Pennsylvania Northeast Regional Railroad Authority or “PNRRA.” Thus, PNRRA as a corporate entity is the continuing corporate body of both the MCRA and the LCRA.

PNRRA, acting as MCRA and LCRA, acquired existing railroad lines beginning in 1985. By 1994, PNRRA had acquired rail lines running northeast from Scranton to Carbondale (the “Scranton/Carbondale rail line”) and southeast from Scranton to Analomink (the “Scranton/Analomink rail line”). As PNRRA acquired the rail lines in the period 1985-1994, deeds for the rail lines were publicly recorded, the rail lines were marked on publicly available Pennsylvania railroad maps prepared by the Pennsylvania Department of Transportation and, obviously, the rail lines were visible.

After PNRRA acquired the rail lines described above, RBM&N acquired rail lines in 1996 running roughly parallel to PNRRA’s Scranton/Analomink rail line. RBM&N’s rail lines were located west of the PNRRA Scranton/Analomink rail line and ran from Lehighton to the Scranton area in roughly a north/south direction.

PNRRA has entered into a series of operating agreements with the DL since 1993. On August 27, 2010, PNRRA entered into the current Operating Agreement with the DL. Under the terms of the Operating Agreement, the DL was granted access to and exclusive use of the PNRRA rail lines to establish, operate, and maintain freight rail service. (*See* Ex. A. to Appl. at 1-2, § 1.) RBM&N itself has repeatedly asserted throughout this case that the Operating Agreement is a “lease.” (*See, e.g.*, RBM&N Brief in Opp’n to POs to Am. Compl. at 1, 12, 15, 24-26, 31, 43-44; RBM&N Reply to New Matter at ¶¶ 65-70, 77-78; RBM&N Opp’n to POs to

were filed, briefed and argued before Judge Saxton, a visiting judge for this Court. On April 9, 2014, Judge Saxton overruled the Preliminary Objections without any opinion. On April 29, 2014, PNRRA and its Board as Defendants filed a timely Answer with New Matter to the Amended Complaint.

Thereafter, the parties commenced discovery. RBM&N has objected to virtually all of the discovery requested by PNRRA and its Board, has produced only three pages of documents to date, and RBM&N's counsel has notified counsel for Defendants that RBM&N will not produce for deposition Andrew Muller, RBM&N's Chairman and CEO. Discovery disputes have been submitted to the Court's Discovery Master but have not been resolved as of the date of this filing. By contrast, PNRRA has produced more than 1,600 pages of documents and has submitted to lengthy depositions of its President, its only other employee, and the majority of the members of its Board. Thus, PNRRA and its Board have been denied any meaningful discovery in this case.

On August 18, 2014, RBM&N filed a Motion Requesting Leave of Court to File a Second Amended Complaint. Although opposed by Defendants, this Court granted RBM&N's Motion to Amend on December 8, 2014, and RBM&N filed its Second Amended Complaint on December 17, 2014. The Second Amended Complaint contains two counts, both styled as declaratory judgment actions.

In Count I of the Second Amended Complaint, which was not included in the First Amended Complaint, RBM&N asserts that PNRRA violated Section 5607(b)(2) of the Municipality Authorities Act ("MAA"), 53 Pa. C.S. § 5607(b)(2), by "engaging in an enterprise that provides freight rail service in direct competition with privately owned rail freight operators such as the RBM&N, and to the exclusion of the same." (2d Am. Compl., ¶ 77.) While

ostensibly styled as a claim for declaratory relief, RBM&N in Count I requests the Court to order that PNRRA and its Board divest PNRRA's "rail freight business," and/or sell "the rights to freight traffic on its lines," and "declare PNRRA's Operating Agreement with the DL void." (*Id.* at p. 15 ("WHEREFORE").) In short, Count I of the Second Amended Complaint asks the Court for relief which could have the effect of removing PNRRA from the rail freight industry, PNRRA's primary purpose.

RBM&N asserts in Count II of the Second Amended Complaint that the Operating Agreement must be competitively bid pursuant to Section 5614(a) of the MAA, 53 Pa. C.S. § 5614(a), as supplemented by 62 Pa. C.S. §§ 3901 *et seq.* RBM&N seeks in Count II an Order from the Court declaring that:

[PNRRA] and its Board must follow the public notice and competitive bidding requirements of 53 Pa. C.S. § 5614(a) and 62 Pa. C.S. §§ 3901 *et seq.* for contracts for the operation of its rail lines, and that any operating agreements entered into by PNRRA and its Board without having been subjected to the competitive bidding requirements of [these statutes] are deemed null and void.

(2d Am. Compl. at 16; *see also id.* at ¶ 86 ("Any contract entered into by PNRRA for the operation of its rail lines without having been subjected to a public competitive bidding process...must be declared by this Court to be null and void.")) Thus, RBM&N's Count II seeks mandatory relief in the form of asking the Court to "void" the existing Operating Agreement.¹

¹ The First Amended Complaint filed by RBM&N contained counts for "injunction" (Count I), "declaratory action" (Count II), and "mandamus" (Count III). All three counts were exclusively based on a claim that the exercise of PNRRA's option under the Operating Agreement to extend the term of that contract for an additional five years was required to be submitted to competitive bidding under Section 5614(a) of the MAA, as supplemented by the provisions of 62 Pa. C.S. §§ 3901 *et seq.* Thus, RBM&N in the Second Amended Complaint tried to combine these counts in Count II while attempting to style count as a request for declaratory relief.

PNRRA and its Board filed timely Preliminary Objections to Count I of the Second Amended Complaint on December 31, 2014, asserting (1) federal preemption under the ICCTA; (2) failure to state a cause on which relief can be granted by attempting to use a declaratory judgment action to secure affirmative or mandamus relief; and (3) lack of subject matter jurisdiction by the Court because of the failure to join the DL as an indispensable party. These Preliminary Objections, which were argued before Judge Braxton on February 27, 2015, remain pending with the Court.

On May 8, 2015, RBM&N's counsel provided notice to Defendants' counsel of RBM&N's intent to present the Application to the Court on May 13, 2015. RBM&N presented its Application to the Court on that date. RBM&N's Application requests that this Court schedule an immediate hearing on the Application, and further requests that this Court enter an Order enjoining PNRRA and its Board from "signing any extension of its current operating agreement until the merits of this controversy are decided," and mandating that "[t]he current operating agreement shall remain in place until that time." (*See Proposed Orders to Appl.; see also Appl. at ¶ 23.*)

Thus, RBM&N seeks in its Application to enjoin PNRRA and its Board from exercising PNRRA's option to extend the Operating Agreement, whereas the ultimate relief RBM&N seeks in this lawsuit is as follows: (1) for purported violation of Section 5607(b)(2) of the MAA, an Order declaring void any Operating Agreement for the use of PNRRA's rail lines and requiring PNRRA to either divest itself of its rail lines or sell the rights to freight traffic on its rail lines; and (2) in the alternative, for purported violation of Section 5614(a) of the MAA, an Order declaring void any Operating Agreement entered into by PNRRA without competitive bidding

and requiring PNRRA to subject the Operating Agreement to the competitive bidding provisions of Section 5614(a).

PNRRA and its Board now submit this Pre-Hearing Brief in Opposition to the Application.

III. STATEMENT OF QUESTION INVOLVED

1. WHETHER RBM&N IS ENTITLED TO THE PRELIMINARY INJUNCTIVE RELIEF REQUESTED IN THE APPLICATION?

Suggested Answer: No

IV. ARGUMENT

A. LEGAL STANDARD FOR PRELIMINARY INJUNCTIVE RELIEF

A preliminary injunction should only be issued where the party seeking the injunction is able to prove all of the following elements:

- (1) that the party's right to relief is clear;
- (2) that the relief is necessary to prevent immediate and irreparable harm which cannot be compensated by damages;
- (3) that greater injury will occur from refusing the injunction than from granting it;
- (4) the preliminary injunction will not adversely affect the public interest;
- (5) that the injunction will restore the parties to the *status quo* as it existed immediately before the alleged wrongful conduct; and
- (6) that the alleged wrong is manifest, and the injunction is reasonably suited to abate it.

See, e.g., Warehime v. Warehime, 860 A.2d 41, 46-47 (Pa. 2004); *Central Dauphin Educ. Ass'n v. Central Dauphin Sch. Dist.*, 792 A.2d 691, 697 (Pa. Cmwlth. 2001). The burden of proving all of the above elements is on RBM&N as Plaintiff; failure to establish any one of the elements requires that the preliminary injunction be denied. *Warehime* 860 A.2d at 47; *Summit Towne*

Center, Inc. v. Shoe Show of Rocky Mount, Inc., 828 A.2d 995, 1001 (Pa. 2003); *Patriot-News Co. v. Empowerment Team of Harrisburg CH. Dist.*, 763 A.2d 539, 546 (Pa. Cmwlth. 2000).

B. RBM&N COMPLETELY LACKS THE REQUISITE CLEAR RIGHT TO RELIEF FOR ANY FORM OF INJUNCTIVE RELIEF

To establish a clear right to relief, the movant must demonstrate that it is likely to prevail on the merits. *Summit*, 828 A.2d at 1001; *Oliviero v. Diven*, 908 A.2d 933, 937 (Pa. Cmwlth. 2006). The movant must, at a minimum, establish a *prima facie* right to relief. *Shenango Valley Osteopathic Hospital v. Dep't of Health*, 451 A.2d 434, 440 (Pa. 1982). For the reasons set forth below, RBM&N does not have a clear right to relief under Count I or Count II of the Second Amended Complaint.

1. RBM&N'S SECOND AMENDED COMPLAINT IS BASED SOLELY ON TWO PENNSYLVANIA STATUTORY PROVISIONS, SECTIONS 5614(A) AND 5607(B)(2) OF THE MAA

In its Second Amended Complaint, RBM&N premises the entirety of its claims on two Pennsylvania statutory provisions, Sections 5614(a) and 5607(b)(2) of the MAA. RBM&N's interpretation of and reliance on both statutory provisions is completely erroneous. For that reason, RBM&N has no clear right to relief to support its Application.

2. RBM&N DOES NOT HAVE A CLEAR RIGHT TO RELIEF UNDER SECTION 5614(A) OF THE MAA, AS SUPPLEMENTED BY 62 PA. C.S. §§ 3901 ET SEQ.

RBM&N attempts to assert in Count II of the Second Amended Complaint that the Operating Agreement must be competitively bid pursuant to Section 5614(a) of the MAA, as supplemented by 62 Pa. C.S. §§ 3901 *et seq.*² RBM&N's superficial claim under Section

² As discussed in greater detail below, the provisions of 62 Pa. C.S. §§ 3901 *et seq.* apply only where competitive bidding is *otherwise required* by some other statute and, thus, are not applicable here because, *inter alia*, competitive bidding is not required under Section 5614(a) of the MAA.

competitive process pursuant to these statutory provisions *must be declared by this Court to be null and void.*" (Emphasis added). Further, RBM&N requests in its prayer for relief to Count II that the Court declare "that *any operating agreements* entered into...without having been subjected to competitive bidding...*are deemed null and void.*" (2d Am. Compl. at 16 (emphasis added).) RBM&N cannot deny the plain language of its Second Amended Complaint.

The DL's rights are also inextricably linked with the claims asserted in the Second Amended Complaint, such that the DL is an indispensable party, because of the DL's express authorization from the STB to provide common carrier freight rail service on the rail lines owned by PNRRA. In fact, the DL is the *only* rail operator the STB has authorized to provide service on PNRRA's lines. As a result, the DL is subject to STB regulation as the rail carrier directly responsible for providing responsive rail service on PNRRA's rail lines and is obligated to continue such service until relieved of that responsibility by the STB. RBM&N's claims, if successful, threaten to interfere with the DL's performance of activities that are not only authorized but required by the STB. RBM&N failed to join the DL as a necessary party, thereby depriving this Court of jurisdiction.

Accordingly, RBM&N has failed to demonstrate a clear right to relief with respect to any of its claims. RBM&N's Application must therefore be denied.

5. RBM&N'S CLAIMS ARE FEDERALLY PREEMPTED UNDER SECTION 10501(B) OF THE ICCTA

This Court, as an additional threshold matter,¹⁵ lacks subject matter jurisdiction over RBM&N's claims and/or the Second Amended Complaint fails to state a cause of action on which the requested relief can be granted because RBM&N's claims and/or the relief RBM&N

¹⁵ This threshold issue is also pending before the Court on Preliminary Objections to the Second Amended Complaint.

seeks in the Second Amended Complaint are expressly preempted under federal law by Section 10501(b) of the ICCTA.¹⁶ That federal statute provides:

(b) The jurisdiction of the [Surface Transportation] Board [“STB”] over—

(1) *transportation by rail carriers*, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, *operation*, abandonment, or discontinuance or spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one state,

is *exclusive*. Except as otherwise provided in this part, *the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.*

49 U.S.C. § 10501(b) (emphasis added). Thus, the exclusive nature of federal regulation is clear.

Congress enacted the ICCTA to vest exclusive jurisdiction in the Federal STB and specifically *barred* the states from regulating *all aspects of rail service*. See *Fayus Enterprises v. BNSF Ry. Co.*, 602 F.3d 444, 449-50 (3d Cir.), *cert. denied*, 131 S. Ct. 822 (2010). “The regulation of railroad operations has long been a traditionally Federal endeavor, to better establish uniformity in such operations and expediency in commerce, and it appears manifest that Congress intended the ICCTA to further that exclusively federal effort.” *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439, 443 (5th Cir. 2001). As noted by multiple United States Courts of Appeals, “[i]t is difficult to imagine a broader statement of Congress’s intent to preempt state

¹⁶ PNRRA’s preemption argument related to Section 5607(b)(2) of the MAA is the subject of a Preliminary Objection to the Second Amended Complaint pending with the Court. PNRRA raised a separate and distinct preemption argument related to Section 5614(a) of the MAA as a Preliminary Objection to the First Amended Complaint, which was overruled by Judge Saxton on April 9, 2014 without any opinion.

regulatory authority over railroad operations.” *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 645 (2d Cir. 2005) and *City of Auburn v. United States*, 154 F.3d 1025, 1030 (9th Cir. 1998) (quoting *CSX Transp., Inc. v. Ga. Pub. Serv. Comm’n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996)).

The first step in an ICCTA preemption analysis is to determine whether the activities at issue are subject to the ICCTA, *i.e.*, whether the relevant activities relate to “(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules..., practices, routes, services, and facilities of such carriers; and (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities.” 49 U.S.C. § 10501(b); *see also Texas Cent. Bus. Lines Corp. v. City of Midlothian*, 669 F.3d 525, 529-530 (5th Cir. 2012); *New York Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 246-252 (3d Cir. 2007). Where the ICCTA applies to the activities at issue, the remaining question is whether the relevant state law or regulation falls within the scope of ICCTA preemption. Courts have consistently interpreted the ICCTA to “preempt[] all state laws that may reasonably be said to have the effect of managing or governing rail transportation.” *New York Susquehanna*, 500 F.3d at 252 (quotations omitted); *see also Elam v. Kansas City S. Ry. Co.*, 635 F.3d 796, 805 (5th Cir. 2011); *PCS Phosphate Co., Inc. v. Norfolk S. Corp.*, 559 F.3d 212, 218 (4th Cir. 2009); *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001). Likewise, “[t]o the extent remedies are provided under laws that have the effect of regulating [i.e., managing or governing] rail transportation, they too are expressly preempted.” *Elam*, 635 F.3d at 805 (alterations in original) (quoting *Franks Inv. Co. LLC v. Union Pac. R.R. Co.*, 593 F.3d 404, 410 (5th Cir. 2010)).

While not limited to such, the core concern of ICCTA preemption is state and local *economic regulation* of railroad operations. See *Elam*, 635 F.3d at 806; *Fayus*, 602 F.3d at 451; *New York Susquehanna*, 500 F.3d at 252. Thus, the ICCTA “completely preempts state laws (and remedies based on such laws) that directly attempt to manage or govern a railroad’s decisions in the economic realm.” *Elam*, 635 F.3d at 807; see also *Fayus*, 602 F.3d at 451-52; *New York Susquehanna*, 500 F.3d at 252-53; *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 593 F.Supp.2d 29, 39 (D.D.C. 2008), *aff’d*, *Fayus*, 602 F.3d 444.

Outside of the economic realm, state and local governments retain only limited police powers to enforce generally applicable laws having no more than an *incidental or remote* effect on rail transportation. Such laws, however, are permissible only if they do not prevent, interfere with or unreasonably burden railroad activities. *Fayus*, 602 F.3d at 451; *New York Susquehanna*, 500 F.3d at 253; *CSX Transp., Inc.-Petition for Declaratory Order*, STB Finance Docket No. 34662, 2005 WL 1024490, *4 (S.T.B. May 3, 2005). Applying this standard, courts and the STB have recognized “two broad categories of state and local actions to be preempted regardless of the context or rationale for the action,” thus constituting a “*per se* unreasonable interference with interstate commerce.”

The first is any form of state or local permitting or preclearance that, by its nature, could be used to *deny a railroad the ability to conduct some part of its operations or to proceed with activities that the Board has authorized*.

Second, there can be no state or local regulation of *matters directly regulated by the [STB]*—such as the construction, operation, and abandonment of rail lines (see 49 U.S.C. §§ 10901-10907); railroad mergers, line acquisitions, and other forms of consolidation (see 49 U.S.C. §§ 11321-11328); and railroad rates and services (see 49 U.S.C. §§ 10501(b), 10701-10747, 11101-11124).

CSX Transp., 2005 WL 1024490, *2 (emphasis added) (citations omitted) (citing *Green Mountain*, 404 F.3d at 641-45; *City of Auburn*, 154 F.3d at 1030-31); *see also New York Susquehanna*, 500 F.3d at 253. For state or local actions falling outside of these categories, “the section 10501(b) preemption analysis requires a factual assessment of whether that action would have the effect of preventing or unreasonably interfering with railroad transportation.” *CSX Transp.*, 2005 WL 1024490, *3; *see also Adrian*, 550 F.3d at 539-40 (citing *CSX Transp.*, 2005 WL 1024490).

a) **ICCTA Preemption of the Application of 53 Pa. C.S. § 5607(b)(2) (Count I of the Second Amended Complaint)**

RBM&N’s attempted application of a state law, Section 5607(b)(2) of the MAA, to PNRRA in Count I of its Second Amended Complaint is completely and categorically preempted by Section 10501(b) of the ICCTA. Section 5607(b)(2), if applied to railroad-related municipal authorities in the manner advocated by RBM&N, would effectively regulate who can *acquire, construct and/or operate* rail lines; where rail lines can be *acquired, constructed and/or operated*; and what *activities and operations* can be performed on rail lines.

RBM&N, through its proposed application of Section 5607(b)(2) of the MAA and its requested relief in Count I of its Second Amended Complaint, attempts to apply a state law in a manner that would include: *discontinuance* of freight rail service by PNRRA and its chosen rail operator; *divestiture* or *abandonment* by PNRRA of its rail lines or sale of its freight traffic rights; and *acquisition or purchase* of PNRRA’s rail lines and/or freight traffic rights by a third party. All of these activities clearly fall within the ambit of the ICCTA, and, more importantly, all of these activities are directly regulated by the STB, thus rendering any state or local action related to these activities completely preempted under the second category established by the Courts and the STB.

Section 10501(b) of the ICCTA itself provides: “[t]he jurisdiction of the [STB] over...transportation by rail carrier, and...the *construction, acquisition, operation, abandonment, or discontinuance* of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State...is *exclusive*” 49 U.S.C. § 10501(b) (emphasis added). Expanding on this broad statement of jurisdiction, the ICCTA includes extensive provisions regarding the STB’s authority over construction and operation of rail lines (*see* 49 U.S.C. § 10901 (requiring STB review approval to construct and/or provide rail transportation over a rail line)); abandonment of rail lines and discontinuance of rail operations (*see* 49 U.S.C. §§ 10903-10904 (requiring STB review and approval to abandon and/or discontinue rail transportation on any rail line)); and purchase, acquisition and operation of rail lines and trackage rights (*see* 49 U.S.C. § 10902 (requiring STB review and approval for short line purchases), 10905 (relating to purchase of abandoned rail properties for public convenience and necessity), 10907 (relating to preemptive acquisition of rail lines for inadequate service), and 11323-11326 (requiring STB review and approval for acquisition of rail lines and trackage rights)). PNRRA complied with and received approval from the STB under the relevant statutory provisions listed above to undertake a variety of its actions. As a result, PNRRA is a non-operating Class III rail carrier wholly subject to STB jurisdiction. Thus, application of Section 5607(b)(2) of the MAA here would not only constitute an improper state intrusion into matters directly regulated by the STB and an impermissible attempt by RBM&N to have the Court exercise jurisdiction where jurisdiction is vested by law exclusively in the STB, it would deny PNRRA the ability to proceed with activities the STB has expressly authorized PNRRA to undertake—activities which PNRRA is required to continue until relieved of its obligation by the STB.

Moreover, while PNRRA denies that its rail freight activities violate Section 5607(b)(2), what RBM&N attempts to claim on the face of the Second Amended Complaint is that PNRRA must be barred from competition with RBM&N. For purposes of RBM&N's attempt to deny preemption, it is particularly noteworthy that Congress has explicitly directed the STB to foster and maintain competition in the railroad industry. The expressly stated purposes of the ICCTA include "to ensure the development and continuation of a sound rail transportation system with *effective competition among rail carriers*" and "to foster sound economic conditions in transportation and to *ensure effective competition and coordination between rail carriers.*" 49 U.S.C. § 10101 (emphasis added). With these purposes in mind, the ICCTA includes extensive provisions relating to the STB's purview over competition between rail carriers, including, *inter alia*, determining whether the acquisition or divestiture of rail lines or trackage rights will result in a "substantial lessening of competition, creation of a monopoly, or restraint of trade." 49 U.S.C. § 11324.

RBM&N's claim that PNRRA must be barred from competition with RBM&N also conclusively supports preemption of RBM&N's attempted application of Section 5607(b)(2) because the United States Supreme Court has definitively stated that such an application is "economic regulation" which, as discussed *supra* at 51, is the primary focus of ICCTA preemption. *See, e.g., Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 461 (1997); *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 387-91 (1991). Thus, application of Section 5607(b)(2) of the MAA to remove PNRRA from owning rail lines and freight rights (part of the relief requested by RBM&N) *on its face constitutes economic regulation* completely preempted under Section 10501(b) of the ICCTA.

Section 5607(b)(2) of the MAA also necessarily constitutes economic regulation to the extent it is applied to prohibit municipal authorities from acquiring, owning and/or providing rail transportation on rail lines or, as advocated by RBM&N here, to prevent PNRRA from continuing its rail freight activities. See *City of Auburn*, 154 F.3d at 1027-28; see also *Elam*, 635 F.3d at 806. Indeed, Courts and the STB have held claims that would divest a party of property that is used for railroad activities are completely preempted. See *14500 Ltd. v. CSX Transp., Inc.*, 2013 WL 1088409, *4-*5 (N.D. Ohio 2013); *B&S Holdings, LLC v. BNSF Ry. Co.*, 889 F.Supp.2d 1252, 1257-58 (E.D. Wash. 2012); *Mark Lange—Petition for Declaratory Order*, STB Finance Docket No. 35037 at p. 3 (S.T.B. Jan. 24, 2008).

As discussed above, not only is the application of Section 5607(b)(2) of the MAA preempted by the Federal statute, but any state remedies applied pursuant to that section are expressly preempted as well. See 49 U.S.C. § 10501(b); *Elam*, 635 F.3d at 805. RBM&N specifically asks this Court to order PNRRA to undertake “divestiture of [PNRRA’s] rail freight business, and/or sale of the rights to freight traffic on [PNRRA’s] lines” and “declare PNRRA’s Operating Agreement with the DL void.” (2d Am. Compl. at 15.) These requested remedies are clearly preempted by Section 10501(b) of the ICCTA for the reasons discussed above. Accordingly, Count I of the Second Amended Complaint is federally preempted under the ICCTA and preemption deprives this Court of subject matter jurisdiction.

b) ICCTA Preemption of the Application of 53 Pa. C.S. § 5614(a) and 62 Pa. C.S. §§ 3901 et seq. (Count II of the Second Amended Complaint)

Application of Section 5614(a) of the MAA here, as supplemented by 62 Pa. C.S. §§ 3901 et seq., is similarly completely and categorically preempted by Section 10501(b) of the ICCTA. RBM&N seeks in Count II of the Second Amended Complaint an Order from the Court declaring that PNRRA and its Board must subject the Operating Agreement to competitive

bidding under Section 5614(a) and that any agreements entered into without having been subjected to competitive bidding are deemed null and void. (2d Am. Compl. at 16.)

The activities contemplated by the Operating Agreement in this case, *i.e.*, the DL's exclusive use of PNRRA's rail lines and provision of common carrier rail freight service on those rail lines (*see* Ex. A. to Appl. at 1, ¶ 1), even as framed by Plaintiff in the Second Amended Complaint, clearly implicate application of the ICCTA, which grants the STB exclusive jurisdiction over "transportation by rail carriers" and "operation" of rail lines and facilities. 49 U.S.C. § 10501(b).

Subjecting the Operating Agreement to the competitive bidding process under Section 5614(a) of the MAA, as supplemented by 62 Pa. C.S. §§ 3901 *et seq.*, clearly constitutes economic regulation of rail transportation, expressly preempted by Section 10501(b) of the ICCTA. Such competitive bidding requirements would dictate not only *how* and *when* PNRRA may contract for the provision of common carrier rail freight service on its rail lines, but with *whom* PNRRA may contract and at what *price*. The timing, economics and terms of the Operating Agreement, as well as the rail operator with whom PNRRA contracts, directly impact the operation and economics of rail transportation on PNRRA's rail lines.

Further, application of 53 Pa. C.S. § 5614(a) and 62 Pa. C.S. §§ 3901 *et seq.* as requested by RBM&N would impose preclearance requirements completely preempted as a "*per se* unreasonable interference with interstate commerce" under the first category established by the Courts and the STB. *See New York Susquehanna*, 500 F.3d at 253; *Green Mountain*, 404 F.3d at 641-45; *City of Auburn*, 154 F.3d at 1030-31; *CSX Transp.*, 2005 WL 1024490, *2. The procedures set forth under these statutory provisions necessarily constitute preclearance requirements because PNRRA would be forced to complete the public notice and competitive

bid process before railroad operations could begin. PNRRA would be subject to subsequent legal challenges, including appeals, questioning PNRRA's compliance with such requirements. RBM&N's requested relief in the present matter clearly demonstrates how such legal proceedings could prevent, delay or interfere with PNRRA's freight rail activities. An order voiding the Operating Agreement as requested by RBM&N could effectively halt current and/or prevent future rail transportation on PNRRA's rail lines. It is the potential for such interruption that places RBM&N's claims and requested relief within the scope of ICCTA preemption. Accordingly, Count II of the Second Amended Complaint is federally preempted by the ICCTA.

While RBM&N's claims under Section 5607(b)(2) and Section 5614(a) of the MAA each require their own preemption analysis, it is clear that both Count I and Count II of the Second Amended Complaint (and the remedies sought therein) are federally preempted under the ICCTA. Preemption deprives this Court of subject matter jurisdiction. Thus, for this reason alone, RBM&N has no clear right to relief and is not entitled to the relief requested in the present Application.

C. RBM&N CANNOT DEMONSTRATE IMMEDIATE AND IRREPARABLE HARM REQUIRED FOR ISSUANCE OF ANY PRELIMINARY INJUNCTIVE RELIEF

A plaintiff seeking a Preliminary Injunction must show that an injunction is necessary to prevent immediate and irreparable harm that cannot be compensated adequately by money damages. *Greenmoore, Inc. vs. Burchick Construction Co.*, 908 A.2d 310, 314 (Pa. Super. 2006). To meet this burden, a plaintiff must present "concrete evidence" demonstrating "actual proof of irreparable harm." *Id.* It cannot be based solely on speculation and hypothesis. *Id.*

RBM&N argues, first, that irreparable harm is presumed where a statute has been violated. Contrary to RBM&N's assertions, mere allegations of statutory violations cannot give rise to such a presumption. While the Supreme Court in *Pennsylvania Public Utility*

Accordingly, RBM&N's Application must be denied because RBM&N has failed to name the DL as a party to these proceedings.

H. THE PREEMPTIVE EFFECT OF SECTION 10501(B) OF THE ICCTA PRECLUDES THE COURT FROM GRANTING THE REQUESTED INJUNCTIVE RELIEF

Federal preemption under Section 10501(b) of the ICCTA not only destroys RBM&N's ability to demonstrate a likelihood of success on the merits of its claims under Sections 5607(b)(2) and 5614(a) of the MAA, as discussed above, it also precludes RBM&N from seeking and the Court from granting the injunctive relief requested in the Application *sub judice*. As discussed above, the preemptive reach of Section 10501(b) of the ICCTA extends to remedies. See, e.g., *Elam*, 635 F.3d at 805 ("[t]o the extent remedies are provided under laws that have the effect of regulating [i.e., managing or governing] rail transportation, they too are expressly preempted." (alterations in original)). Just as the Court cannot grant RBM&N ultimate relief under Sections 5607(b)(2) and 5614(a) of the MAA, the Court cannot grant injunctive relief that would have the effect of impermissibly managing or governing railroad operations. Entry of an order enjoining PNRRA from extending its Operating Agreement with the DL, the rail operator expressly authorized by the STB to provide common carrier freight on PNRRA's rail lines, would do just that.

Accordingly, this Court is federally preempted under Section 10501(b) of the ICCTA from granting RBM&N's requested injunctive relief. For this additional reason, RBM&N's Application must be denied.

I. RBM&N MUST FILE A BOND FOR AN AMOUNT FIXED BY THE COURT BEFORE THIS COURT CAN GRANT THE REQUESTED PRELIMINARY INJUNCTION

While Defendants believe that RBM&N has woefully failed to meet its heavy burden, if this Court decides that RBM&N is entitled to injunctive relief, RBM&N must file a bond "in an

damages to the DL. Because of this obvious and direct potential for damages to the DL, any bond fixed by this Court should account for such damages. Unfortunately, such damages cannot be reasonably calculated without the presence of the DL. Moreover, the DL cannot recover its damages from any bond filed by RBM&N unless RBM&N names the DL as a party in this matter as required under Pennsylvania law.

V. CONCLUSION

Based on the foregoing, Defendants respectfully request that this Court deny RBM&N's Application.

Respectfully submitted,

BUCHANAN INGERSOLL & ROONEY PC

By: 

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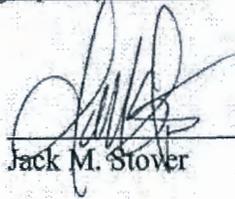
*Attorneys for Defendants Pennsylvania
Northeast Regional Railroad Authority and the
Board of Pennsylvania Northeast Regional
Railroad Authority*

DATE: May 18, 2015

CERTIFICATE OF SERVICE

I, Jack M. Stover, certify that I am this day serving a copy of the foregoing document upon the persons below via hand delivery:

Frederick J. Fanelli, Esquire
Fanelli, Evans & Patel, P.C.
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Jack M. Stover

DATE: May 18, 2015

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OF
DAKOTA COUNTY
2015 MAY 18 A 9:15
CIVIL DIVISION

EXHIBIT "J"

MARY E RINALDI
LACKAWANNA COUNTY

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CLERK OF
JUDICIAL RECORDS

READING, BLUE MOUNTAIN & : IN THE COURT OF COMMON PLEAS
NORTHERN RAILROAD, : OF LACKAWANNA COUNTY
Plaintiff :

vs. :

PENNSYLVANIA NORTHEAST :
REGIONAL RAIL AUTHORITY :
and BOARD OF THE : CIVIL ACTION
PENNSYLVANIA NORTHEAST :
REGIONAL RAIL AUTHORITY, :
Defendants : NO. 13-CIV-6796

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OPINION

GEROULO, J.

On May 13, 2015, Plaintiff Reading, Blue Mountain & Northern Railroad filed an Emergency Application for a Preliminary Injunction, and Defendants Pennsylvania Northeast Regional Rail Authority and the Board of the Pennsylvania Northeast Regional Rail Authority filed an Answer. On May 13, 2015, the parties appeared before this court for a hearing on the application and this court heard argument from both sides and then continued the hearing until May 18, 2015 in order for the parties to submit briefs. On May 18, 2015, the defendants filed a brief; the plaintiff did not file a brief. A hearing was conducted and this court denied the application for a preliminary injunction. On May 29, 2015, the defendant filed a Notice of Appeal of this court's order to the Commonwealth Court of Pennsylvania. This opinion is filed

in compliance with Rule 1925(a) of the Pennsylvania Rules of Appellate Procedure.

I. BACKGROUND

The defendant, Pennsylvania Northeast Regional Railroad Authority, is a municipal authority which owns rail lines in Northeast Pennsylvania for the purpose of maintaining federal common carrier rail transportation along the rail lines. It and its predecessors were created in 1982 as a result of private railroads abandoning rail lines in the area. The defendant has had an operating agreement with the Delaware-Lackawanna Railroad Company, Inc. ("DL") since 1993 to operate and provide rail freight services on its lines. The federal Surface Transportation Board has approved the defendant's acquisition of the lines and DL's operation of the lines pursuant to the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10101 et seq. The plaintiff, Reading, Blue Mountain & Northern Railroad, is a private for-profit railroad company which acquired rail lines that run close to some of the defendant's lines in 1996.

The current operating agreement between the defendants and DL was signed on August 27, 2010 and expires on August 26, 2015. See Exhibit A to Plaintiff's Emergency Application for a Preliminary Injunction. The agreement provides that the defendants have the option to extend the agreement for another five-year term and must give 90 days written notice to DL prior to August 27, 2015. *Id.* In November 2013, the Board of the Pennsylvania Northeast Regional Railroad Authority voted to exercise this option and extend the term of the operating agreement for an additional five years.

On December 23, 2013, the plaintiff filed its initial complaint, and on January 28, 2014, filed a First Amended Complaint challenging the operating agreement. The parties engaged in some discovery, and on December 17, 2014, the plaintiff filed a Second Amended Complaint. In Count I of its Second Amended Complaint, the

plaintiff seeks a declaratory judgment that the defendants are violating 53 Pa.C.S. § 5607(b)(2) by competing with existing enterprises serving the same purpose and must refrain from doing so by divestiture of its rail freight business, and sale of the rights to freight traffic, and asks the court to declare that the operating agreement with DL is void. In Count II, the plaintiff seeks a declaratory judgment that the defendants have violated 53 Pa.C.S. § 5614 and 62 Pa.C.S. § 3901 by entering into an operating agreement without subjecting the operation of the lines to competitive bidding, and asks the court to declare that the current operating agreement with DL is null and void. The defendants have filed preliminary objections to the Second Amended Complaint, which are currently pending before Judge Braxton, asserting federal preemption, failure to state a cause of action on which relief can be granted and lack of subject matter jurisdiction because of the failure to join DL as an indispensable party.

On May 13, 2015, the plaintiff filed and presented this court with its Emergency Application for Preliminary Injunction, asking this court to enjoin the defendants from signing any extension of the current operating agreement until the merits of the controversy are decided, and to order that the current operating agreement remain in place until that time. The court heard argument from both sides and continued the hearing until May 18, 2015 for the parties to file briefs supporting their positions. The hearing was concluded on May 18, 2015 and the court denied the request for a preliminary injunction. On May 29, 2015, the plaintiff filed this appeal to the Commonwealth Court.

II. DISCUSSION

A. Plaintiff's Application

The plaintiff has not submitted a brief to this court as requested, but in its Application for the preliminary injunction argues: (1) in a situation like this where a plaintiff is seeking to require the defendant to comply with a statute, irreparable harm

is presumed; (2) if a municipality is enjoined from entering into a public contract, the court can require the existing contract to continue in place; (3) the plaintiff is likely to succeed on the merits and the right to relief is clear since the operating agreement is a contract for work and thus subject to the bidding requirements of 53 Pa.C.S. § 5614 and 62 Pa.C.S. § 3901 and the Surface Transportation Board does not require any particular qualifications when seeking authorization to be a freight rail operator; (4) the plaintiff has a clear right to relief in having the opportunity to submit a bid to operate the rail lines which the defendants have avoided by voting to renew the operating agreement with DL to the detriment of the taxpayers of Lackawanna County; (5) the plaintiff has a clear right to relief because the defendants are directly engaging in competition with a private enterprise in violation of 53 Pa.C.S. § 5607(b)(2); (6) greater injury will result if the court does not grant the preliminary injunction since the plaintiff and other railroads will not have the opportunity to have their bids considered for five more years and the defendants will continue to violate the law and the taxpayers will lose out on the opportunity for increased revenue; and (7) DL is obligated to continue to provide rail service until it is authorized by the Surface Transportation Board to discontinue operations even if the current operating agreement expires, so rail service will not be affected by an injunction, no harm will be suffered and the status quo will be maintained.

At the hearing, plaintiff's counsel argued that granting a preliminary injunction would not adversely affect the public interest because under federal rules, DL as the current rail provider is mandated to continue to provide service and would have no choice but to continue to operate even if the current contract expires. He argued that the defendants conceded that DL might drop their insurance or things to that effect, but the shippers along the rail will be provided service. He argued that before DL could abandon the lines it would have to get permission from the federal authorities

and that would not be granted. He argued that there is irreparable injury here because a violation of competitive bidding requirements constitutes irreparable harm, as do statutory violations. He argued that federal preemption is not an issue because the judge handling the underlying case denied the defendants' preliminary objection to the first complaint when they raised this issue and the federal government does not get involved in issues of awards of contracts or contract disputes. He argued that there is greater injury in refusing to grant the injunction because the defendants and DL have had a contract since 1993 and it will continue ad infinitum without competitive bidding in violation of the law. He argued that if the injunction is not granted then the court would be sanctioning the ongoing violation of state law. He argued that if the injunction is not granted, and the operating agreement is extended for another five years, if the plaintiff prevails in the underlying lawsuit, it would have no way to force DL off the line since the state court does not have that authority, only the federal government does, and the plaintiff would have to file proceedings in federal court to get them off the line. The plaintiff's attorney also argued that to resolve this, he had proposed that the defendants and DL extend the contract with a proviso that if after final judicial determination, the plaintiff prevails on the merits, the contract would terminate within six months and DL would abandon within six months but the defendants would not agree to this settlement.

B. Defendant's Response

In their brief, the defendants respond that the plaintiff has failed to meet any of the six elements necessary to issue a preliminary injunction. First, the defendants assert that the right to relief is not clear, since, as is being litigated in the underlying case, 53 Pa.C.S. § 5614 and § 5607(b)(2) do not apply to the operating agreement between the defendants and DL. The defendants provide several arguments to support this position, including that the operating agreement is a lease rather than a contract

for construction, public funds are not being expended under the agreement since DL is the party expending funds, there cannot be a "lowest possible bidder" for this kind of contract, the operating agreement is similar to a professional service contract which is not subject to bidding, the plaintiff came into existence and started competing with the defendants long after the defendants acquired the lines, and the plaintiff lacks standing. Second, the defendants assert, as they have in the pending preliminary objections, that there is not a clear right to relief since the court lacks subject matter jurisdiction because the plaintiff has not joined DL and DL is an indispensable party to the lawsuit since its rights are being litigated. Third, the defendants assert, as they have in the pending preliminary objections, that the right to relief is not clear because the plaintiff's claims are preempted under section 10501(B) of the Interstate Commerce Commission Termination Act since regulation of rail transportation is exclusive to the Surface Transportation Board and the relief sought by the plaintiff would violate this law. Fourth, the defendants assert that the plaintiff cannot demonstrate immediate and irreparable harm since it has not shown that the state statutes it claims are being violated apply here. They also argue that the remedy that the plaintiff is seeking in the underlying lawsuit is to have the operating agreement declared null and void, but it is asking here that the contract remain in place if the injunction is granted, so if it succeeds in the underlying suit, the injunction would have no effect since the plaintiff will be in the same position if the injunction is not granted and the operating agreement is extended. Thus, the defendants argue that extending the operating agreement another five years does not negatively affect the plaintiff in any way. Fifth, the defendants argue that greater injury will occur from granting the injunction than from denying it since if the operating agreement with DL is not renewed, there would no longer be an agreement in place and the contract governs many important terms, including revenues paid to the defendants by DL;

indemnification to the defendants; insurance for the protection of the defendants, shippers using the lines, and the public; and security for the protection of the defendants, shippers and the public. The defendants assert that this court cannot order the current operating agreement to remain in place beyond its term particularly in the absence of DL and that DL would also be harmed if it were required to keep operating without a contract in place. Sixth, the defendants assert that an injunction would adversely affect the public interest since if the option to renew the contract is not exercised, and the plaintiff is not successful in its underlying suit, the defendants will have lost the ability to compel the continuation of the contract with DL and the terms of the contract mentioned above (insurance, indemnification, security) would no longer be in place. Finally, the defendants assert that the requested injunctive relief would change the status quo since the status quo is the continued existence of the operating agreement between the defendants and DL, and if the option to extend the contract for five years is exercised, the same operating agreement remains in place.

C. Reasons for Court's Decision

Denial of a preliminary injunction is proper if any one of the six "essential prerequisites" for granting a preliminary injunction is not satisfied. Summit Towne Center, Inc. v. Shoe Show of Rocky Mount, Inc., 828 A.2d 995 (Pa. 2003). First, a party seeking a preliminary injunction must show that it is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages. Second, the party must show that greater injury would result from refusing an injunction than from granting it, and that issuance of an injunction will not substantially harm other interested parties. Third, the party must show that the injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct. Fourth, the party seeking the injunction must show that the activity it seeks to restrain is actionable, that its right to relief is clear,

and that the wrong is manifest, or in other words, must show that it is likely to prevail on the merits. Fifth, the party must show that the injunction it seeks is reasonably suited to abate the offending activity. Finally, the party seeking an injunction must show that a preliminary injunction will not adversely affect the public interest. *Id.* at 1001. An injunction that commands the performance of an affirmative act, a “mandatory injunction,” is the rarest form of injunctive relief and an extreme remedy. Hoffman v. Steel Valley School District, 107 A.3d 288 (Pa. Comwlth. 2015).

As this court found at the conclusion of the May 18, 2015 hearing, the plaintiff failed to establish several of these essential prerequisites here. The plaintiff has not established a clear right to relief. The defendants have made plausible arguments that the state statutes which the plaintiff claims are being violated do not even apply to the operating agreement between the defendants and DL. As the plaintiff’s attorney acknowledged at the hearing, the federal Surface Transportation Board does have authority over the rail lines at issue, and has authorized DL to operate the lines on the defendants’ behalf. In fact, one of the reasons that the plaintiff’s attorney argued that the injunction is necessary is that if the plaintiff is successful in the underlying lawsuit, but the operating agreement is still in place, the plaintiff would then have to file a lawsuit in federal court to stop DL from operating on the lines. For this court to find at this early stage of this case that the defendants and DL do not have a legal right to the lines and that federal law, which clearly comes into play here, does not preempt state law in this case would be premature, particularly since this same issue is pending before another judge who is considering preliminary objections.

Moreover, the plaintiff is asking this court to order DL, who has not been named a party to this lawsuit, to continue operating the lines, either without an operating agreement in place, or for this court to change the existing operating agreement to extend the termination date of the agreement indefinitely. When

declaratory relief is sought, as it is in this case, all persons who have any interest which would be affected by the declaratory action must be made parties to the lawsuit or the court lacks subject matter jurisdiction. City of Philadelphia v. Commonwealth, 838 A.2d 566 (Pa. 2003). This is another issue that the defendants have raised in the preliminary objections currently pending before Judge Braxton. Because it is not clear that this court has subject matter jurisdiction since an indispensable party has not been joined, nor that this court has the authority to modify the existing agreement between DL and the defendants to extend the termination date indefinitely if the operating agreement were to stay in place without DL as a party, the plaintiff's right to relief is not clear.

The plaintiff has not demonstrated that the injunction is necessary to prevent immediate and irreparable harm which cannot be compensated by damages. In its Application, the plaintiff is asking this court to enjoin the defendants from exercising the right to extend the current operating agreement, which expires on August 26, 2015, for another five years, but at the same time, is asking this court to keep the current operating agreement in place. The plaintiff is thus acknowledging that there will not be immediate and irreparable harm if the operating agreement remains in place while this lawsuit is pending. In fact, the plaintiff's attorney represented to the court that it was willing to resolve the matter by keeping the agreement in place through the course of the lawsuit, but adding a provision to the agreement that if the plaintiff prevailed, DL would vacate the rail lines within 6 months of such a ruling. Of course, DL is not a party to this lawsuit so it is not clear that this court could order DL to do anything. In any event, the plaintiff also argued that if the court did not extend the agreement beyond August 26, 2015, then DL would still have to continue to operate the lines under federal law even without an operating agreement in place. As discussed below, this is a risky proposition and unnecessary. The better remedy here is to deny the

injunction and allow the defendants to exercise the option to extend the existing operating agreement for another five years. The operating agreement will remain in place while the lawsuit is pending. If the plaintiff prevails, then the relief it is seeking in the underlying suit, to have the operating agreement declared null and void, will presumably be granted. The plaintiff argued that it would suffer irreparable harm because it would have to file a lawsuit in federal court to then get DL removed as the authorized operator of the rail lines. That the plaintiff would have to file suit in federal court does not constitute irreparable harm, and, in fact, appears to be something it would have to do whether the injunction is granted or not, since only the federal Surface Transportation Board can authorize a different rail operator.

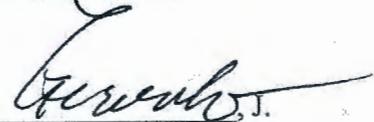
The plaintiff has also failed to show that the injunction will not adversely affect the public interest, and that greater injury will occur from refusing the injunction than from granting it. The plaintiff argued that if the defendant does not exercise the option to extend the operating agreement beyond August 26, 2015, and the operating agreement expires, under federal law, DL will still be required to operate the lines without an operating agreement. As the defendants argued, however, this would result in an adverse affect to the public interest because the operating agreement governs much more than just who operates the lines. Among many other requirements, the agreement also requires DL to pay the defendants a percentage of operating revenues, fully indemnify the defendants, maintain specific levels of insurance, maintain a certain level of working capital, provide security, perform marketing and sales, and take responsibility for public crossings. See Exhibit A to Plaintiff's Emergency Application for a Preliminary Injunction. If DL were to operate the rail lines without the operating agreement in place, none of this would be required at great detriment to the defendants, the shippers, the public and public safety. DL's rights under the contract would also be unenforceable, so its interests would be

compromised by an injunction as well. The plaintiff argues that greater injury will result if the court does not grant the preliminary injunction since there will not be bidding for another five years and taxpayers will lose out on increased revenue, but also concedes that there will be no bidding unless and until it is successful in its underlying suit and the operating agreement is declared null and void. Thus, an injunction at this time will not resolve this alleged injury since DL will remain the operator of the lines and only the remedy the plaintiff seeks in the underlying lawsuit would enable bidding.

Finally, denying the injunction maintains the status quo, while granting it would alter the status quo substantially. The plaintiff asks the court to keep the current operating agreement in place, but prevent the defendants from extending it beyond August 26, 2015. It is not clear how the court can require the defendants and DL to continue to operate under an expired contract indefinitely, particularly since DL is not a party to this lawsuit. To maintain the status quo, the defendants should be allowed to exercise their option to extend the operating agreement for another five years. If the plaintiff prevails in the underlying lawsuit, the agreement will be declared null and void, but while the lawsuit is pending, DL and the defendants will continue to operate under the agreement as they have since 1993. It is certainly not the status quo for DL to operate without an operating agreement in place.

For the foregoing reasons, the plaintiff has failed to establish the elements necessary to grant the extreme remedy of a preliminary injunction.

BY THE COURT:



[Handwritten signature]

cc: Frederick Fanelli, Esq.
Jack Stover, Esq.

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EXHIBIT "K"

IN THE COURT OF COMMON PLEAS OF NORTHUMBERLAND COUNTY
CIVIL DIVISION - LAW

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READING, BLUE MOUNTAIN &
NORTHERN RAILROAD

Plaintiff

v.

SEDA-COG JOINT RAIL AUTHORITY
and BOARD OF SEDA-COG JOINT
RAIL AUTHORITY,

Defendants

No. CV-15-1201

COMPLAINT

Plaintiff Reading, Blue Mountain & Northern Railroad, by and through its counsel, Frederick J. Fanelli, Esquire, brings this Complaint for declaratory and injunctive relief against Defendants SEDA-COG Joint Rail Authority and the Board of the SEDA-COG Joint Rail Authority and in support thereof, avers as follows:

THE PARTIES

1. Plaintiff Reading, Blue Mountain & Northern Railroad ("RBMN") is a Pennsylvania corporation with a registered office address of 1 Railroad Boulevard, P.O. Box 218, Port Clinton, Pennsylvania, 19549.
2. RBMN owns land and rail lines located within Northumberland County and is bringing this action as a landowner within the county and as a taxpayer of the Commonwealth of Pennsylvania and subject to the Public Utility Realty Tax Act, 72 P.S. §§ 8101 et seq., on behalf of itself and all other taxpayers, and as a direct competitor that is being harmed by the actions of a government entity which is competing for its business.

3. RBMN is a privately held railroad company that began operations in 1990 and is in the business of, among other things, providing freight rail service to industries located in east central Pennsylvania, including along its rail lines in Northumberland, Schuylkill, Berks, Carbon, Luzerne, Lackawanna, Columbia, Bradford and Wyoming counties.

4. Rail freight service is a substantial part of RBMN's business.

5. RBMN serves more than 50 customers in nine eastern Pennsylvania counties, employs over 150 people and owns over 1,000 rail freight cars. RBMN provides freight service to customers in Northumberland County.

6. RBMN is an award-winning railroad, recently named 2015 Regional Railroad of the Year, for an unprecedented third time, by Railway Age Magazine.

7. Defendant SEDA-COG Joint Rail Authority ("JRA") is a municipal authority formed pursuant to the Municipality Authorities Act of 1945, Act of May 2, 1945, P.L. 382, as amended, now codified at 53 Pa. C.S. §§ 5601 et seq., with offices located at 201 Furnace Road, Lewisburg, Pennsylvania, 17837.

8. JRA's Board of Directors ("Board") consists of sixteen members, two appointed by each of JRA's eight member counties, including Northumberland County, and holds regular meetings to conduct the business of the JRA.

9. JRA owns approximately 200 miles of rail lines located in eight counties including Northumberland on which it provides freight rail service via a private common carrier rail operator, under contract to JRA.

JURISDICTION AND VENUE

10. Jurisdiction is based on the Pennsylvania Constitution, Article 5, Section 5, and 42 Pa. C.S.A. § 931(a), both of which confer broad original jurisdiction upon the Court of Common Pleas.

11. Venue in the Northumberland County Court of Common Pleas is based upon 42 Pa.C.S. § 931 and Pa.R.C.P. 1006.

12. This Court has jurisdiction over this matter which involves the interpretation and application of the Municipality Authorities Act (“MAA”), 53 Pa. C.S. §§ 5301 et seq. and Contracts for Public Works, 62 Pa. C.S. §§ 3901 et seq.

FACTUAL BACKGROUND

13. JRA was incorporated in 1983 by five initial member counties including Northumberland for the purpose of acquiring, owning and maintaining various railroad properties throughout central Pennsylvania, and its primary mission has been to provide rail freight service and foster economic development and job creation in the region through improvement and expansion of rail infrastructure.

14. It is believed and therefore averred that JRA is engaging in an enterprise which directly competes with RBMN and other privately-owned railroads.

15. Both RBMN and JRA apply for and receive state grant funding for various rail construction projects, which are issued in a finite, limited amount each year.

16. It is believed and therefore averred that JRA uses state grant monies and its own funds to buy additional rail lines, in direct competition with RBMN. The recently issued Draft

Pennsylvania State Rail Plan reflects the lengths to which JRA will go to compete for limited state grant money. Of the 175 listed shortline railroad projects, 84 belonged to JRA. The other 24 shortlines that submitted project requests totaled only 90 projects.

17. It is believed and therefore averred that JRA's employees and Board members actively work to develop new industry along JRA's rail lines to increase its freight rail income, in direct competition with RBMN. The JRA utilized public grant money and its own money to construct a rail/truck transload terminal at Ranshaw, Pennsylvania, in Northumberland County. This terminal directly competes for business with the RBMN. Specifically this JRA terminal has been utilized to load anthracite coal into rail cars in direct competition with RBMN. The JRA also utilized grant money and its own money to construct a similar rail transload terminal in Point Township, Northumberland County which will compete directly with terminals of RBMN. A recent JRA Board meeting included a discussion mentioning that this terminal could be used as a pipe transload and storage terminal in direct competition with sites located on the RBMN.

18. It is believed and therefore averred that JRA and its rail operator regularly collaborate with each other on sales marketing to target potential customers using all means possible and develop leads.

19. It is believed and therefore averred that JRA competes with RBMN and other freight rail operators for the same customers.

20. It is believed and therefore averred that JRA owns property and buildings along its rail lines which it can rent, lease or sell to a potential customer in order to attract that customer to locate along JRA's rail lines. The JRA has in the past acquired property and utilized grant money and its own money to acquire property and develop industrial sites in direct

competition with sites on the RBMN. The JRA continues to acquire industrial property in Northumberland County for this purpose, most recently a site in the City of Shamokin and a site in Point Township.

21. As a municipal agency, JRA is subject to the requirements of the Municipality Authorities Act (“MAA”), 53 Pa. C.S. §§ 5301 et seq. and, for the contracts subject to competitive bidding under the MAA, to the competitive sealed bidding and proposal provisions for contracts for public works of 62 Pa. C.S. § 3901 et seq.

22. It is believed and therefore averred that JRA contracts with a rail operator to provide rail freight service on JRA’s rail line, for which JRA receives payment and also construction, repair and/or maintenance work on its rail lines. The operating agreement is a lease agreement, in which the operator and JRA agree on how much money the operator will pay to JRA for the use of JRA’s assets, and what additional construction, repair and/or maintenance work the operator will be required to perform for JRA. As a municipal authority, JRA should be obligated to seek the “highest” bid and therefore the most income from among the responsible bidders for the benefit of the taxpayers among its eight county area.

23. The past and current operating agreements were entered into by JRA without utilizing a public competitive bidding process.

24. JRA’s past practice of failing to seek competitive bids for its operating agreements was challenged by the Commonwealth of Pennsylvania, Office of Attorney General, Antitrust Section (“AG”) in 2011. In a letter dated January 25, 2011, the AG noted that JRA’s last operating agreement “did not result from a competitive bid process as required by (the MAA).” **AG Letter dated January 25, 2011, attached hereto as Exhibit “A”**. In that letter,

the AG offered to work with JRA to develop bid specifications consistent with the law. It is believed and therefore averred that JRA never worked with the AG to develop those specifications.

25. In September of 2013, RBMN wrote a letter to JRA Chairman Jerry Walls to express interest in bidding to be the operator of the rail lines. RBMN did so after hearing that JRA “is about to embark on an open and transparent process of seeking bids to operate the JRA rail lines.” Unfortunately it has become apparent that the bid process was neither open nor transparent.

26. At some point thereafter, JRA formed an Operating Agreement Committee to develop a bidding process and an Operating Agreement. However, in forming the Operating Agreement Committee, JRA allowed members with clear conflicts of interest to assume a majority role on the Committee. The Chair and half of the members of the JRA Operating Agreement Committee are customers of JRA’s current rail freight operator. It is believed and therefore averred that these customer members acted in the narrow best interests of their companies in designing an arbitrary and subjective bid process, and it is believed and therefore averred that JRA Board member Eric Winslow, who has an ownership interest in and is President of the West Shore Railroad, receives lease payments from the Union County Industrial Railroad, which is owned by JRA’s current operator, also creating a conflict of interest. It is believed and therefore averred that the same Union County Industrial Railroad also has a contract with JRA.

27. As a result of the work of the Operating Agreement Committee, JRA issued a public Request for Proposals – Operation of Five Short Line Railroads in Central Pennsylvania (“RFP”) on May 16, 2014, three years prior to the expiration of its current operating agreement

on June 30, 2017. **Request for Proposals – Operation of Five Short Line Railroads in Central Pennsylvania dated May 16, 2014, attached hereto as Exhibit “B”.**

28. The RFP called for a two-phase review, with Phase 1 Request for Qualifications (“RFQ”) submissions due by August 1, 2014 and Phase 2 RFP submissions due on a date thereafter, later determined by the Board to be April 3, 2015. The winner of Phase 2 is to be announced July 8, 2015.

29. RBMN is a responsible, qualified bidder in that it has the financial responsibility, integrity, efficiency, industry experience, promptness and ability to successfully undertake the rail freight operation of JRA’s rail lines.

30. RBMN is a responsive bidder in that it complied with all of JRA’s requirements and timely submitted a RFQ in accordance with JRA’s RFP requirements, demonstrating that it is a responsible qualified bidder and should have been entitled to submit an RFP in Phase 2.

31. JRA, its Board and the Operating Agreement Committee utilized a questionnaire process as part of Phase 1 so that it could initially review the RFQs and select the RFQ applicants who would then be “invited” to submit RFPs. Initially the Operating Agreement Committee designed Phase 1 to utilize a point scoring system to select the “top three candidates” to move on to Phase 2. **RFP, Ex. B at 8-9, 12-13.** JRA’s Operating Agreement Committee could then deduct points based on the responses given to the last questions quoted in paragraph 34, *infra. Id.* at 13. The Phase I RFP questions were clearly designed to eliminate RBMN from consideration in Phase 2. As originally designed, only the members of the Operating Agreement Committee would assign points to the different bids. The JRA Board role was designed to be limited to ratifying the decision of the Operating Agreement Committee’s biased members.

Based on information and belief, the entire process by which RBMN was excluded from bidding was conducted in secret, including discussions regarding the scoring and selection process, which were improperly discussed by the full Board, including board members with conflicts of interest, in executive sessions. The guidelines by which the Board members scored the RFPs and the details of the final scoring process were never made public.

32. RBMN pointed out the risk of bias in a series of emails to the JRA Executive Director after the pre-bid meeting and before the bids were due. RBMN noted that customer members depended on the existing Operator for service, rates, and car supply. Given that the Operating Agreement Committee designed a process whereby the existing Operator could find out that it had lost the business two years before the end of its current contract, RBMN pointed out that the customer members of the Operating Agreement Committee could fear retaliation should they vote in favor of any competing bids. In addition, RBMN pointed out that the current Operator was in a position to solicit a favorable response from these members because the Operator controlled all aspects of their rail freight transportation.

33. As a result of RBMN's email, the customer members of the Operating Agreement Committee recused themselves from further consideration and the JRA Board scrambled to develop new voting procedures. However, the JRA Board did nothing to change the subjective scoring process and questionnaire designed by the customer members of the Operating Agreement Committee.

34. Thus it came as no surprise to RBMN that of the five potential rail freight operators that submitted RFQs, RBMN was the only bidder deemed unqualified by the JRA

Operating Agreement Committee and Board to move on to Phase 2 RFP submissions. Some of the questions included:

- “a description of any pending, threatened, or concluded litigation involving the proposer or any of the proposer’s directors, officers, or other key personnel or otherwise involving any railroads owned or operated by the proposer, for the past seven (7) years;”
- “a description of any operations specifically involving a public-private partnership, including an identification of the entities involved;”
- “a statement concerning whether the proposer presently has or may in the future have an interest, direct or indirect, which would conflict in any manner with the performance of its obligations under the Operating Agreement or that is adverse or potentially adverse to the JRA (e.g., operation of other rail lines that may adversely affect rail operations of the JRA rail lines).”

RFP, Ex. B at 11-12.

35. RBMN was as responsible, or more responsible, than the other four potential rail operators invited by JRA and its Board to proceed to Phase 2. RBMN operates a 320 mile railroad adjacent to the JRA territory and RBMN has been recognized by neutral parties, such as Railway Age magazine, as one of the premier regional railroads in the nation. RBMN is the only railroad to have been named Regional Railroad of the Year three times by Railway Age. RBMN has a direct physical connection with the JRA railroads, and currently provides freight service to customers in Northumberland County.

36. As a result of the subjective and arbitrary work by the Operating Agreement Committee, JRA and its Board cannot determine which bidder is the lowest (or in this case, the highest revenue, construction, reconstruction and maintenance-producing bid) responsible and responsive bidder as mandated by 53 Pa. C.S. § 5614(a) and 62 Pa. C.S. 3911(a). Failure to

include RBMN as a responsible and responsive potential bidder is a violation of the law if they refuse to consider RBMN's RFP.

COUNT 1 – DECLARATORY ACTION – VIOLATION OF 53 Pa. C.S. § 5607(b)(2) – PROHIBITING DIRECT COMPETITION WITH PRIVATE ENTERPRISE

37. The averments of paragraphs 1 through 36 are incorporated herein as if set forth at length.

38. The Declaratory Judgments Act, 42 Pa. C.S. §§ 7531 et seq., provides:

Courts of record, within their respective jurisdictions, shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree.

42 Pa. C.S. § 7532.

39. The Declaratory Judgments Act further provides:

Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder.

42 Pa. C.S. § 7533.

40. JRA is a municipal authority subject to the provisions of the MAA.

41. JRA's powers are set forth under the MAA, including the specific powers set forth in 53 Pa. C.S. § 5607(d), and the exercise of those powers are limited by the limitation provisions of section

5607(b). Dominion Products and Services v. Pittsburgh Water and Sewer Authority, 44 A.3d 697 (Pa. Cmwlth. 2011).

42. The MAA prohibits JRA from unnecessarily burdening or interfering with existing business by the establishment of enterprises which in whole or part duplicate or compete with existing enterprises serving substantially the same purpose. 53 Pa. C.S. § 5607(b)(2); Dominion Products and Services v. Pittsburgh Water and Sewer Authority, 44 A.3d 697 (Pa. Cmwlth. 2011).

43. JRA has established and is engaging in an enterprise that is in direct competition with privately owned rail freight operators such as the RBMN, and to the exclusion of same, in violation of the MAA.

44. JRA directly competes with RBMN for state grant funding which JRA uses to expand and enhance JRA's own freight rail assets, in direct competition with other privately owned rail freight operators such as the RBMN.

45. JRA directly competes with RBMN through its rail freight operator's receipt of state grants, which the rail freight operator uses to construct, reconstruct, repair and/or maintain JRA's assets.

46. Neither the MAA nor any other statute authorizes or requires JRA to engage in such an enterprise or receive state grants to increase or enhance its rail assets for the purpose of competing with privately owned freight rail businesses.

WHEREFORE, Plaintiff Reading, Blue Mountain & Northern Railroad respectfully requests that this Court declare that Defendants SEDA-COG Joint Rail Authority and its Board are in violation of MAA § 5607(b)(2), and must refrain from engaging in an enterprise that is in

direct competition with private enterprise in whole or in part, and grant any other relief that this Court deems just and proper.

COUNT II – DECLARATORY ACTION – VIOLATIONS OF
53 Pa. C.S. § 5314 AND 62 PA. C.S. § 3911(a)

47. The averments of paragraphs 1 through 46 are incorporated herein as if set forth at length.

48. This Count is asserted in the alternative to the relief sought in Count I. Pa.R.C.P. 1020.

49. The MAA provides that competitively-bid contracts must be awarded as follows:

§ 5614. Competition in award of contracts.

(a) *Services.*

(1) Except as set forth in paragraph (2), all construction, reconstruction, repair or work of any nature made by an authority if the entire cost, value or amount, including labor and materials, exceeds a base amount of \$ 18,500, subject to adjustment under subsection (c.1), shall be done only under contract to be entered into by the authority **with the lowest [or in this case, highest] responsible bidder** upon proper terms after public notice asking for competitive bids as provided in this section.

53 Pa. C.S. § 5614(a)(1) (emphasis added).

50. The proposed Operating Agreement is a contract for revenue, construction, reconstruction, repair and maintenance work well in excess of \$18,500 and is subject to the competitive bidding requirements of the MAA and 62 Pa. C.S. § 3911(a).

51. The purpose and intent of the Pennsylvania Legislature in enacting the MAA is to benefit the people of the Commonwealth by, among other things, increasing their commerce,

health, safety and prosperity, and to permit the authority to benefit the people. 53 Pa. C.S. § 5607(b)(2), (3).

52. Competitive bidding invites competition and assures that contracts will be awarded free from any possible personal interests, favoritism, bias or fraud and that the taxpayers receive the work for the best possible price.

53. JRA's competitive bidding process fails to comply with the MAA's requirements, specifically 53 Pa. C.S. § 5614(a)(1), in that it has excluded a qualified, responsible and potentially highest-revenue bidder from submitting an RFP, to the detriment of the taxpayers.

54. JRA's competitive bidding process also violates Contracts for Public Works, 62 Pa. C.S. § 3911(a), which requires that a "contract to be entered into by a government agency through competitive sealed bidding shall be awarded to the lowest [or in this case, highest] responsible and responsive bidder . . . or all bids shall be rejected[.]" 62 Pa. C.S. § 3911(a) (in relevant part).

55. JRA and the Board violated the MAA and 62 Pa. C.S. § 3911(a) and abused their discretion by excluding RBMN, a responsible and responsive bidder, from submitting an RFP under Phase 2, and plan to announce the Phase 2 winner July 8, 2015. Therefore, all bids must be rejected and the process must start over.

WHEREFORE, Plaintiff Reading, Blue Mountain & Northern Railroad respectfully requests that this Court grant relief to Plaintiff and declare that Defendants SEDA-COG Joint Rail Authority and its Board are in violation of the competitive bidding requirements of the MAA, 53 Pa. C.S. § 5614(a) and 62 Pa. C.S. § 3911(a), require Defendants to reject all bids and start the process over, and award any other relief that this Court deems just and proper.

COUNT III – INJUNCTION

56. The averments of paragraphs 1 through 55 are incorporated herein as if set forth at length.

57. RBMN seeks an order enjoining JRA and its Board from continuing with their illegal RFP process and announcing a winner on July 8, 2015 until the merits of this case are heard by this Court. Pa.R.C.P. 1531.

58. RBMN is likely to succeed on the merits of its claim that JRA is directly competing with private enterprise in violation of the MAA. 53 Pa. C.S. § 5607(b)(2); Dominion Products and Services v. Pittsburgh Water and Sewer Authority, 44 A.3d 697 (Pa. Cmwlth. 2011).

59. RBMN is also likely to succeed on the merits of its claim that JRA is violating the competitive bidding requirements of the MAA and 62 Pa. C.S. § 3911(a) because it is a responsible, responsive bidder, and RBMN as well as the taxpayers have a clear right to equitable relief in having the opportunity for RBMN to submit a RFP to operate JRA's rail lines, which JRA has excluded from consideration in violation of 53 Pa. C.S. § 5614(a) and 62 Pa. C.S. § 3911(a), and for JRA to select the highest responsible bidder on behalf of the taxpayers.

60. Violation of an express statutory provision *per se* constitutes irreparable harm to the taxpayers. Stilp v. Commonwealth, 910 A.2d 775, 787 (Pa. Cmwlth. 2006).

61. Without an injunction issuing, JRA will award and enter into a new Operating Agreement with a private operator, in violation of the MAA. 53 Pa. C.S. § 5607(b)(2); Dominion Products and Services v. Pittsburgh Water and Sewer Authority, 44 A.3d 697 (Pa. Cmwlth. 2011).

62. Without an injunction issuing, if this Court determines that JRA is not the provision precluding direct competition with private businesses pursuant to section 5607(b)(2), and JRA can proceed with the RFP process, RBMN will lose its right to have its RFP considered by JRA, and the taxpayers will lose the opportunity for JRA to choose the best bid among the original five bidders.

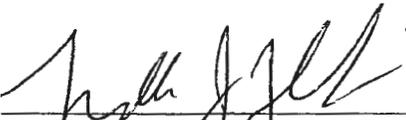
63. JRA will not suffer any harm if an injunction is issued because its current operating agreement does not expire until 2017, giving JRA ample time to properly and lawfully consider RFPS submissions from all responsible bidders, and the status quo will be maintained until the Court can decide the merits of the case. Moreover JRA's current Operator is obligated to continue providing rail freight service until it is authorized to discontinue such service by the federal agency that oversees rail freight operations, the Surface Transportation Board. As a result, there is no harm to the JRA, its customers or its communities by putting the illegal bid process on indefinite hold until this matter is ultimately resolved by the Court.

64. RBMN has made numerous open records documents requests, with which JRA failed to voluntarily comply; this delay contributed to the timing of the filing of this Complaint and request for an Order enjoining the RFP process.

WHEREFORE, Plaintiff Reading, Blue Mountain & Northern Railroad respectfully requests that this Court enjoin Defendants SEDA-COG Joint Rail Authority and its Board from acting upon or accepting any RFPS or entering into any contract for a rail freight operator until the merits of this case are decided, and award any other relief that this Court deems just and proper.

Respectfully submitted,

FANELLI EVANS & PATEL, P.C.

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VERIFICATION

The language of the foregoing document is that of counsel and not necessarily my own; however, I have read the foregoing document and to the extent it is based upon information I have given to counsel, it is true and correct to the best of my knowledge, information and belief; to the extent that the content of the foregoing document is that of counsel, I have relied upon counsel in making this verification.

I understand that false statements herein are made subject to the penalties of 18 Pa.C.S.A Section 4904, relating to unsworn falsification to authorities.

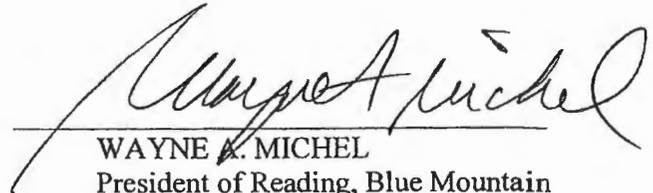

WAYNE A. MICHEL
President of Reading, Blue Mountain
& Northern Railroad Company

EXHIBIT “A”



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

January 25, 2011

ANTITRUST SECTION
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Tel: (717) 787-4530
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Thomas S. Schrack, Esq.
McQuiside Blasko
811 University Drive
State College, PA 16801-6699

RE: SEDA-COG Joint Rail Authority

Dear Mr. Schrack:

This letter is sent to you as solicitor of the SEDA-COG Joint Rail Authority ("JRA"). We understand that the JRA entered into a contract for the operation and maintenance of rail property owned by the JRA. We further understand that this contract did not result from a competitive bid process as required by 53 Pa. C.S.A. § 5614 of the Municipality Authorities Act ("MAA"). We are also concerned about a right of first refusal provision amending the aforementioned contract, which operates to negate the legislative requirement of a competitive bid process.

By this letter, this Office is extending its assistance to the JRA to assure compliance with the MAA. We would like to discuss developing bid specifications with the JRA to issue a new bid notice for the operation and maintenance of JRA rail property to supersede the non-conforming existing contract.

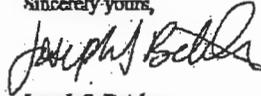
This Office is invoking its right under 53 Pa. C.S.A. § 5612 (c) and is requesting copies of any documents including, but not limited to, contracts, notes, minutes, audio tapes of all JRA meetings, correspondence, e-mails, calendars, presentations, proposals, financial projections and financial statements related to the contract and right of first refusal concerning the operation and maintenance of JRA rail property. Document type includes, but is not limited to, hard copy, audio tape, video tape and any form of electronic media.

Please produce responsive documents within two weeks to the undersigned. Our invocation of the statutory right granted to the Office of Attorney General to have access

to such documents is of a continuing nature. As the JRA finds additional responsive documents, please produce on a rolling basis.

Please contact me as soon as possible to discuss.

Sincerely yours,



Joseph S. Betsko
Deputy Attorney General

JSB/HW/mack1108

cc: Jeff Stover ✓
Executive Director, SEDA-COG JRA



Office of Attorney General
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EXHIBIT “B”



**Request for Proposals – Operation of Five Short Line Railroads
In Central Pennsylvania**

Issued by:

**SEDA-COG Joint Rail Authority
201 Furnace Road
Lewisburg, PA 17837
www.sedacograil.org**

Issued May 16, 2014

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Appendix A - Proposed Operating Agreement x

**SEDA-COG JOINT RAIL AUTHORITY
REQUEST FOR PROPOSALS – OPERATION OF FIVE SHORT LINE RAILROADS**

I. INTRODUCTION AND PURPOSE OF RFP

This Request for Proposals (the "RFP") is issued by the SEDA-COG Joint Rail Authority (the "JRA") for the purpose of seeking a railroad operator to enter into an agreement with the JRA for the operation of the JRA's rail lines for rail freight service. The JRA invites proposals from experienced railroad operators capable of providing the specialized, professional services required for operation of the JRA's rail lines. The railroad operating services sought by the JRA pursuant to this RFP will commence July 1, 2017.

The JRA desires to obtain first-class, high-quality operating services that meet the needs of the railroad customers on the JRA's rail lines. The intent of this RFP is to engage an operator that is deemed most capable of providing such services as a contractor of the JRA. Specifically, the JRA seeks an operator that will:

- manage and operate the JRA's rail lines in a high quality and efficient manner;
- operate the JRA rail lines in a manner so as to enhance rail revenues while ensuring that the JRA's rail lines remain economically competitive;
- properly maintain and safeguard the JRA's investment in its railroad properties through the exercise of highest standards of maintenance in accordance with JRA requirements and, where approved by the JRA, recommend or undertake capital improvements to improve the rail lines;
- maximize the economic impact to the central Pennsylvania region and the utilization of rail in the region;
- implement appropriate marketing activities to attract new customers to be served by JRA rail lines; and
- accomplish all objectives required of the operator in a professional manner, in compliance with best railroad industry practices and applicable laws and ordinances.

In order to satisfy the JRA's requirements and meet the JRA's goals mentioned above, proposers must agree to provide all of the services sought by the JRA under this RFP. At the conclusion of the RFP process, and upon the execution of an operating agreement between the selected proposer and the JRA, the selected proposer will have responsibility for the operation of the JRA's rail lines for rail freight services.

II. BACKGROUND OF JRA

In the early 1980s, Consolidated Rail Corporation (Conrail) began pursuing an expedited abandonment of its rail lines, after several federal laws were enacted that enabled Conrail to eliminate unprofitable lines. In central Pennsylvania, the potential impact of these rail line abandonments greatly concerned industries that relied on Conrail for rail service. In particular, the rail line known as the Bloomsburg Branch (traversing Northumberland-Danville-Bloomsburg-Berwick) and rail lines in Centre County (the Bellefonte Branch, Pleasant Gap Industrial Track and portions of the Bald Eagle Branch) were all targets for abandonment. This abandonment would have affected approximately 80 miles of rail lines, and would have left a significant void in rail service for industry throughout central Pennsylvania.

In response to this potential loss of rail service, the concerned shippers banded together into "shipper groups." These groups contacted the SEDA-Council of Governments ("SEDA-COG") for assistance in developing a solution for the potential rail line abandonment and loss of rail service. SEDA-COG, a public development organization, is an eleven-county council of governments that provides a wide-range of services to its member counties, including economic and community development services, transportation projects and similar activities.

SEDA-COG coordinated a series of meetings of the shipper groups to address the concerns related to potential rail line abandonment. At some point during these meetings, the idea of purchasing the subject rail lines from Conrail was raised. Although the idea sparked interest, there was no immediate consensus on a possible purchaser. There was concern that a private acquisition without public oversight or involvement would potentially result in yet another rail line abandonment, should profitably again become a concern as it was with Conrail. It was therefore decided that public oversight would be necessary to preserve rail service in central Pennsylvania.

Thus was born the concept of the public-private partnership to both take ownership of the rail lines (public) and provide rail operation on the failing rail lines (private). The participant shippers all agreed that the lines needed local ownership, and a public owner provided the stability necessary to ensure long-term preservation of the rail lines. Initially, SEDA-COG was considered as the possible "public" purchaser of the rail lines from Conrail. However, due to a recognized need to separate rail activities from the other activities conducted by SEDA-COG, it was proposed that a multi-county joint municipal authority be formed to take ownership of the rail lines from Conrail.

Consequently, on June 30, 1983, the JRA was incorporated as a joint municipal authority under the Pennsylvania Municipality Authorities Act, 53 Pa. C.S. § 5601 et seq. (the "Act"). As set forth in the relevant ordinances of the five initial member counties which established the JRA (Centre, Columbia, Montour, Northumberland, and Union), the JRA was formed to:

[F]inance, construct or otherwise acquire, purchase, hold, lease or sub-lease, either in the capacity of lessee or lessor, land, rail lines, buildings or other facilities to be devoted wholly or partially for the operation of rail lines, for public uses, or for any other purpose permitted by said Act, whether said projects are situated in the Counties of Centre, Columbia, Montour, Northumberland or Union, or elsewhere in the Commonwealth.

Accordingly, the JRA was formed for the purpose of acquiring, owning and maintaining various railroad properties throughout central Pennsylvania, and its primary mission has been to preserve rail freight service and foster economic development and job creation in the region through the improvement and expansion of

rail infrastructure. After its incorporation, the JRA successfully acquired and ultimately rehabilitated the 80 miles of rail line from Conrail, through various funding sources including the Commonwealth of Pennsylvania, the United States Economic Development Administration, and the Federal Railroad Administration. The JRA now consists of eight member counties, including the Counties of Centre, Clinton, Columbia, Lycoming, Mifflin, Montour, Northumberland, and Union.

Despite its authorized public purposes of owning and maintaining the rail lines, the JRA's authorized purposes do not include operation of the rail lines. Therefore, since its formation, the JRA has contracted with a private railroad operator for the operation of rail freight service on the JRA's rail lines. There is currently an operating agreement in effect for rail freight services on the JRA rail lines, which will expire June 30, 2017. This RFP, therefore, seeks a new operating agreement for rail freight services on JRA rail lines to commence July 1, 2017.

Further information concerning the background of the JRA is available in the JRA's 30th anniversary booklet entitled "Preserving Rail Freight in Central Pennsylvania for 30 Years," which is available as a .pdf file on the JRA website at: http://www.sedacograil.org/Documents/RailBk2014_RcvwCover.pdf. This includes a listing of customers and commodities handled on the JRA rail lines. A printed copy of that file can be obtained by contacting Ms. Kay Aikey at kaikey@седа-cog.org or by calling 570-522-7333.

III. JRA MISSION STATEMENT/STRATEGIC GOALS AND OBJECTIVES

On August 8, 2012, the JRA adopted a comprehensive five-year strategic plan (the "Strategic Plan"). This is a very detailed document containing significant information about the JRA and its railroad properties. The Strategic Plan included a review and evaluation of the JRA's public/private partnership model and identified goals and potential action to be taken by the JRA, many of which involve rail operations on the JRA's rail lines. Specifically, the following are a few objectives relating to rail freight operations that will be pursued by the JRA as part of the Strategic Plan:

- Expand and maintain the JRA's strong rail system preservation and maintenance program through its successful public-private partnership (P3) business model.
- Proactively identify new industrial properties to facilitate new rail freight service dependent upon industrial development opportunities.
- Develop and maintain an effective continuity of operations program to effectively sustain rail service in central Pennsylvania.
- Continue to improve and build upon the JRA and Operator's strong rail operations.

On the following page is an excerpt from the Executive Summary of the Strategic Plan.

<p>SEDA-COG Joint Rail Authority</p> <p>Vision: To provide Central Pennsylvania with a world-class railroad enterprise that affords its customers and partners with the most reliable, efficient, and safest short line system.</p>		
<p>Mission: To preserve and foster rail service in Central Pennsylvania and to further economic development through the retention, improvement, and expansion of the infrastructure and the rail service it supports.</p>		
<p>Core Values:</p> <ul style="list-style-type: none"> • Excellence • Stewardship • Safety • Integrity • Leadership 	<p>Core Functions:</p> <ul style="list-style-type: none"> • Rail System Preservation and Improvement • Economic Development • Collaboration 	<p>Guiding Principles:</p> <ul style="list-style-type: none"> • Plan and implement regional rail system projects with member county needs, private shipper needs, Rail Service Operator and other stakeholder interests in balance. • Conduct open public JRA Board meetings with a public forum agenda item at every meeting. • Adhere to state Right-to-Know Laws. • Exercise ethical procurement standards and procedures that go beyond that required by the Commonwealth. • Commit to a professional Code of Conduct and Ethics Policy for Board Members, Staff and Operator. • Maintain a culture of cooperative problem-solving and partnership with our local governments, utilities, shippers, economic development agencies and property owners.

In many instances, the railroad operator is identified as the lead entity responsible for carrying out identified recommendations to meet those objectives. As such, proposers are encouraged to review the Strategic Plan in order to clearly understand the JRA's goals for future rail operations. A copy of the Strategic Plan may be downloaded at www.sedacograil.org. A printed copy of the Strategic Plan can be obtained by contacting Ms. Kay Aikey at kaikey@seda-cog.org or by calling 570-522-7333.

IV. JRA RAIL PROPERTIES SUBJECT TO THIS RFP

The JRA owns railroad properties throughout nine counties in central Pennsylvania. The railroad properties which are the subject of this RFP include five short lines and line segments,¹ as follows:

Track Segments in Blair-Centre-Clinton Counties (currently referred to as the "Nittany & Bald Eagle Rail Line"):

Bald Eagle Branch from M.P. 1.0W to M.P. 54.3 (Lock Haven to Tyrone)
Gray Yard adjacent to M.P. 222.2 to M.P. 223.2 (Norfolk Southern Pittsburgh line M.P. numbers)
Lock Haven Yard adjacent to M.P. 194.3 to M.P. 195.1 (Norfolk Southern Buffalo line M.P. numbers)
Pleasant Gap Industrial Track from M.P. 0.0 to M.P. 3.0
Bellefonte Branch from M.P. 30.8 to M.P. 42.5 (Milesburg to Lemont)
Bellefonte Sutinyside Yard M.P. 32.4 to M.P. 33.1
"Shop" Track from M.P. 0.0 to M.P. 1.0
All operating remnants of the Mill Hall Industrial Track (N&BE main line M.P. 51.9)
Mill Hall Industrial Track - starting at M.P. 13 (Draketown) and extending east 1.9 miles to end of track (Castanea)....

Track Segments in Northumberland-Montour-Columbia-Luzerne Counties (currently referred to as the "North Shore Rail Line"):

North Shore Railroad from M.P. 213.45 to M.P. 176.97
Berwick Yard M.P. 178.7
BIDA Complex from NSHR M.P. 176 up the Hill Track to and including all track within the BIDA Complex

Track Segments in Northumberland County (currently referred to as the "Shamokin Valley Rail Line"):

Shamokin Valley Main from M.P. 0.0 to M.P. 25.2
Carbon Run Branch from M.P. 0.0 to M.P. 1.5
SAIC Industrial Park Track from M.P. 0.0 to M.P. 1.0

Track Segments in Clinton-Lycoming Counties (currently referred to as the "Lycoming Valley Rail Line"):

Grumman Lead from M.P. 199 to M.P. 200
Lycoming Secondary from M.P. 199.8 to M.P. 181.1
Newberry Yard M.P. 181.1 to M.P. 179.4
Avis branch from M.P. 179.4 to M.P. 166.0 at Avis
All operating remnants of the Williamsport Industrial Track
Antlers Running Track M.P. 179.4 to M.P. 178.7

Track Segments in Mifflin County (currently referred to as the "Juniata Valley Rail Line"):

Lewistown Yard M.P. 0.2
Maitland Industrial Track from M.P. 0.0 to M.P. 7.4

¹ The JRA controls a sixth short line known as the White Deer and Reading (WDR) line in Union County, which is not included in the rail lines to be operated under this RFP. The WDR line is a four-mile line segment that extends from White Deer to a point just north of Allenwood. The northerly 2.5 miles, more or less, of this line segment is owned by the JRA. The southern segment (approximately 1.57 miles) is leased by the JRA from the Central Pennsylvania Chapter of the National Railway Historical Society. This WDR line does not directly connect to Norfolk Southern or any other Class I railroad. The WDR line extends north to a major industrial park owned by the County of Union, known as Great Stream Commons. The WDR line connects at its southern end with the rail line owned by the West Shore Railroad.

Burnham Branch from M.P. 0.0 to M.P. 4.0

MCIDC Plaza Track

West Park Track - Granville Township from the NS Pittsburgh Main north to and including all track within the MCIDC West Park

The JRA may include additional rail lines and properties to the Operating Agreement for the services sought by this RFP, as set forth more specifically in the Operating Agreement.

V. MAPS OF LINES/RAIL LINE DATA AND INFRASTRUCTURE INVESTMENTS

All JRA rail system and individual rail line maps are available for downloading at www.sedacograil.org. Each of these individual rail line maps shows current rail customer locations and aggregate rail traffic volumes for the past ten years on the line. Each individual rail line has an additional map which documents the investments and expansions made on that line by the JRA, customers and/or other partners in economic development.

Track charts for the rail lines above are available at for downloading at www.sedacograil.org.

VI. CURRENT OPERATIONS

Typical operations for each of the lines are shown below.

Juniata Valley Railroad

<i>Line Segment</i>	<i>Frequency</i>
Lcwistown Yard	M-W-F
Maitland Industrial Track	As needed
Burnham Branch	M-W-F
West Park Track	M-W-F

Lycoming Valley Railroad

<i>Line Segment</i>	<i>Frequency</i>
Lycoming Secondary	M-W-F
Newberry Yard	M-T-W-Th-F-Sa-Su
Avis Branch	M-T-W-Th-F
Antlers Running Track	M-T-W-Th-F-Sa-Su
Grumman Lead	M-W-F

Nittany & Bald Eagle Railroad

<i>Line Segment</i>	<i>Frequency</i>
Nittany Main Line	M-T-W-Th-F
Gray Yard (Tyrone)	M-(T)-W-(Th)-F
Lock Haven Yard	M-T-W-Th-F
Pleasant Gap Industrial Track	M-T-W-Th-F

Bellefonte Branch	M-T-W-Th-F
Shop Track (Coleville)	M-T-W-Th-F
Mill Hall Industrial Track	M-T-W-Th-F

North Shore Railroad

<i>Line Segment</i>	<i>Frequency</i>
North Shore Railroad	M-W-F
Berwick Yard	M-W-F
Hill Track/BIDA	M-W-F

Shamokin Valley Railroad

<i>Line Segment</i>	<i>Frequency</i>
Shamokin Valley Main	Tues
Carbon Run Branch	N/A
SAIC Industrial Park Track	Tues

VII. INTERCHANGES

Active Class 1 interchanges are:

Norfolk Southern (NS)
 Northumberland
 Lock Haven
 Tyrone
 Lewistown

Canadian Pacific (CP)
 Sunbury *limited*

VIII. PROPOSED OPERATING AGREEMENT

At the conclusion of the RFP process, the JRA and the selected proposer will enter into an agreement for the operation of rail freight services on the JRA's rail lines (the "Operating Agreement"). See Appendix "A" for the proposed Operating Agreement, which will take effect on July 1, 2017.

The term of the Operating Agreement shall be seven years, with a possible renewal term of five years. Under the Operating Agreement, the selected proposer will have exclusive use of the JRA's rail lines for rail freight services in exchange for payment of an operating fee, which will be determined as part of the RFP process, and fulfillment of other requirements set forth in the Operating Agreement. Thus, the Operating Agreement contains all duties and responsibilities expected to be observed and performed by the selected proposer in its day-to-day operations of the JRA rail lines. By way of example and not limitation, the Operating Agreement requires the operator to do the following:

- make various reports to the JRA, including reports relating to financial performance, operations, marketing, and maintenance of way;

- maintain the JRA rail lines in accordance with the JRA's track maintenance standards and asset guidelines;
- furnish all required management, supervision, and other services required in the performance of rail operations;
- meet certain customer service standards and operator and maintenance expenditure thresholds as determined by an independent JRA consultant;
- cooperate with the JRA in carrying out its mission of preserving rail freight service and fostering economic development and job creation in the region through the improvement and expansion of rail infrastructure;
- provide and maintain required insurance for its operations; and
- indemnify the JRA for liabilities arising from the rail operations.

As the Operating Agreement provides the relevant rights and responsibilities of the JRA and the railroad operator, proposers are advised to review the proposed Operating Agreement with legal counsel. The Operating Agreement is incorporated by reference into this RFP, and any conflict in terms between this RFP and the Operating Agreement shall be resolved in favor of the conflicting term in the Operating Agreement.

IX. PASSENGER EXCURSIONS

This RFP does not encompass rail passenger services. By way of supplemental information, on October 22, 2010, the JRA entered into a three-party Agreement for Rail Passenger Excursion Service with Susquehanna Union Railroad Company and its subsidiary operating companies, and Penn Valley Railroad, LLC for the provision of rail passenger excursions on JRA rail lines (the "Passenger Excursions Agreement"). The Passenger Excursions Agreement provides for the operation of certain public passenger excursions, which are annually operated at nine locations on the JRA rail lines, through the contribution of various services by the involved parties. The Passenger Excursions Agreement continues until June 30, 2017. For purposes of this RFP, no assumption should be made on whether the Passenger Excursions Agreement will remain in effect beyond June 30, 2017, or that a similar successor agreement will be executed. The JRA nonetheless recognizes the benefit that these excursions provide for the public and intends to examine all options to ensure that these excursions can continue beyond June 30, 2017.

X. OVERVIEW OF RFP PROCESS: TWO PHASES

The JRA desires to ensure that first-class rail operations are provided on its rail lines. The intent of this RFP is, therefore, to ensure that an appropriate level of review of proposals is undertaken in order to select a rail operator that the JRA deems best suited to provide rail freight service operations on its rail lines.

The JRA will employ a two-phase review process in its selection of an operator, which involves this RFP being divided into two phases. The first phase of this RFP shall be referred to as Phase 1 (Request for Qualifications (RFQ)). (Although there will be two phases in this process, this RFP document will cover both phases -- there will be no additional RFQ or RFP document issued.) Phase 1 will involve an examination and evaluation of the qualifications of proposers. The JRA will assess each proposer's approach to operations, qualifications and experience, financial capability and other areas described below. There will be no restriction to the number of proposers that may participate in Phase 1. From the responses received, the JRA will utilize a scoring system in order to select the top three candidates to proceed to the next phase,

known as Phase 2 (Detailed RFP). More details concerning Phases 1 and 2, and the requirements for submission for each phase of the process, are listed below.

A mandatory pre-Phase 1 (RFQ) proposers' meeting will be held by the JRA at June 5, 2014, at 10:00 a.m. at the Union County Government Center, 155 North 15th Street, Lewisburg, Pennsylvania 17837. At this meeting, proposers will have the opportunity to ask questions about the JRA, the RFP process, the requirements of the RFP, the history of revenue derived from operation of JRA rail lines, and other items relevant to this RFP. Interested proposers are required to attend this meeting. Failure to attend this meeting in person may constitute grounds for removal of the proposer from consideration.

Based upon the results obtained from Phase 1, the JRA Board of Directors, upon recommendation of the JRA Operating Agreement Committee with the assistance of JRA's consultants, staff, and solicitor, will select the top three candidates to be invited to participate in Phase 2 of the RFP process. Phase 2 (Detailed RFP) will involve a more detailed evaluation of the three remaining proposers by the JRA's Operating Agreement Committee. The Operating Agreement Committee shall base its review and evaluation upon multiple criteria discussed below and shall score the three remaining proposers in accordance with a scoring system. The Operating Agreement Committee shall, at the conclusion of its review and evaluation in this second phase, recommend the best proposal for an Operating Agreement for rail freight services to the JRA Board.

XI. PHASE 1 AND PHASE 2 OF RFP: GENERAL INSTRUCTIONS FOR ALL PROPOSALS

This section explains the procedure that will be followed by all proposers. Proposers should carefully read and follow the procedures required by this section. Material deviations from these requirements may cause rejection of proposals.

Each proposer must submit one (1) original signed proposal and a cover letter, each signed in ink, and six (6) unbound hard copies to the JRA at the following address:

SEDA-COG Joint Rail Authority
201 Furnace Road
Lewisburg, PA 17837
570-524-4491

In addition, all proposers must submit an electronic .pdf copy of their proposal. The .pdf must be a single document and not broken into multiple files. If the file size of the .pdf exceeds 12 MB, the proposer must contact the JRA to get instructions for FTP or Dropbox file transfers. Such communications shall be directed to Mr. Jeffrey K. Stover at jstover@seda-cog.org -- mobile phone number: 570-847-9503.

The first time an email is sent from an outside email address the sender will receive a response from a SEDA-COG computer program that is designed to filter spam emails. Proposers must follow the instructions that are automatically generated by this software, and then the email will go directly into Mr. Stover's email inbox. Otherwise, the email will go to a spam filter. Proposers are therefore urged not to wait until the last few minutes to comply with the deadline. Timely submission of proposals is the sole responsibility of the proposer. Late proposals after the deadline will not be considered. The JRA reserves the right to determine the timeliness of all submissions.

In addition, all proposers must submit one additional unbound copy of their proposal with any redacted sections "blacked out," for a total of seven (7) unbound copies. The "blacked out copy" should only redact information deemed confidential and proprietary and will be used to response to requests under the Pennsylvania Right to Know Law. More details on this procedure are set forth later in this RFP.

Proposers should be clear, concise and direct in their submissions. Elaborate or lengthy proposals beyond those needed to provide a clear response to all requirements are not encouraged. Unclear, incomplete, or inaccurate documentation may not be considered. Falsification of any information may result in disqualification from the selection process, or in termination of the Operating Agreement if later discovered that the award of the agreement was made as a result of false information submitted in response to this RFP.

Submitted materials will not be returned to the sender after the proposals have been opened.

To be responsive, a proposal must be submitted in writing. All applicable documents, including attachments and exhibits, must be included with the proposal. Each page of the proposal should be numbered sequentially at the bottom of the page. Proposals must be submitted in the English language and must be at least 12 point font size, have at least one inch margins on all sides, and be on plain white paper.

Each proposal must be accompanied by a cover letter limited to one page that references the title of this RFP and includes the following information:

- (1) Full legal name of the proposer;
- (2) Legal business status (individual, partnership, corporation, limited liability company, etc.), address, telephone number, fax number, and email address of the authorized representative(s) of the proposer;
- (3) State in which, in the case of an individual, the individual is domiciled, or in the case of an entity, the entity is organized or incorporated.
- (4) Name, title, email address, telephone number and mailing address of the person(s) authorized to be the primary contact and represent the proposer in the RFP process.

The JRA, or its solicitor, reserves the right to seek additional information or clarifications from any proposers. The JRA may elect to interview any or all of the proposers.

All costs of preparation of a proposal shall be borne by the proposer. The JRA shall not be liable for any expenses incurred by proposers in the preparation and/or submission of proposals.

Proposals may be withdrawn by written request of the authorized representative of the proposer on letterhead at any time prior to the submission deadline.

XII. PHASE 1 (RFQ): SPECIFIC INFORMATION REQUIRED FROM PROPOSERS

The JRA will accept submissions for the Phase 1 (RFQ) until 3:00 p.m. on August 1, 2014. Initial responses for Phase 1 shall be in narrative form and shall include the information required in this section. Proposers shall not submit proposals to address Phase 2 of the RFP process unless they are selected by the JRA to proceed to that phase. Failure to adhere to these requirements may be cause for rejection of the proposal as non-responsive.

To ensure a uniform review process and to ensure an appropriate level of comparability, initial responses by proposers for Phase 1 (RFQ) must be organized as follows:

1. *Approach to Operations.* In this section, each proposer should include the following:
 - a preliminary statement or summary of its overall approach or philosophy concerning the operation of short line railroads, including strategies or business practices that address the scope of services sought by this RFP;
 - a list of all railroads owned or operated by the proposer, along with an identification of any Class I railroad connections;
 - a description of its existing marketing activities employed in its rail operations to attract rail customers and otherwise market the proposer's business;
 - a description of the proposer's policies and procedures for operating its business, including policies and procedures relating to customer service, employee matters, risk management, and accounting and financial management;
 - a description of the proposer's approach to maintenance of rail lines;
 - a description of any pending, threatened, or concluded litigation involving the proposer or any of the proposer's directors, officers, or other key personnel, or otherwise involving any railroads owned or operated by proposer, for the past seven (7) years;
 - a description of any pending, threatened, or concluded investigation or proceeding instituted by any government agency against the proposer, including any citations or fines levied, for the past seven (7) years;
 - a summary of track inspections conducted by the Federal Railroad Administration (FRA) on any rail lines owned or operated by the proposer and a list of any violations or fines imposed by the FRA concerning same; and
 - a list of any contracts relating to rail operation services that were terminated or not renewed within the past ten (10) years, including reasons for termination or non-renewal.
2. *Qualifications and Experience.* In this section, each proposer should include the following:
 - a statement of its qualifications and experience and number of years managing and operating short line railroads;

- a minimum of five customer references, including name, mailing address, email address, and telephone number of the reference;
- if the proposer is a business entity (e.g., corporation, limited liability company, partnership), the proposer should detail the experience and qualifications of the proposer's management team; and
- a description of any operations specifically involving a public-private partnership, including an identification of the entities involved.

3. *Financial Capability.* In this section, each proposer should include the following:

- audited financial statements for the prior three years prepared in accordance with generally accepted accounting principles, including notes to financial statements;
- balance sheets for the prior three years;
- statements of income and expenses for the prior three years;
- corporate/partnership federal income tax returns for the last completed tax year;
- a credit report (e.g., Dun & Bradstreet report); and
- its most recent quarterly financial statement.

4. *Effect of Other Operations on JRA Lines.* In this section, each proposer should include the following:

- a description of any facts bearing upon any possible interests, direct or indirect, that the proposer believes any member, director, officer, employee or agent of the JRA presently has, or will have, in the performance of the Operating Agreement by the proposer; and
- a statement concerning whether proposer presently has or may in the future have an interest, direct or indirect, which would conflict in any manner with the performance of its obligations under the Operating Agreement or that is adverse or potentially adverse to the JRA (e.g., operation of other rail lines that may adversely affect rail operations of the JRA rail lines).

XIII. PHASE 1 (RFQ): SELECTION CRITERIA TO BE USED BY THE JRA

The JRA Operating Agreement Committee will review and evaluate the information received from Phase 1 of the process. Each response will first be reviewed and analyzed to determine overall responsiveness and completeness. Failure to comply with the instructions above may result in the proposal being deemed non-responsive and may, at the discretion of the JRA, be eliminated from further consideration.

The JRA Operating Agreement Committee will then assess each proposer's Phase 1 response through the use of a scoring system. The proposers receiving the top three scores (which may, in the event of a tie, be more than three proposers) will advance from Phase 1 to the more detailed Phase 2 of the RFP process described below. The remaining proposers who do not advance will be removed from further consideration.

The scoring system is as follows: Each proposer will receive a single score of between zero (0) and twenty (20) points (twenty being the highest score) in the following categories:

- *Approach to Operations*
- *Qualifications and Experience*
- *Financial Capability*

The Operating Agreement Committee may then deduct points based on the response in the section entitled "Effect of Other Operations on JRA Lines."

The proposers with the three highest scores out of sixty points will be invited to proceed to Phase 2. The JRA Operating Agreement Committee will thoroughly review all responses in the Phase 1 (RFQ); however, the Committee may request additional information from proposers or conduct additional investigation to verify the responses submitted by proposers in Phase 1. For example, the JRA may conduct interviews with federal, state, and local government agencies and/or Class I railroads that connect with lines operated by the proposer. Each proposer consents to any such additional investigation by the JRA.

At the conclusion of Phase 1, which is expected to occur within 60 days after the deadline for Phase 1 submissions, the JRA's Operating Agreement Committee will recommend to the JRA Board of Directors the top scoring proposers who shall be invited to proceed to Phase 2 of the RFP process, which will involve submission of a second, more detailed response. The JRA, at its option, may reject any and all proposals submitted in response to this RFP at any time during this process.

XIV. PHASE 2 (DETAILED RFP): SPECIFIC INFORMATION REQUIRED FROM INVITED PROPOSERS

Shortly after the conclusion of Phase 1, the top three scoring proposers will be formally invited by the JRA to proceed to Phase 2 of this RFP. In Phase 2, the invited proposers will be asked to submit a more detailed proposal following the same general instructions for all proposals. Each proposal shall be in narrative form and shall include the specific information required in this section. Failure to adhere to these requirements may be cause for rejection of the proposal as non-responsive.

The following information should be included in each Phase 2 proposal from the invited proposers:

1. *Background information.* Proposer should include a more detailed description of its background than provided in its initial Phase 1 response, including historical information, specific awards and recognitions that the proposer has won (including from Class I railroads), information about its business approach to the extent not covered in its Phase 1 response, and other items deemed relevant to proposer's railroad operations.

2. *Operations plan.* Proposer should provide an operational plan that describes proposer's planned approach to operating the JRA rail lines, including approaches relating to labor and supplier management, customer service, maintenance of way, and other items. This plan should specifically include:

- planned training programs for personnel relating to rail safety and operations;
- risk and safety management plans and programs;
- personnel management and administrative policies and procedures;
- a description of proposer's management and accounting systems;
- an organizational chart that outlines the proposed staffing plan for operations of the JRA rail lines, including descriptions of the functional responsibilities of each staff

member and an identification of the proposed individual who will have overall responsibility for day-to-day operations;

- a description of the proposed staffing of train crews, maintenance of way crews, and rolling stock;
- resumes outlining the experience, education and performance record of individuals who will have supervisory authority over day-to-day operations;
- a succession plan for management;
- a description of existing locomotives, rolling stock, and other equipment owned or leased by the proposer, including locomotive listing model, dates and descriptions of major repairs or improvements to such equipment;
- an administrative support plan;
- plans to provide cooperation to the JRA in support of its mission;
- a local service plan outlining the proposed operations to service all of the JRA lines; and
- a description of proposed interchange relationships with Class I railroads, whether handling line agreements, interline settlement system agreements, or otherwise, and a statement concerning how each such proposed relationship will keep JRA rail lines economically competitive during the term of the proposed Operating Agreement.

3. *Maintenance plan.* Proposer should include a plan for maintenance of track and bridges on the JRA lines.

4. *Marketing Plan.* Proposer should include a marketing plan outlining proposer's planned marketing activities and programs for retention of existing customers on JRA rail lines and generation of new customers. This plan should include proposed expenditures for marketing activities.

5. *Financial Plan.* Proposer should include a financial plan that includes the following:

- an estimated financial pro forma for operations for the first five years of the Operating Agreement term, which should itemize estimated revenues and expenses by major line item and include supporting assumptions;
- proposer's strategy for maximizing annual operating revenues and minimizing operating expenses;
- an operating fee proposal or other proposal for compensating the JRA for use of the rail lines and other property available for use under the Operating Agreement (Note: Proposers are directed to Exhibit "C" of the Operating Agreement, attached at Appendix "A" to this RFP, for guidance in developing a fee proposal); and
- a proposal for sharing any federal or state tax credits or other special incentives afforded to operating railroads.

XV. PHASE 2 (DETAILED RFP): SELECTION PROCESS FOR AWARD OF CONTRACT

The JRA will employ a more comprehensive review and evaluation of the proposals received in Phase 2. Each proposal will first be reviewed and analyzed to determine overall responsiveness and completeness. Failure to comply with the instructions of this RFP may result in the proposal being deemed non-responsive and may, at the discretion of the JRA, be eliminated from further consideration.

In Phase 2 of the RFP, the JRA anticipates conducting an in-depth investigation to verify proposals received. Proposers consent to such additional investigation. This may include the following:

- an inspection of other rail lines operated by proposer by JRA staff and consultants, including a review of track inspection reports of the Pennsylvania Public Utilities Commission and the Federal Railroad Administration for such lines;
- a survey conducted by JRA of the proposer's customers of other lines operated by the proposer.
- an interview of proposer's current Class I connecting railroads and state and federal regulatory agencies concerning proposer's performance; and
- a review of safety records and track inspection reports for proposer.

The proposers will also have the opportunity to inspect the JRA's rail lines in Phase 2 at a date and time to be determined.

The JRA Operating Agreement Committee will thoroughly review the proposals received in Phase 2 of the RFP. The JRA Operating Agreement Committee will then rank each proposal through the use of another scoring system.

The scoring system shall be as follows: Each proposer will receive a single score of between zero (0) and twenty (20) points (twenty being the highest score) in the following categories:

- *Commitment to Track Maintenance*
- *Commitment to Safe Operations*
- *Soundness and Sustainability of Operating, Marketing, and Financial Plans*
- *Commitment to Public-Private Partnership*
- *Commitment to Economic Development*

The Operating Agreement will be awarded to the proposer who obtains the highest score in Phase 2 of the RFP process. The JRA reserves the right to make the award of the Operating Agreement contingent upon the satisfactory completion by the proposer of certain conditions. The Operating Agreement shall contain the same terms and conditions set forth in Appendix "A" set forth herein, unless otherwise agreed by the JRA.

The JRA reserves the right to reject any and all proposals, waive informalities and irregularities in proposals received and to accept any portion of any proposal if deemed in the best interests of the JRA.

XVI. PROPOSAL ACCEPTANCE

Each proposal is submitted with the understanding that the JRA's written acceptance of the offer of proposer to provide the services described herein, shall be the foundation for the Operating Agreement between the proposer and the JRA. Submission of a proposal shall therefore bind the proposer to furnish and deliver the services and related components in accordance with conditions of the proposal.

XVII. PROPOSAL OWNERSHIP AND CONFIDENTIALITY

All proposals, including attachments, supplementary material, addenda, etc., shall become the property of the JRA and will not be returned to the sender. The JRA has the right to use any or all ideas presented in the proposal without limitation. All proposals will be considered public documents, subject to review and inspection by the public at the JRA's discretion, in accordance with the Pennsylvania Right-To-Know Law, 65 P.S. § 67.101 et. seq (the "RTK Law"). The JRA acknowledges that proposals may contain proprietary, financial or other data, the disclosure of which could cause substantial injury to the proposer's business. Proposers must therefore specifically identify the pages of a response or proposal that contain confidential information and provide a statement that such information is considered confidential by proposer and disclosure of such information would cause substantial injury to proposer. Proposers are also asked to provide a redacted unbound copy of any response or proposal with confidential information blacked out or removed from the text. This copy will be subject to public disclosure.

In the event a request for a response or proposal is received by the JRA, the JRA will advise the proposer of the request and ask the proposer to immediately submit a detailed statement indicating the proposer's legal basis for treating the information as confidential or otherwise seeking exemption from disclosure under federal, state or local law. The JRA will exercise care in applying this procedure, but will not be held liable for any damage or injury that may result from any disclosure that may occur. If proposer requests that the JRA resist disclosure of any records provided to the JRA by the proposer, and the JRA does withhold disclosure at the request of proposer, then proposer agrees to indemnify, defend, and hold JRA and its members, officers, employees, and directors harmless from any claim, liability, damages, losses, judgments, awards, costs or expenses that may be incurred by the JRA or arise out of its denial of a request for such records or withholding of such records from disclosure, and proposer will defend any action brought against the JRA for its denial of such records from disclosure as confidential or proprietary information to any person making a request for such records. Failure to agree to indemnify and defend the JRA as aforesaid shall constitute a waiver of the proposer's right to exemption from disclosure.

XVIII. GENERAL CONDITIONS, RESERVATIONS, AND DISCLAIMERS

In addition to any other conditions, reservations, or disclaimers set forth in this RFP, the following section sets forth general conditions, reservations, and disclaimers which apply to this RFP.

- The JRA reserves the right to extend any submission deadline should doing so be in the interest of the JRA. Proposers shall have the right to revise their proposals in the event that a deadline is extended. In the event a deadline is extended, the JRA shall provide notice of same on its website at www.sedacograil.org.
- The JRA reserves the right to withdraw this RFP at any time without prior notice. The JRA makes no representation that an Operating Agreement will be awarded to any proposer responding to this RFP. The JRA reserves the right to reject any or all proposals.
- If an inadequate number of proposals are received or the proposals received are deemed to be non-responsive, the JRA may, in its sole discretion, reissue the RFP or execute a sole-source agreement for rail freight operations with any individual or entity.
- The JRA will review and rate submitted proposals as described in this RFP. Proposers may not make any changes or additions after the deadline for receipt of proposals. The JRA reserves the right to request additional information or documentation from proposers as it deems necessary or appropriate.

RFP For Railroad Operations/SEDA-COG Joint Rail Authority

- The JRA reserves the right to verify information in any response or proposal. If the information cannot be verified, the JRA reserves the right to reduce the score awarded to the response or proposal.
 - The JRA may require interviews with any proposer.
 - The JRA reserves the right to waive minor defects in any response or proposal.
 - This RFP does not represent a commitment or offer by the JRA to enter into an agreement with a proposer or to pay any costs incurred in the preparation of a response or proposal. The proposer assumes all costs associated with responding to this RFP.
 - The JRA reserves the right to seek new proposals when such a request is in the best interest of the JRA and to reasonably request such additional information or clarification of information provided in a proposal without changing the RFP.
 - This RFP and a proposer's response to the RFP may become a part of the Operating Agreement between the selected proposer and the JRA resulting from this RFP process.
 - No proposer shall offer any favor or anything of pecuniary value to any JRA Board member, staff member, consultant or any other individual with an interest in this RFP process for the purposes of influencing the outcome of the RFP selection process.
 - Should any question arise as to the proper interpretation of the terms and conditions contained in this RFP, the JRA's decision shall be final.
-  The JRA reserves the right not to award the Operating Agreement or to award an Operating Agreement to one or more proposers as it deems to be in the best interest of the JRA.

XIX. QUESTIONS AND COMMUNICATIONS PROTOCOL

The following communications protocol shall apply throughout the RFP process.

- All discussions by proposers with JRA consultants and JRA Board members during the RFP process are prohibited.
- There will be one individual at the JRA with whom proposers may communicate or direct questions. The sole point of contact for proposers is:

Jeff Stover
Executive Director
SEDA-COG Joint Rail Authority
201 Furnace Road
Lewisburg, PA 17837
570-524-4491 (office)
570-847-9503 (cell)
jstover@sedacog.org
www.sedacograil.org

- Each proposer shall direct all communications or questions concerning this RFP or existing rail operations on the JRA rail lines to Mr. Stover.

- Each proposer shall receive the same information concerning the RFP at substantially the same time as all other proposers.
- To ensure fair and consistent distribution of information, all proposer questions will be answered in a "Q&A" format in a document to be provided to all proposers. No individual answers will be given.
- After the submittal of proposals and until the award of the Operating Agreement, all JRA personnel will be directed not to hold or participate in any meetings, conferences or technical discussions with any proposer concerning the RFP except as provided in the RFP. Proposers shall not initiate communication in any manner with JRA personnel regarding this RFP during this period unless authorized in advance by the JRA. Failure of a proposer to comply with this requirement may result in removal of the proposer's proposal from consideration.

XX. TIMELINE

The tentative timeline for the RFP submissions, review, selection and operating agreement award will be available on the JRA's website at www.sedacograil.org. This timeline is subject to change by the JRA, in its sole discretion.

EXHIBIT "L"

IN THE COURT OF COMMON PLEAS OF NORTHUMBERLAND COUNTY

READING, BLUE MOUNTAIN &
NORTHERN RAILROAD

Plaintiff,

v.

SEDA-COG JOINT RAIL AUTHORITY and
BOARD OF SEDA-COG JOINT RAIL AUTHORITY

Defendants.

Court of Common Pleas
Northumberland County, PA

Civil Action – Law

No. CV – 15 – 1201

ORDER

AND NOW, this _____ day of _____, 2015, upon consideration of Defendants' Preliminary Objections to Plaintiff's Complaint, and any response thereto, it is hereby **ORDERED** that Defendants' Preliminary Objections are **SUSTAINED**. The Complaint is **DISMISSED** with prejudice against all Defendants.

BY THE COURT:

J.

SIANA, BELLWOAR & MCANDREW, LLP
By: Michael G. Crotty, Esquire, I.D. # 92254
Ryan M. Jennings, Esquire, I.D. # 309145
941 Pottstown Pike, Suite 200
Chester Springs, PA 19425

READING, BLUE MOUNTAIN &
NORTHERN RAILROAD

Plaintiff,

v.

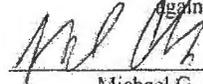
SEDA-COG JOINT RAIL AUTHORITY and
BOARD OF SEDA-COG JOINT RAIL AUTHORITY

Defendants:

ATTORNEYS FOR DEFENDANTS

NOTICE TO PLAINTIFF:

You are hereby notified to file a written response to these Preliminary Objections within twenty (20) days from the date of service hereof or a judgment may be entered against you.



Michael G. Crotty, Esquire

Court of Common Pleas
Northumberland County, PA

Civil Action – Law

No. CV – 15 – 1201

DEFENDANTS' PRELIMINARY OBJECTIONS TO PLAINTIFF'S COMPLAINT

Defendants SEDA-COG Joint Rail Authority and the Board of the SEDA-COG Joint Rail Authority (hereinafter, the "Authority") file the within Preliminary Objections to Plaintiff's Complaint, and in support thereof, aver the following:

I. Background¹

1. On Friday, June 26, 2015, Plaintiff, Reading, Blue Mountain and Northern Railroad (hereinafter, "RBMN") filed the above-captioned lawsuit with this Honorable Court, with service not being made until July 2, 2015.

2. RBMN is a Pennsylvania Business Corporation, having its registered office in Port Clinton, Schuylkill County, Pennsylvania. (Compl., ¶ 1).

3. RBMN alleges that it "...owns land and rail lines located within Northumberland County..." and further alleges that it is a taxpayer of the Commonwealth of Pennsylvania.

¹ The factual averments in the Complaint are presumed to be true for purposes of these Preliminary Objections only.

(Compl., ¶ 2). Nowhere in the Complaint does RBMN allege that it is a taxpayer of Northumberland County or any other member County underlying the joint Authority (Compl., ¶¶ I-64).

4. RBMN is "...is a privately held railroad company that began operations in 1990" (Compl., ¶ 3).

5. The Authority is a joint authority formed under the Pennsylvania Municipality Authorities Act, 53 Pa.C.S. § 5601, *et seq* (hereinafter, "MAA") and other relevant law.

6. The Authority was incorporated in 1983, and owns nearly 200 miles of rail lines within its eight (8) member counties. (Compl., ¶¶ 9, 13).

7. After much discussion, the Authority issued a Request for Proposals ("RFP") on May 16, 2014, seeking proposals from qualified railroad operators to provide rail freight service to customers on the Authority's rail lines under a proposed Operating Agreement. (Compl., ¶¶ 26-27; Ex. "B").

8. The RFP called for a two (2) phase review process entailing a request for qualifications ("RFQ") in Phase 1 and a Request for Proposals ("RFP") for Phase 2. (Compl., ¶¶ 28, 31, 34).

9. RBMN was one (1) of five (5) proposers who submitted a proposal in Phase 1 of the RFP process, but it was not selected to move forward to Phase 2. (Compl., ¶ 34).

10. Accordingly, RBMN does not qualify for further participation in the RFP process.

11. RBMN asserts essentially three (3) claims:

- a. RBMN seeks a declaratory judgment that the Authority has violated 53 Pa. C.S. § 5607(b)(2), which prohibits the exercise of certain statutorily-afforded powers by authorities created under the MAA, in interference with existing

businesses, upon the ludicrous theory that the Authority “duplicates or competes” with RBMN for state grant funding, despite that it is clear from RBMN’s Complaint that the Authority predated RBMN. (Compl., ¶¶ 37-46) (“Count I”);

- b. Alternatively, RBMN seeks a declaration that the Authority has violated 53 Pa.C.S. § 5614(a), which requires a competitive bidding process for certain types of contracts not here involved, let out by authorities created under the MAA. RBMN’s skewed reading of the statutory language has been rejected by the appellate courts of this Commonwealth in analogous contexts. RBMN also contends that the Authority’s RFP process violates Pennsylvania’s Procurement Code sections relating to “Contracts for Public Works”, 62 Pa. C.S. § 3911(a). (Compl., ¶¶ 47-55) (“Count II”); and
- c. As an apparent adjunct to its above-referenced alternative asserted claims, RBMN seeks the issuance of an injunction to prohibit the Authority or its Board from acting upon or accepting any proposal submitted under the RFP process until the merits of the above-captioned action are decided, but fails to demonstrate *prima facie* the essential prerequisites to the issuance of such relief. (Compl., ¶¶ 56-64) (“Count III”).

12. RBMN’s Complaint is premised entirely upon RBMN’s misinterpretations of law, and essentially requests this Honorable Court to substitute its judicial discretion, for the Authority’s discretion.

13. None of RBMN’s allegations are actionable, as a matter of law, and the within action is frivolous and vexatious.

14. Furthermore, RBMN does not have the requisite standing to bring the above-captioned action.

15. Furthermore, RBMN's causes of action are preempted by federal law.

16. Furthermore, RBMN has failed to join indispensable parties, thereby depriving this Honorable Court of subject matter jurisdiction.

II. Preliminary Objections

A. **As to All Counts – Pursuant to Pa. R.C.P. No. 1028(a)(4) – Legal Insufficiency of Pleading (Demurrer); and Pa. R.C.P. No 1028(a)(5) – Lack of Capacity to Sue; or, in the alternative, Pa. R.C.P. No. 1028(a)(3) – Motion for More Specific Pleading.**

RBMN, as a disappointed proposer, has no standing to pursue the RFP issues within the instant matter.

17. The foregoing paragraphs are incorporated herein as though set forth in their entirety.

18. A party seeking adjudication of a purported controversy must, as a necessary prerequisite, establish his or her standing to maintain the action. See Step Plan Services v. Koresko, 12 A.3d 401, 417 (Pa. Super. 2010).

19. The general principle behind the necessity for the standing to sue requirement is "...to protect against improper plaintiffs." See Step Plan Services, supra, 12 A.3d, at 418 (quoting Szoko v. Township of Wilkins, 974 A.2d 1216, 1219 (Pa. Cmwlth. 2009)).

20. RBMN premises its assertion of standing upon its ownership of land and rail lines located within Northumberland County, its status as a taxpayer of the Commonwealth and upon the assertion that it is "...a direct competitor that is being harmed by the actions of a government entity which is competing for its business." (Compl., ¶ 2).

21. Disappointed proposers or bidders under a government agency's request for proposals or invitation for bids are not entitled to any protection by virtue of that status. Rather, taxpayers are the only beneficiaries of laws governing the procedure for public contract awards. See American Totalisator Co., Inc. v. Seligman, 489 Pa. 568, 574, 414 A.2d 1037, 1040 (1980); Premier Comp Solutions, 949 A.2d 381, 384 (Pa. Cmwlth. 2008) ("Premier, as a prospective contractor, does not have a legally maintainable interest that implicates due process requiring an adequate available remedy. That is so because a disappointed bidder, offeror, or contractor to a public contract has no right to receive the contract as it has suffered no injury that would give it standing to seek redress"); National Const. Services, Inc. v. Philadelphia Regional Port Authority, 789 A.2d 306, 309 (Pa. Cmwlth. 2001) ("In Pennsylvania, as in most states, the 'best bidder' has no right to have the contract awarded to it because the 'lowest responsible bidder' provisions are not there to give the bidder any rights but to protect taxpayers as evidenced by the settled law that only taxpayers have a right to seek an action to enjoin the contract."); J.P. Mascaro & Sons, Inc. v. Bristol Tp., 505 A.2d 1071 (Pa. Cmwlth. 1986) (rejecting due process argument by disappointed bidder); see also Yurcho v. Hazleton Area School Dist., 1430 C.D. 2011, 2012 WL 8683308, at *5 (Pa. Cmwlth., Nov. 12, 2012) (unreported) ("[w]e agree that Plaintiffs enjoy standing as District taxpayers to challenge the legality of District Defendants' award of the bus transportation contracts....However, Plaintiffs do not have standing as bidders to challenge the award.");

22. In order to have standing to challenge the award of a government contract, the aggrieved party must be a taxpayer of the specific municipality, not merely a general taxpayer of the Commonwealth. See Black Ash Services, Inc. v. Dubois Area School Dist., 764 A.2d 672, 674-675 (Pa. Cmwlth. 2000); Nunemacher v. Borough of Middletown, 759 A.2d 57, 60 (Pa.

Cmwlth. 2000) (collecting Pennsylvania cases in support of this proposition); Gen. Crushed Stone Co. v. Caernarvon Twp., 605 A.2d 472, 473 (Pa. Cmwlth. 1992) (held payment of liquid fuel tax insufficient to afford taxpayer status for standing); accord Yureho, supra, (finding that "...District taxpayers..." had standing to challenge award of contract).

23. RBMN alleges that the Authority has eight (8) member Counties, including Northumberland County, but fails to allege that RBMN is a local taxpayer in any of the Authority's member Counties (let alone within Northumberland County).

24. RBMN alleges that its registered office is located in Port Clinton, Pennsylvania, 19549, which is situated in Schuylkill County (Compl., ¶ 1).

25. In a general sense, capacity to sue refers to the legal ability of a person to come into court and want of capacity to sue involves a general legal disability, including a want of authority. See In re Estate of Sauers, 613 Pa. 186, 198, 32 A.3d 1241, 1248 (2011).

26. RBMN lacks standing – and therefore the capacity to sue – to pursue the relief it seeks before this Honorable Court, unless and until it pleads local taxpayer status or some other basis of standing and its claims are therefore subject to Preliminary Objection. See Pa. R.C.P. No. 1028(a)(5).

27. Standing is a threshold requirement. See Pittsburgh Palisades Park, LLC v. Com., 585 Pa. 196, 888 A.2d 655 (2005); Howard v. Com., 957 A.2d 332, 335 (Pa. Cmwlth. 2008).

28. If RBMN cannot plead local taxpayer status, then it has no standing and cannot state a cause of action, upon which relief may be granted, and its Complaint is subject to Preliminary Objection in the nature of a demurrer. See Pa. R.C.P. No. 1028(a)(4).

29. Therefore, RBMN's Complaint, as plead, is insufficiently specific in that it fails to plead local taxpayer status or any other valid basis conferring standing upon it. See Pa. R.C.P. No. 1028(a)(3).

WHEREFORE, Defendants respectfully request that this Honorable Court sustain their Preliminary Objection and dismiss Plaintiff's action, in its entirety, with prejudice, or, in the alternative, dismiss Plaintiff's action, with leave to amend (to the extent that the Complaint survives all other Objections), specifically requiring Plaintiff to amend its Complaint to plead local taxpayer status or some other basis of standing within a reasonable period of time, or suffer dismissal with prejudice.

B. As to All Counts – Pursuant to Pa. R.C.P. No. 1028(a)(1) – Lack of Subject Matter Jurisdiction.

RBMN's Action is Preempted in its entirety by Section 10501(B) of the Federal Interstate Commerce Commission Termination Act ("ICCTA").

30. The foregoing paragraphs are incorporated herein as though set forth in their entirety.

31. The question, in all matters of preemption, is whether State laws conflict with an Act of Congress. There are three (3) permutations of preemption: (1) when preemptive intent is manifest through a statute's express language or through its structure and purpose; (2) preemption may be inferred from a federal statute if the scope of the statute indicates that Congress intended federal law to occupy the legislative field; and (3) nullification of State law where there is a direct conflict with a federal statute. See Sauer, *supra*, 613 Pa., at 200, 32 A.3d, at 1250 (citing, *inter alia*, Freightliner Corp. v. Myrick, 514 U.S. 280, 115 S.Ct. 1483 (1995)).

32. Issues of preemption constitute pure questions of law. See Sauers, supra, 613 Pa., at 197, 32 A.3d, at 1248 (citing Dooner v. DiDonato, 601 Pa. 209, 971 A.2d 1187, 1193 (2009)).

33. Section 10501(B) of the ICCTA, relating to “General jurisdiction” of the Surface Transportation Board, provides:

(b) The jurisdiction of the Board over –

(1) *transportation by rail carriers*, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, *operation*, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, *the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.*

49 U.S.C. § 10501(b) (*emphasis added*).

34. Additionally, Surface Transportation Board approval is required for, *inter alia*, construction of railroad lines and transportation over railroad lines. See 49 Pa. C.S. § 10901(a).

35. Congress has therefore vested exclusive jurisdiction of transportation by rail carriers in the Surface Transportation Board and preempted State law remedies dealing with, *inter alia*, the operation of rail transportation. See also Fayus Enterprises v. BNSF Railway Co., 602 F.3d 444 (3d Cir. 2010), cert. denied, 131 S.Ct. 822 (2010) (holding that Congress preempted state regulation of rail transportation under federal Staggers Act and enactment of ICCTA did not reduce scope of Staggers Act Preemption, but, rather expanded it and “regulation of rail transportation” includes economic regulation, with narrow exceptions for claims based in contract).

36. This Honorable Court may consider not only the averments of RBMN's Complaint, but also the documents attached thereto, to wit – the RFP documents issued by the Authority to proposers, including RBMN. See Lawrence v. Pa. Dept. of Corrections, 941 A.2d 70, 71 (Pa. Cmwlth. 2007); Diess v. Pa. Dept. of Transp., 935 A.2d 895 (Pa. Cmwlth. 2007).

37. The sole purpose of the Authority's RFP was to solicit proposals for operation of its rail lines by a qualified operator, consistent with the terms outlined in the RFP and proposed Operating Agreement, which was incorporated therein (Compl., Ex. "B," p. 3) ("Despite its authorized public purposes of owning and maintaining the rail lines, the JRA's authorized purposes do not include operation of the rail lines. Therefore, since its formation, the JRA has contracted with a private railroad operator for the operation of rail freight service on the JRA's rail lines. There is currently an operating agreement in effect for rail freight services on the JRA rail lines, which will expire June 30, 2017. This RFP, therefore, seeks a new operating agreement for rail freight services on JRA rail lines to commence on July 1, 2017.")

38. Pursuant to the terms of the RFP document, "At the conclusion of the RFP process, the JRA and the selected proposer will enter into an agreement for the operation of rail freight services on the JRA's rail lines (the "Operating Agreement")..." (Compl., Ex. "B," p. 7).

39. Pursuant to the terms of the RFP document, "[e]ach proposal is submitted with the understanding that the JRA's written acceptance of the offer of proposer to provide the services described herein, shall be the foundation for the Operating Agreement between the proposer and the JRA..." (Compl., Ex. "B," p. 15).

40. RBMN's own allegations negate the formation or existence of a contract between RBMN and the Authority (Compl., ¶ 34) ("...RBMN was the only bidder deemed unqualified ... to move on to Phase 2 RFP submissions").

41. This Honorable Court lacks subject matter jurisdiction to hear the above-captioned matter, because jurisdiction is vested exclusively in the Surface Transportation Board and only federal statutory remedies are available.

WHEREFORE, Defendants respectfully request that this Honorable Court sustain their Preliminary Objection and dismiss Plaintiff's action, in its entirety, with prejudice, for lack of subject matter jurisdiction.

C. As to All Counts – Pursuant to Pa. R.C.P. No. 1028(a)(5) – Nonjoinder of a Necessary Party; and Pa. R.C.P. No. 1028(a)(1) – Lack of Subject Matter Jurisdiction.

Plaintiff RBMN has failed to join necessary, indispensable parties, and has, therefore, deprived the Court of subject matter jurisdiction.

42. The foregoing paragraphs are incorporated herein as though set forth in their entirety.

43. A necessary or indispensable party is one whose rights are so connected with the claims of the litigants that no decree can be made without impairing those rights. See, e.g., Sabella v. Appalachian Development Corp., 103 A.3d 83, 90 (Pa. Super, 2014); Polydyne, Inc. v. City of Phila., 795 A.2d 495, 496 (Pa. Cmwlth, 2002).

44. It has been held, in the context of actions pursued by disappointed bidders for other public contracts, that a successful bidder is an indispensable party, irrespective of whether the government agency advocates in favor of maintaining its award of the contract to the successful bidder. See Polydyne, supra, at 496; accord Xpress Truck Lines, Inc. v. Pa. Liquor Control Bd., 503 Pa. 399, 410, 469 A.2d 1000, 1006 (1983).

45. Since the proposed Operating Agreement has not yet been awarded (Plaintiff's Mot. For Reconsideration, filed July 14, 2015, at ¶ 11-12), all Phase 2 proposers have an interest

31), RBMN omits that the RFP document explicitly provides that in the event of a tie, *more* than three proposers could move to Phase 2 (Id., Ex. "B," p. 12), instead insisting that "...the RFP questions were clearly designed to eliminate RBMN from consideration in Phase 2..." (Id.)

100. Neither sour grapes nor the executive discretion afforded to the Authority in selecting the appropriate criteria by which to select a new rail operator do not support a cause of action (particularly where the criteria were determined by an outside, independent professional consultant), and Count II, insofar as it is premised upon Title 62, Chapter 39 is subject to Preliminary Objection in the nature of a demurrer. See Pa. R.C.P. No. 1028(a)(4).

WHEREFORE, Defendants respectfully request that this Honorable Court sustain their Preliminary Objection and dismiss Count II, with prejudice, to the extent that it is premised upon an application of Title 62, Chapter 39.

SIANA, BELLWOAR & McANDREW, LLP

By:



Michael G. Crotty, Esquire, I.D. # 92254
Ryan M. Jennings, Esquire, I.D. # 309145

Attorneys for Defendants
SEDA-COG Joint Rail Authority and the Board of
Directors of the SEDA-COG Joint Rail Authority

SIANA, BELLWOAR & MCANDREW, LLP
By: Michael G. Crotty, Esquire, I.D. # 92254
Ryan M. Jennings, Esquire, I.D. # 309145
941 Pottstown Pike, Suite 200
Chester Springs, PA 19425

ATTORNEYS FOR DEFENDANTS

READING, BLUE MOUNTAIN &
NORTHERN RAILROAD

Plaintiff,

v.

SEDA-COG JOINT RAIL AUTHORITY and
BOARD OF SEDA-COG JOINT RAIL AUTHORITY

Defendants.

Court of Common Pleas
Northumberland County, PA

Civil Action - Law

No. CV - 15 - 1201

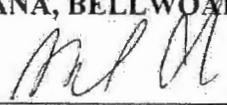
CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on this day a true and correct copy of Defendants' Preliminary Objections to Plaintiff's Complaint was served by first class mail, postage prepaid, addressed as follows:

Frederick J. Fanelli, Esquire
John R. Kantner, Esquire
Fanelli, Evans & Patel, P.C.
The Necho Allen
No. 1 Manhantongo Street
Pottsville, PA 17901

SIANA, BELLWOAR & McANDREW, LLP

Date: 7/21/15

By: 

Michael G. Crotty, Esquire, I.D. # 92254
Ryan M. Jennings, Esquire, I.D. # 309145

Attorneys for Defendants
SEDA-COG Joint Rail Authority and the Board of
Directors of the SEDA-COG Joint Rail Authority

EXHIBIT "M"

READING, BLUE MOUNTAIN &
NORTHERN RAILROAD,
Plaintiffs

IN THE COURT OF COMMON PLEAS
OF NORTHUMBERLAND COUNTY, PA
CIVIL ACTION – LAW

vs.

DOCKET NO. CV-2015-1201

SEDA-COG JOINT RAIL AUTHORITY and,
BOARD OF SEDA-COG JOINT RAIL
AUTHORITY,
Defendants

ORDER

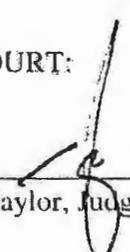
AND NOW, this 28th day of August, 2015, it is hereby ORDERED and DIRECTED that oral argument on Defendants' Preliminary Objections is scheduled for **Wednesday, November 4, 2015 at 2:15 p.m.** in Courtroom #1 of the Northumberland County, Courthouse, 201 Market Street, Sunbury, PA 17801.

MOVING PARTY BRIEFS DUE: October 21, 2015

OPPOSING PARTY BRIEFS DUE: October 28, 2015

- 1) Parties should submit an original and one (1) copy of their brief directly upon **Judges Chambers.**
- 2) Briefs are **NOT** filed in the Clerk of Courts office.
- 3) If you request any time stamped copies to be returned, you must submit additional copies of the brief together with a self-addressed, stamped envelope.

BY THE COURT:



Charles H. Saylor, Judge

cc: Frederick J. Fanelli, Esquire, The Necho Allen, 1 Manhantongo Street, Pottsville, PA 17801
John R. Kantner, Esquire The Necho Allen, 1 Manhantongo Street, Pottsville, PA 17801
Michael G. Crafty, Esquire, 941 Pottstown Pike, Suite 200, Chester Springs, PA 19425
Ryan M. Jennings, Esquire, 941 Pottstown Pike, Suite 200, Chester Springs, PA 19425
Tiffanie Baldock, Esquire, Law Clerk
Court Administrator
Court

EXHIBIT "N"

§ 5603. Method of incorporation

(a) Resolution of intent.—Whenever the municipal authorities of any municipality singly or of two or more municipalities jointly desire to organize an authority under this chapter, they shall adopt a resolution or ordinance signifying their intention to do so. No such resolution or ordinance shall be adopted until after a public hearing has been held, the notice of which shall be given at least 30 days before the hearing and in the

same manner as provided in subsection (b) for the giving of notice of the adoption of the resolution or ordinance.

(b) **General notice of adopted resolution.**—If the resolution or ordinance is adopted, the municipal authorities of such municipality or municipalities shall cause a notice of such resolution or ordinance to be published at least one time in the legal periodical of the county or counties in which the authority is to be organized and at least one time in a newspaper published and in general circulation in such county or counties. The notice shall contain a brief statement of the substance of the resolution or ordinance, including the substance of the articles making reference to this chapter. In the case of authorities created for the purpose of making business improvements or providing administrative services, if appropriate, the notice shall specifically provide that the municipality or municipalities have retained the right which exists under this chapter to approve any plan of the authority. The notice shall state that on a day certain, not less than three days after publication of the notice, articles of incorporation of the proposed authority shall be filed with the Secretary of the Commonwealth. No municipality shall be required to make any other publication of the resolution or ordinance under the provisions of existing law.

(c) **Filing articles of incorporation.**—On or before the day specified in the notice required under subsection (b), the municipal authorities shall file with the Secretary of the Commonwealth articles of incorporation together with proof of publication of the notice required under subsection (b). The articles of incorporation shall set forth:

(1) The name of the authority.

(2) A statement that the authority is formed under this chapter.

(3) A statement whether any other authority has been organized under this chapter or under the former act of June 28, 1935 (P.L. 463, No. 191), entitled "An act providing for the incorporation, as bodies corporate and politic, of "Authorities" for municipalities, counties, and townships; defining the same; prescribing the rights, powers, and duties of such Authorities; authorizing such Authorities to acquire, construct, improve, maintain, and operate projects, and to borrow money and issue bonds therefor; providing for the payment of such bonds, and prescribing the rights of the holders thereof; conferring the right of eminent domain on such Authorities; authorizing such Authorities to enter into contracts with and to accept grants from the Federal Government or any agency thereof; and for other purposes," or the act of May 2, 1945 (P.L. 382, No. 164), known as the Municipality Authorities Act of 1945, and is in existence in or for the incorporating municipality or municipalities. If any one or more of the municipalities have already joined with other municipalities not composing the same group in organizing a joint authority the application shall set forth the name of that authority, together with the names of the municipalities joining in it.

(4) The name of the incorporating municipality or municipalities together with the names and addresses of its municipal authorities.

(5) The names, addresses and term of office of the first members of the board of the authority.

(6) In the case of authorities created for the purpose of making business improvements or providing administrative services, if appropriate, a statement that the municipality or municipalities have retained the right which exists under this chapter to approve any plan of the authority.

(7) Any other matter which shall be determined in accordance with the provisions of this chapter.

(d) **Execution of articles.**—The articles of incorporation shall be executed by each incorporating municipality by its proper officers and under its municipal seal.

(e) **Certification of incorporation.**—If the Secretary of the Commonwealth finds that the articles of incorporation conform to law, he shall, but not prior to the day specified in the notice published in accordance with subsection (b), endorse his approval of them and, when all proper fees and charges have been paid, shall file the articles and issue a certificate of incorporation to which shall be attached a copy of the approved articles. Upon the issuance of a certificate of incorporation by the Secretary of the Commonwealth, the corporate existence of the authority shall begin. The certificate of incorporation shall be conclusive evidence of the fact that the authority has been incorporated, but proceedings may be instituted by the Commonwealth to dissolve an

authority which was formed without substantial compliance with the provisions of this section.

(f) **Certification of officers.**—When an authority has been organized and its officers, elected, its secretary shall certify to the Secretary of the Commonwealth the names and addresses of its officers as well as the principal office of the authority. Any change in the location of the principal office shall likewise be certified to the Secretary of the Commonwealth within ten days after such change. An authority created under the laws of the Commonwealth and existing at the time this chapter is enacted, in addition to powers granted or conferred upon the authority, shall possess all the powers provided under this chapter.

2001, June 19, P.L. 287, No. 22, § 1, imd. effective. Amended 2001, Dec. 17, P.L. 926, No. 110, § 3, imd. effective.

§ 5607. Purposes and powers

(a) **Scope of projects permitted.**—Every authority incorporated under this chapter shall be a body corporate and politic and shall be for the purposes of financing working capital; acquiring, holding, constructing, financing, improving, maintaining and operating, owning or leasing, either in the capacity of lessor or lessee, projects of the following kind and character and providing financing for insurance reserves:

- (1) Equipment to be leased by an authority to the municipality or municipalities that organized it or to any municipality or school district located wholly or partially within the boundaries of the municipality or municipalities that organized it.
- (2) Buildings to be devoted wholly or partially for public uses, including public school buildings, and facilities for the conduct of judicial proceedings and for revenue-producing purposes.
- (3) Transportation, marketing, shopping, terminals, bridges, tunnels, flood control projects, highways, parkways, traffic distribution centers, parking spaces, airports and all facilities necessary or incident thereto.
- (4) Parks, recreation grounds and facilities.
- (5) Sewers, sewer systems or parts thereof.
- (6) Sewage treatment works, including works for treating and disposing of industrial waste.
- (7) Facilities and equipment for the collection, removal or disposal of ashes, garbage, rubbish and other refuse materials by incineration, landfill or other methods.
- (8) Steam heating plants and distribution systems.
- (9) Incinerator plants.
- (10) Waterworks, water supply works, water distribution systems.
- (11) Facilities to produce steam which is used by the authority or is sold on a contract basis for industrial or similar use or on a sale-for-resale basis to one or more entities authorized to sell steam to the public, provided that such facilities have been approved by resolution or ordinance adopted by the governing body of the municipality or municipalities organizing such authority and that the approval does not obligate the taxing power of the municipality in any way.
- (12) Facilities for generating surplus electric power which are related to incinerator plants, dams, water supply works, water distribution systems or sewage treatment plants pursuant, where applicable, to section 3 of the Federal Power Act (41 Stat. 1063, 16 U.S.C. § 796) and section 210 of the Public Utility Regulatory Policies Act of 1978 (Public Law 95-617, 16 U.S.C. § 824a-3) or Title IV of the Public Utility Regulatory Policies Act of 1978 (Public Law 95-617, 16 U.S.C. §§ 2701 to 2708) if:
 - (i) electric power generated from the facilities is sold or distributed only on a sale-for-resale basis to one or more entities authorized to sell electric power to the public;
 - (ii) the facilities have been approved by resolution or ordinance adopted by the governing body of the municipality or municipalities organizing the authority and the approval does not obligate the taxing power of the municipality in any way; and
 - (iii) the incinerator plants, dams, water supply works, water distribution systems or sewage treatment plants are or will be located within or contiguous with a county

in which at least one of the municipalities organizing the authority is located, except that this subparagraph shall not apply to incinerator plants, dams, water supply works, water distribution systems or sewage treatment plants located in any county which have been or will be constructed by or acquired by the authority to perform functions the primary purposes of which are other than that of generation of electric power for which the authority has been organized.

(13) Swimming pools, playgrounds, lakes and low-head dams.

(14) Hospitals and health centers.

(15) Buildings and facilities for private, nonprofit, nonsectarian secondary schools, colleges and universities, State-related universities and community colleges, which are determined by the authority to be eligible educational institutions, provided that such buildings and facilities shall have been approved by resolution or ordinance adopted by the governing body of the municipality or municipalities organizing the authority and that the approval does not obligate the taxing power of the governing body in any way.

(16) Motor buses for public use, when such motor buses are to be used within any municipality, and subways.

(17) Industrial development projects, including, but not limited to, projects to retain or develop existing industries and the development of new industries, the development and administration of business improvements and administrative services related thereto.

(b) **Limitations.**—This section is subject to the following limitations:

(1) An authority created by a school district or school districts shall have the power only to acquire, hold, construct, improve, maintain, operate and lease public school buildings and other school projects acquired, constructed or improved for public school purposes.

(2) The purpose and intent of this chapter being to benefit the people of the Commonwealth by, among other things, increasing their commerce, health, safety and prosperity and not to unnecessarily burden or interfere with existing business by the establishment of competitive enterprises; none of the powers granted by this chapter shall be exercised in the construction, financing, improvement, maintenance, extension or operation of any project or projects or providing financing for insurance reserves which in whole or in part shall duplicate or compete with existing enterprises serving substantially the same purposes. This limitation shall not apply to the exercise of the powers granted under this section:

(i) for facilities and equipment for the collection, removal or disposal of ashes, garbage, rubbish and other refuse materials by incineration, landfill or other methods if each municipality organizing or intending to use the facilities of an authority having such powers shall declare by resolution or ordinance that it is desirable for the health and safety of the people of such municipality that it use the facilities of the authority and state if any contract between such municipality and any other person, firm or corporation for the collection, removal or disposal of ashes, garbage, rubbish and other refuse material has by its terms expired or is terminable at the option of the municipality or will expire within six months from the date such ordinance becomes effective;

(ii) for industrial development projects if the authority does not develop industrial projects which will compete with existing industries;

(iii) for authorities created for the purpose of providing business improvements and administrative services if each municipality organizing an authority for such a project shall declare by resolution or ordinance that it is desirable for the entire local government unit to improve the business district;

(iv) to hospital projects or health centers to be leased to or financed with loans to public hospitals, nonprofit corporation health centers or nonprofit hospital corporations serving the public or to school building projects and facilities to be leased to or financed with loans to private, nonprofit, nonsectarian secondary schools, colleges and universities, State-related universities and community colleges or to facilities, as limited under the provisions of this section, to produce steam or to generate electric power if each municipality organizing an authority for such a project shall declare by resolution or ordinance that it is desirable for the health, safety and welfare of the people in the area served by such facilities to have such facilities provided by or financed through an authority;

(v) to provide financing for insurance reserves if each municipality or authority intending to use any proceeds thereof shall declare by resolution or ordinance that it is desirable for the health, safety and welfare of the people in such local government unit or served by such authority; or

(vi) to projects for financing working capital.

(3) It is the intent of this chapter in specifying and defining the authorized purposes and projects of an authority to permit the authority to benefit the people of this Commonwealth by, among other things, increasing their commerce, health, safety and prosperity while not unnecessarily burdening or interfering with any municipality which has not incorporated or joined that authority. Therefore, notwithstanding any other provisions of this chapter, an authority shall not have as its purpose and shall not undertake as a project solely for revenue-producing purposes the acquiring of buildings, facilities or tracts of land which in the case of an authority incorporated or joined by a county or counties are located either within or outside the boundaries of the county or counties and in the case of all other authorities are located outside the boundaries of the municipality or municipalities that incorporated or joined the authority unless either:

(i) the governing body of each municipality in which the project will be undertaken has by resolution evidenced its approval; or

(ii) in cases where the property acquired is not subject to tax abatement, the authority covenants and agrees with each municipality in which the authority will acquire real property as part of the project either to make annual payments in lieu of real estate taxes and special assessments for amounts and time periods specified in the agreement or to pay annually the amount of real estate taxes and special assessments which would be payable if the real property so acquired were fully taxable and subject to special assessments.

(c) **Effect of specificity.**—The municipality or municipalities organizing such an authority may, in the resolution or ordinance signifying their intention so to do or from time to time by subsequent resolution or ordinance, specify the project or projects to be undertaken by the authority, and no other projects shall be undertaken by the authority than those so specified. If the municipal authorities organizing an authority fail to specify the project or projects to be undertaken, then the authority shall be deemed to have all the powers granted by this chapter.

(d) **Powers.**—Every authority may exercise all powers necessary or convenient for the carrying out of the purposes set forth in this section, including, but without limiting the generality of the foregoing, the following rights and powers:

(1) To have existence for a term of 50 years and for such further period or periods as may be provided in articles of amendment approved under section 5605(e) (relating to amendment of articles).

(2) To sue and be sued, implead and be impleaded, complain and defend in all courts.

(3) To adopt, use and alter at will a corporate seal.

(4) To acquire, purchase, hold, lease as lessee and use any franchise, property, real, personal or mixed, tangible or intangible, or any interest therein necessary or desirable for carrying out the purposes of the authority, and to sell, lease as lessor, transfer and dispose of any property or interest therein at any time acquired by it.

(5) To acquire by purchase, lease or otherwise and to construct, improve, maintain, repair and operate projects.

(6) To finance projects by making loans, which may be evidenced by and secured as may be provided in loan agreements, mortgages, security agreements or any other contracts, instruments or agreements, which contracts, instruments or agreements may contain such provisions as the authority shall deem necessary or desirable for the security or protection of the authority or its bondholders.

(7) To make bylaws for the management and regulation of its affairs.

(8) To appoint officers, agents, employees and servants, to prescribe their duties and to fix their compensation.

(9) To fix, alter, charge and collect rates and other charges in the area served by its facilities at reasonable and uniform rates to be determined exclusively by it for the purpose of providing for the payment of the expenses of the authority, the construction, improvement, repair, maintenance and operation of its facilities and properties

and, in the case of an authority created for the purpose of making business improvements or providing administrative services, a charge for such services which is to be based on actual benefits and which may be measured on, among other things, gross sales or gross or net profits, the payment of the principal of and interest on its obligations and to fulfill the terms and provisions of any agreements made with the purchasers or holders of any such obligations, or with a municipality and to determine by itself exclusively the services and improvements required to provide adequate, safe and reasonable service, including extensions thereof, in the areas served. If the service area includes more than one municipality, the revenues from any project shall not be expended directly or indirectly on any other project unless such expenditures are made for the benefit of the entire service area. Any person questioning the reasonableness or uniformity of a rate fixed by an authority or the adequacy, safety and reasonableness of the authority's services, including extensions thereof, may bring suit against the authority in the court of common pleas of the county where the project is located or, if the project is located in more than one county, in the court of common pleas of the county where the principal office of the project is located. The court of common pleas shall have exclusive jurisdiction to determine questions involving rates or service. Except in municipal corporations having a population density of 300 persons or more per square mile, all owners of real property in eighth class counties may decline in writing the services of a solid waste authority.

(10) In the case of an authority which has agreed to provide water service through a separate meter and separate service line to a residential dwelling unit in which the owner does not reside, to impose and enforce the owner's duty to pay a tenant's bill for service rendered to the tenant by the authority only if the authority notifies the owner and the tenant within 30 days after the bill first becomes overdue. Notification shall be provided by first class mail to the address of the owner provided to the authority by the owner and to the billing address of the tenant, respectively. Nothing in this paragraph shall be construed to require an authority to terminate service to a tenant, and the owner shall not be liable for any service which the authority provides to the tenant 90 or more days after the tenant's bill first becomes due unless the authority has been prevented by court order from terminating service to that tenant.

(11) In the case of an authority which has agreed to provide sewer service to a residential dwelling unit in which the owner does not reside, to impose and enforce the owner's duty to pay a tenant's bill for service rendered by the authority to the tenant. The authority shall notify the owner and the tenant within 30 days after the tenant's bill for that service first becomes overdue. Notification shall be provided by first class mail to the address of the owner provided to the authority by the owner and to the billing address of the tenant, respectively. Nothing in this paragraph shall be construed to relieve the owner of liability for such service unless the authority fails to provide the notice required in this paragraph.

(12) To borrow money, make and issue negotiable notes, bonds, refunding bonds and other evidences of indebtedness or obligations, hereinafter called bonds, of the authority. Bonds shall have a maturity date not longer than 40 years from the date of issue except that no refunding bonds shall have a maturity date later than the life of the authority; also, to secure the payment of the bonds or any part thereof by pledge or deed of trust of all or any of its revenues and receipts; to make agreements with the purchasers or holders of the bonds or with others in connection with any bonds, whether issued or to be issued, as the authority shall deem advisable; and in general to provide for the security for the bonds and the rights of the bondholders. In respect to any project constructed and operated under agreement with any authority or any public authority of any adjoining state, to borrow money and issue notes, bonds and other evidences of indebtedness and obligations jointly with that authority. Notwithstanding any of the foregoing, no authority shall borrow money on obligations to be paid primarily out of lease rentals or other current revenues other than charges made to the public for the use of the capital projects financed if the net debt of the lessee municipality or municipalities shall exceed any limit provided by any law of the Commonwealth.

(13) To make contracts of every name and nature and to execute all instruments necessary or convenient for the carrying on of its business.

(14) Without limitation of the foregoing, to borrow money and accept grants from and to enter into contracts, leases or other transactions with any Federal agency, the Commonwealth or a municipality, school district, corporation or authority.

(15) To have the power of eminent domain.

(16) To pledge, hypothecate or otherwise encumber all or any of the revenues or receipts of the authority as security for all or any of the obligations of the authority.

(17) To do all acts and things necessary or convenient for the promotion of its business and the general welfare of the authority to carry out the powers granted to it by this chapter or other law, including, but not limited to, the adoption of reasonable rules and regulations that apply to water and sewer lines located on a property owned or leased by a customer and to refer for prosecution as a summary offense any violation dealing with rules and regulations relating to water and sewer lines located on a property owned or leased by a customer. Under this paragraph, an authority established by a county of the second class A which is not a home rule county shall have powers for the inspection and repair of sewer facilities comparable to the powers of health officials under section 3007 of the act of May 1, 1933 (P.L. 103, No. 69), 1 known as The Second Class Township Code.

(18) To contract with any municipality, corporation or a public authority of this and an adjoining state on terms as the authority shall deem proper for the construction and operation of any project which is partly in this Commonwealth and partly in the adjoining state.

(19) To enter into contracts to supply water and other services to and for municipalities that are not members of the authority or to and for the Commonwealth, municipalities, school districts, persons or authorities and fix the amount to be paid therefor.

(20) (i) To make contracts of insurance with an insurance company, association or exchange authorized to transact business in this Commonwealth, insuring its employees and appointed officers and officials under a policy or policies of insurance covering life, accidental death and dismemberment and disability income. Statutory requirements for such insurance, including, but not limited to, requisite number of eligible employees, appointed officers and officials, as provided for in section 621.2 of the act of May 17, 1921 (P.L. 682, No. 284), known as The Insurance Company Law of 1921, and sections 1, 2, 6, 7 and 9 of the act of May 11, 1949 (P.L. 1210, No. 367), known as the Group Life Insurance Policy Law, shall be met.

(ii) To make contracts with an insurance company, association or exchange or any hospital plan corporation or professional health service corporation authorized to transact business in this Commonwealth insuring or covering its employees and their dependents but not its appointed officers and officials nor their dependents for hospital and medical benefits and to contract for its employees but not its appointed officers and officials with an insurance company, association or exchange authorized to transact business in this Commonwealth granting annuities or to establish, maintain, operate and administer its own pension plan covering its employees, but not its appointed officers and officials.

(iii) For the purposes set forth under this paragraph, to agree to pay part or all of the cost of this insurance, including the premiums or charges for carrying these contracts, and to appropriate out of its treasury any money necessary to pay such costs, premiums or charges. The proper officers of the authority who are authorized to enter into such contracts are authorized, enabled and permitted to deduct from the officers' or employees' pay, salary or compensation that part of the premium or cost which is payable by the officer or employee and as may be so authorized by the officer or employee in writing.

(21) To charge the cost of construction of any sewer or water main constructed by the authority against the properties benefited, improved or accommodated thereby to the extent of such benefits. These benefits shall be assessed in the manner provided under this chapter for the exercise of the right of eminent domain.

(22) To charge the cost of construction of a sewer or water main constructed by the authority against the properties benefited, improved or accommodated by the construction according to the foot front rule. Charges shall be based upon the foot frontage of the properties benefited and shall be a lien against such properties. Charges may be assessed and collected and liens may be enforced in the manner provided by law for the assessment and collection of charges and the enforcement of liens of the municipality in which such authority is located. No charge shall be assessed unless prior to the construction of a sewer or water main the authority submitted the plan of construction and estimated cost to the municipality in which the

project is to be undertaken and the municipality approved it. The properties benefited, improved or accommodated by the construction may not be charged an aggregate amount in excess of the approved estimated cost.

(23) To require the posting of financial security to insure the completion in accordance with the approved plat and with the rules and regulations of the authority of any water mains or sanitary sewer lines, or both, and related apparatus and facilities required to be installed by or on behalf of a developer under an approved land development or subdivision plat as these terms are defined under the act of July 31, 1968 (P.L. 805, No. 247), known as the Pennsylvania Municipalities Planning Code. If financial security is required by the authority and without limitation as to other types of financial security which the authority may approve, which approval shall not be unreasonably withheld, federally chartered or Commonwealth-chartered lending institution irrevocable letters of credit and restrictive or escrow accounts in these lending institutions shall be deemed acceptable financial security. Financial security shall be posted with a bonding company or federally chartered or Commonwealth-chartered lending institution chosen by the party posting the financial security if the bonding company or lending institution is authorized to conduct business within this Commonwealth. The bond or other security shall provide for and secure to the authority the completion of required improvements within one year from the date of posting of the security. The amount of financial security shall be equal to 110% of the cost of the required improvements for which financial security is to be posted. The cost of required improvements shall be established by submitting to the authority a bona fide bid from a contractor chosen by the party posting the financial security. In the absence of a bona fide bid, the cost shall be established by an estimate prepared by the authority's engineer. If the party posting the financial security requires more than one year from the date of posting the financial security to complete the required improvements, the amount of financial security may be increased by an additional 10% for each one-year period beyond the first anniversary date from the initial posting date or to 110% of the cost of completing the required improvements as reestablished on or about the expiration of the preceding one-year period by using the above bidding procedure. As the work of installing the required improvements proceeds, the party posting the financial security may request the authority to release or authorize the release of, from time to time, portions of the financial security necessary to pay the contractor performing the work. Release requests shall be in writing addressed to the authority, and the authority shall have 45 days after receiving a request to ascertain from the authority engineer, certified in writing, that the portion of the work has been completed in accordance with the approved plat. Upon receiving written certification, the authority shall authorize release by the bonding company or lending institution of an amount estimated by the authority engineer to fairly represent the value of the improvements completed. If the authority fails to act within the 45-day period, it shall be deemed to have approved the requested release of funds. The authority may, prior to final release at the time of completion and certification by its engineer, require retention of 10% of the estimated cost of improvements. If the authority accepts dedication of all or some of the required improvements following completion, it may require the posting of financial security to secure structural integrity of the improvements as well as the functioning of the improvements in accordance with the design and specifications as depicted on the final plat and the authority's rules and regulations. This financial security shall expire not later than 18 months from the date of acceptance of dedication and shall be of the same type as set forth in this paragraph with regard to that which is required for installation of the improvements, except that it shall not exceed 15% of the actual cost of installation of the improvements. Any inconsistent ordinance, resolution or statute is null and void.

(24) To charge enumerated fees to property owners who desire to or are required to connect to the authority's sewer or water system. Fees shall be based upon the duly adopted fee schedule which is in effect at the time of payment and shall be payable at the time of application for connection or at a time to which the property owner and the authority agree. In the case of projects to serve existing development, fees shall be payable at a time to be determined by the authority. An authority may require that no capacity be guaranteed for a property owner until the tapping fees have been paid or secured by other financial security. The fees shall be in addition to any charges assessed against the property in the construction of a sewer or water main by the authority under paragraphs (21) and (22) as well as any other user

charges imposed by the authority under paragraph (9), except that no reservation of capacity fee or other similar charge shall be imposed or collected from a property owner who has applied for service unless the charge is based on debt and fixed operating expenses. A reservation of capacity fee or other similar charge may not exceed 60% of the average sanitary sewer bill for a residential customer in the same sewer service area for the same billing period. Any authority opting to collect a reservation of capacity fee or other similar charge may not collect the tapping fee until the time as the building permit fee is due. Tapping fees shall not include costs included in the calculation of any other fees, assessments, rates or other charges imposed under this act.

(i) The fees may include any of the following if they are separately set forth in a resolution adopted by the authority:

(A) Connection fee. A connection fee shall not exceed an amount based upon the actual cost of the connection of the property extending from the authority's main to the property line or curb stop of the property connected. The authority may also base the connection fee upon an average cost for previously installed connections of similar type and size. Such average cost may be trended to current cost using published cost indexes. In lieu of payment of the fee, an authority may require the construction of those facilities by the property owner who requested the connection.

(B) Customer facilities fee. A customer facilities fee shall not exceed an amount based upon the actual cost of facilities serving the connected property from the property line or curb stop to the proposed dwelling or building to be served. The fee shall be chargeable only if the authority installs the customer facilities. In lieu of payment of the customer facilities fee, an authority may require the construction of those facilities by the property owner who requests customer facilities. In the case of water service, the fee may include the cost of a water meter and installation if the authority provides or installs the water meter. If the property connected or to be connected with the sewer system of the authority is not equipped with a water meter, the authority may install a meter at its own cost and expense. If the property is supplied with water from the facilities of a public water supply agency, the authority shall not install a meter without the consent and approval of the public water supply agency.

(C) Tapping fee. A tapping fee shall not exceed an amount based upon some or all of the following parts which shall be separately set forth in the resolution adopted by the authority to establish these fees. In lieu of payment of this fee, an authority may require the construction and dedication of only such capacity, distribution-collection or special purpose facilities necessary to supply service to the property owner or owners.

(I) Capacity part. The capacity part shall not exceed an amount that is based upon the cost of capacity-related facilities, including, but not limited to, source of supply, treatment, pumping, transmission, trunk, interceptor and outfall mains, storage, sludge treatment or disposal, interconnection or other general system facilities. Except as specifically provided in this paragraph, such facilities may include only those that provide existing service. The cost of capacity-related facilities, excluding facilities contributed to the authority by any person, government or agency, or portions of facilities paid for with contributions or grants other than tapping fees, shall be based upon their historical cost trended to current cost using published cost indexes or upon the historical cost plus interest and other financing fees paid on debt financing such facilities. To the extent that historical cost is not ascertainable, tapping fees may be based upon an engineer's reasonable written estimate of current replacement cost. Such written estimate shall be based upon and include an itemized listing of those components of the actual facilities for which historical cost is not ascertainable. Outstanding debt related to the facilities shall be subtracted from the cost except when calculating the initial tapping fee imposed for connection to facilities exclusively serving new customers. The outstanding debt shall be subtracted for all subsequent revisions of the initial tapping fee where the historical cost has been updated to reflect current cost except as specifically provided in this section. For tapping fees or components related to facilities initially serving exclusively new customers, an authority may, no more frequently than annually and without updating the historical cost

of or subtracting the outstanding debt related to such facilities, increase such tapping fee by an amount calculated by multiplying the tapping fee by the weighted average interest rate on the debt related to such facilities applicable for the period since the fee was initially established or the last increase of the tapping fee for such facilities. The capacity part of the tapping fee per unit of design capacity of said facilities required by the new customer shall not exceed the total cost of the facilities as described herein divided by the system design capacity of all such facilities. Where the cost of facilities to be constructed or acquired in the future are included in the calculation of the capacity part as permitted herein, the total cost of the facilities shall be divided by the system design capacity plus the additional capacity to be provided by the facilities to be constructed or acquired in the future. An authority may allocate its capacity-related facilities to different sections or districts of its system and may impose additional capacity-related tapping fees on specific groups of existing customers such as commercial and industrial customers in conjunction with additional capacity requirements of those customers. The cost of facilities to be constructed or acquired in the future that will increase the system design capacity may be included in the calculation of the capacity part, subject to the provisions of clause (VI). The cost of such facilities shall not exceed their reasonable estimated cost set forth in a duly adopted annual budget or a five-year capital improvement plan. The authority shall have taken at least two of the following actions toward construction of the facilities:

(a) obtained financing for the facilities;

(b) entered into a contract obligating the authority to construct or pay for the cost of construction of the facilities or its portion thereof in the event that multiple parties are constructing the facilities;

(c) obtained a permit for the facilities;

(d) obtained title to or condemned additional real estate upon which the facilities will be constructed;

(e) entered into a contract obligating the authority to purchase or acquire facilities owned by another;

(f) prepared an engineering feasibility study specifically related to the facilities, which study recommends the construction of the facilities within a five-year period;

(g) entered into a contract for the design or construction of the facilities or adopted a budget which includes the use of in-house resources for the design or construction of the facilities.

(II) Distribution or collection part. The distribution or collection part may not exceed an amount based upon the cost of distribution or collection facilities required to provide service, such as mains, hydrants and pumping stations. Facilities may only include those that provide existing service. The cost of distribution or collections facilities, excluding facilities contributed to the authority by any person, government or agency, or portions of facilities paid for with contributions or grants other than tapping fees, shall be based upon their historical cost trended to current cost using published cost indexes or upon the historical cost plus interest and other financing fees paid on debt financing such facilities. To the extent that historical cost is not ascertainable, tapping fees may be based upon an engineer's reasonable written estimate of replacement cost. Such written estimate shall be based upon and include an itemized listing of those components of the actual facilities for which historical cost is not ascertainable. Outstanding debt related to the facilities shall be subtracted from the cost except when calculating the initial tapping fee imposed for connection to facilities exclusively serving new customers. The outstanding debt shall be subtracted for all subsequent revisions of the initial tapping fee where the historical cost has been updated to reflect current cost except as specifically provided in this section. For tapping fees or components related to facilities initially serving exclusively new customers, an authority may, no more frequently than annually and without updating the historical cost of or subtracting the outstanding debt related to such facilities, increase such tapping fee by an amount calculated by multiplying the tapping fee by the weighted average interest rate on the debt related to such facilities applicable for the

period since the fee was initially established or the last increase of the tapping fee for such facilities. The distribution or collection part of the tapping fee per unit of design capacity of said facilities required by the new customer shall not exceed the cost of the facilities divided by the design capacity. An authority may allocate its distribution-related or collection-related facilities to different sections or districts of its system and may impose additional distribution-related or collection-related tapping fees on specific groups of existing customers such as commercial and industrial customers in conjunction with additional capacity requirements of those customers.

(III) Special purpose part. A part for special purpose facilities shall be applicable only to a particular group of customers or for serving a particular purpose or a specific area based upon the cost of the facilities, including, but not limited to, booster pump stations, fire service facilities, water or sewer mains, pumping stations and industrial wastewater treatment facilities. Such facilities may include only those that provide existing service. The cost of special purpose facilities, excluding facilities contributed to the authority by any person, government or agency, or portions of facilities paid for with contributions or grants other than tapping fees, shall be based upon historical cost trended to current cost using published cost indexes or upon the historical cost plus interest and other financing fees paid on debt financing such facilities. To the extent that historical cost is not ascertainable, tapping fees may be based upon an engineer's reasonable written estimate of current replacement cost. Such written estimate shall be based upon and include an itemized listing of those components of the actual facilities for which historical cost is not ascertainable. Outstanding debt related to the facilities shall be subtracted from the cost except when calculating the initial tapping fee imposed for connection to facilities exclusively serving new customers. The outstanding debt shall be subtracted for all subsequent revisions of the initial tapping fee where the historical cost has been updated to reflect current cost except as specifically provided in this section. For tapping fees or components related to facilities initially serving exclusively new customers, an authority may, no more frequently than annually and without updating the historical cost of or subtracting the outstanding debt related to such facilities, increase such tapping fee by an amount calculated by multiplying the tapping fee by the weighted average interest rate on the debt related to such facilities applicable for the period since the fee was initially established or the last increase of the tapping fee for such facilities. The special purpose part of the tapping fee per unit of design capacity of such special purpose facilities required by the new customer shall not exceed the cost of the facilities as described herein divided by the design capacity of the facilities. Where an authority constructs special purpose facilities at its own expense, the design capacity for the facilities may be expressed in terms of the number of equivalent dwelling units to be served by the facilities. In no event shall an authority continue to collect any tapping fee which includes a special purpose part after special purpose part fees have been imposed on the total number of design capacity units used in the original calculation of the special purpose part. An authority may allocate its special purpose facilities to different sections or districts of its system and may impose additional special purpose tapping fees on specific groups of existing customers such as commercial and industrial customers in conjunction with additional capacity requirements of those customers.

(IV) Reimbursement part. The reimbursement part shall only be applicable to the users of certain specific facilities when a fee required to be collected from such users will be reimbursed to the person at whose expense the facilities were constructed as set forth in a written agreement between the authority and such person at whose expense such facilities were constructed.

(V) Calculation of tapping fee.

(a) In arriving at the cost to be included in the tapping fee, the same cost shall not be included in more than one part of the tapping fee.

(b) No tapping fee may be based upon or include the cost of expanding, replacing, updating or upgrading facilities serving only existing customers in order to meet stricter efficiency, environmental, regulatory or safety standards or to provide better service to or meet the needs of existing customers.

(c) The cost used in calculating tapping fees shall not include maintenance and operation expenses.

(d) As used in this subclause, "maintenance and operation expenses" are those expenditures made during the useful life of a sewer or water system for labor, materials, utilities, equipment accessories, appurtenances and other items which are necessary to manage and maintain the system capacity and performance and to provide the service for which the system was constructed. Costs or expenses to reduce or eliminate groundwater infiltration or inflow may not be included in the cost of facilities used to calculate tapping fees unless these costs or expenses result in an increase in system design capacity.

(e) Except as otherwise provided for the calculation of a special purpose part, the design capacity required by a new residential customer used in calculating sewer or water tapping fees shall not exceed an amount established by multiplying 65 gallons per capita per day for water capacity, 90 gallons per capita per day for sewer capacity times the average number of persons per household as established by the most recent census data provided by the United States Census Bureau. If an authority service area is entirely within a municipal boundary for which there is corresponding census data specifying the average number of persons per household, issued by the United States Census Bureau, the average shall be used. If an authority service area is not entirely within a municipal boundary but is entirely within a county or other geographic area within Pennsylvania for which the United States Census Bureau has provided the average number of persons per household, then that average for the county or geographic area shall be used. If an authority service area is not entirely within a municipal, county or other geographic area within Pennsylvania for which the United States Census Bureau has calculated an average number of persons per household, then the Pennsylvania average number of persons per household shall be used as published by the United States Census Bureau. Alternatively, the design capacity required for a new residential customer shall be determined by a study but shall not exceed:

(i) for water capacity, the average residential water consumption per residential customer, or, for sewage capacity, the average residential water consumption per residential customer plus ten percent. The average residential water consumption shall be determined by dividing the total water consumption for all metered residential customers in the authority's service area over at least a 12-consecutive-month period within the most recent five years by the average number of customers during the period; or

(ii) for sewer capacity, the average sewage flow per residential customer determined by a measured sewage flow study. Such study shall be completed in accordance with sound engineering practices within the most recent five years for the lesser of three or all residential subdivisions of more than ten lots which have collection systems in good repair and which connected to the authority's facilities within the most recent five years. The study shall calculate the average sewage flow per residential customer in such developments by measuring actual sewage flows over at least 12 consecutive months at the points where such developments connected to the authority's sewer main.

(iii) All data and other information considered or obtained by an authority in connection with determining capacity under this subsection shall be made available to the public upon request.

(iv) If any person required to pay a tapping fee submits to the authority an opinion from a professional engineer that challenges the validity of the results of the calculation of design capacity required to serve new residential customers prepared under subparagraph (i) or (ii), the authority shall within 30 days obtain a written certification from another professional engineer, who is not an employee of the authority, verifying that the results and the calculations, methodology and measurement were performed in accordance with this title² and generally accepted engineering practices. If an authority does not obtain a certification required under this subsection within 30 days of receiving such challenge, the authority may not impose or collect tapping fees based on any such challenged calculations or study until such engineering certification is obtained.

(f) An authority may use lower design capacity requirements and impose lower tapping fees for multifamily residential dwellings than imposed on other types of residential customers.

(VI) Separate accounting for future facility costs. Any portion of tapping fees collected which, based on facilities to be constructed or acquired in the future in accordance with this section, shall be separately accounted for and shall be expended only for that particular facility or a substitute facility accomplishing the same purpose which is commenced within the same period. Such accounting shall include, but not be limited to, the total fees collected as a result of including facilities to be constructed in the future, the source of the fees collected and the amount of fees expended on specific facilities. The proportionate share of tapping fees based upon facilities to be constructed or acquired in the future under this section shall be refunded to the payor of such fees within 90 days of the occurrence of the following:

(a) the authority abandons its plan or a part thereof to construct or acquire a facility or facilities which are the basis for such fee; or

(b) the facilities have not been placed into service within seven years, or, for an authority which provides service to five or more municipalities, the facilities have not been placed into service within 15 years, after adoption of a resolution which imposes tapping fees which are based upon facilities to be constructed or acquired in the future. Any refund of fees held for 15 years shall include interest for the period the money was held.

(VII) Definitions. As used in this clause, the following words and phrases shall have the meanings given to them in this subclause:

"BOD5." The five-day biochemical-oxygen demand.

"Design capacity." For residential customers, the permitted or rated capacity of facilities expressed in million gallons per day. For nonresidential customers, design capacity may also be expressed in pounds of BOD5 per day, pounds of suspended solids per day or any other capacity-defining parameter that is separately and specifically set forth in the permit governing the operation of the system and based upon its original design as modified by those regulatory agencies having jurisdiction over these facilities. Additionally, for separate fire service customers, the permitted or rated capacity of fire service facilities may be expressed in peak flows. The units of measurement used to express design capacity shall be the same units of measurement used to express the system design capacity. Except as otherwise provided for special purpose facilities, design capacity may not be expressed in terms of equivalent dwelling units.

"Outstanding debt." The principal amount outstanding of any bonds, notes, loans or other form of indebtedness used to finance or refinance facilities included in the tapping fee.

"Service line." A water or sewer line that directly connects a single building or structure to a distribution or collection facility.

"System design capacity." The design capacity of the system for which the tapping fee is being calculated which represents the total design capacity of the treatment facility or water sources.

(ii) Every authority charging a tapping, customer facilities or connection fee shall do so only pursuant to a resolution adopted at a public meeting of the authority. The authority shall have available for public inspection a detailed itemization of all calculations, clearly showing the maximum fees allowable for each part of the tapping fee and the manner in which the fees were determined, which shall be made a part of any resolution imposing such fees. A tapping, customer facilities or connection fee may be revised and imposed upon those who subsequently connect to the system, subject to the provisions and limitations of the act.

(iii) No authority shall have the power to impose a connection fee, customer facilities fee, tapping fee or similar fee except as provided specifically under this section.

(iv) A municipality or municipal authority with available excess sewage capacity, wishing to sell a portion of that capacity to another municipality or municipal authority, may not charge a higher cost for the capacity portion of the tapping fee

as the selling entity charges to its customers for the capacity portion of the tapping fee. In turn, the municipality or municipal authority buying this excess capacity may not charge a higher cost for the capacity portion of the tapping fee to its residential customers than that charged to them by the selling entity.

(v) As used in this paragraph, the term "residential customer" shall also include those developing property for residential dwellings that require multiple tapping fee permits. This paragraph shall not be applicable to intermunicipal or interauthority agreements relative to the purchase of excess capacity by an authority or municipality in effect prior to February 20, 2001.

(25) To construct tunnels, bridges, viaducts, underpasses or other structures and relocate the facilities of public service companies to effect or permit the abolition of a grade crossing or grade crossings subject to approval of and in accordance with a duly issued order of the Pennsylvania Public Utility Commission. A commission order shall provide that costs payable by a public utility, political subdivision, the Commonwealth or others shall be payable to the authority. Before proceedings are instituted before the commission, the authority and the public utilities or the political subdivisions shall enter an agreement to provide for the conveyance to the authority of title to the land, structure or improvement involved as security for bonds issued to finance the improvement and the leasing of the improvement to the utility or utilities or the political subdivision or subdivisions involved on such terms as will provide for interest and sinking fund charges on the bonds issued for the improvement.

(26) To appoint police officers who shall have the same rights as other peace officers in this Commonwealth with respect to the property of the authority.

(27) (i) In the case of an authority created to provide business improvements and administrative services, to impose an assessment on each benefited property within a business improvement district. This assessment shall be based upon the estimated cost of the improvements or services in the district stated in the planning or feasibility study and shall be determined by one of the following methods:

(A) By an assessment determined by multiplying the total improvement or service cost by the ratio of the assessed value of the benefited property to the total assessed valuation of all benefited properties in the district.

(B) By an assessment upon the several properties in the district in proportion to benefits as ascertained by viewers appointed in accordance with municipal law.

(ii) An assessment or charge may not be made unless:

(A) An authority submits a plan for business improvements and administrative services, together with estimated costs and the proposed method of assessments for business improvements and charges for administrative services, to the municipality in which the project is to be undertaken.

(B) The municipality approves the plan, the estimated costs and the proposed method of assessment and charges.

(iii) An authority may not assess charges against the improved properties in an aggregate amount in excess of the estimated cost.

(iv) An authority may by resolution authorize payment of an assessment or charge in equal, annual or more frequent installments over a fixed period of time and bearing interest of 6% or less. If bonds, notes or guarantees are used to raise revenue to provide for the cost of improvements or services, the installments shall not be payable beyond the term for which the bonds, notes or guarantees are payable.

(v) Claims to secure the payment of assessments shall be entered in the prothonotary's office of the county at the same time and in the same form and shall be collected in the same manner as municipal claims are filed and collected notwithstanding the provisions of this section as to installment payments.

(vi) In case of default of 60 days or more after an installment is due, the entire assessment and interest shall be due.

(vii) An owner of property against whom an assessment has been made may pay the assessment in full at any time along with accrued interest and costs. Upon proof of payment the lien shall be discharged.

(28) To adopt rules and regulations to provide for the safety of persons using facilities of an airport authority pertaining to vehicular traffic control. Police officers appointed under paragraph (26) shall enforce them.

(29) To provide financing for insurance reserves by making loans evidenced and secured by loan agreements, security agreements or other instruments or agreements. These instruments or agreements may contain provisions the authority deems necessary or desirable for the security or protection of the authority or its bondholders.

(30) Where a sewer or water system of an authority is to be extended at the expense of the owner of properties or where the authority otherwise would construct customer facilities referred to in paragraph (24), other than water meter installation, a property owner shall have the right to construct the extension or install the customer facilities himself or through a subcontractor approved by the authority, which approval shall not be unreasonably withheld. The authority shall have the right, at its option, to perform the construction itself only if the authority provides the extension or customer facilities at a lower cost and within the same timetable specified or proposed by the property owner or his approved subcontractor. Construction by the property owner shall be in accordance with an agreement for the extension of the authority's system and plans and specifications approved by the authority and shall be undertaken only pursuant to the existing regulations, requirements, rules and standards of the authority applicable to such construction. Construction shall be subject to inspection by an inspector authorized to approve similar construction and employed by the authority during construction. When a main is to be extended at the expense of the owner of properties, the property owner may be required to deposit with the authority, in advance of construction, the authority's estimated reasonable and necessary cost of reviewing plans, construction inspections, administrative, legal and engineering services. The authority may require that construction shall not commence until the property owner has posted appropriate financial security in accordance with paragraph (23). The authority may require the property owner to reimburse it for reasonable and necessary expenses it incurred as a result of the extension. If an independent firm is employed for engineering review of the plans and the inspection of improvements, reimbursement for its services shall be reasonable and in accordance with the ordinary and customary fees charged by the independent firm for work performed for similar services in the community. The fees shall not exceed the rate or cost charged by the independent firm to the authority when fees are not reimbursed or otherwise imposed on applicants. Upon completion of construction, the property owner shall dedicate and the authority shall accept the extension of the authority's system if dedication of facilities and the installation complies with the plans, specifications, regulations of the authority and the agreement. An authority may provide in its regulations those facilities which, having been constructed at the expense of the owner of properties, the authority will require to be dedicated and which facility or facilities the authority will accept as a part of its system.

(i) In the event the property owner disputes the amount of any billing in connection with the review of plans, construction inspections, administrative, legal and engineering services, the property owner shall, within 20 working days of the date of billing, notify the authority that the billing is disputed as excessive, unreasonable or unnecessary, in which case the authority shall not delay or disapprove any application or any approval or permit related to the extension or facilities due to the property owner's dispute over the disputed billings unless the property owner has failed to make payment in accordance with the decision rendered under clause (iii) within 30 days after the mailing date of such decision.

(ii) If, within 30 days from the date of billing, the authority and the property owner cannot agree on the amount of billings which are reasonable and necessary, the property owner and authority shall, by mutual agreement, appoint a professional of the same profession or discipline licensed in Pennsylvania to review the billings and make a determination as to the amount of billings which is reasonable and necessary.

(iii) The professional appointed under clause (ii) shall hear evidence and review the documentation as the professional in his or her sole opinion deems necessary and shall render a decision within 60 days of the billing date. The property owner shall be required to pay the entire amount determined in the decision immediately.

(iv) In the event that the authority and property owner cannot agree upon the professional to be appointed within 30 days of the billing date, the president judge of the court of common pleas of the judicial district in which the municipality is located or, if at the time there is no president judge, the senior active judge then sitting upon application of either party shall appoint a professional, who shall be neither the authority engineer nor any professional who has been retained by or performed services for the authority or the property owner within the preceding five years.

(v) The fee of the appointed professional for determining the reasonable and necessary expenses shall be paid by the applicant if the amount of payment required in the decision is equal to or greater than the original bill. If the amount of payment required in the decision is less than the original bill by \$2,500 or more, the authority shall pay the fee of the professional. If the amount of the payment required in the decision is less than the original bill by \$2,499 or less, the authority and the property owner shall each pay one-half of the fee of the appointed professional.

(31) Where a property owner constructs or causes to be constructed at his expense any extension of a sewer or water system of an authority, the authority shall provide for the reimbursement to the property owner when the owner of another property not in the development for which the extension was constructed connects a service line directly to the extension within ten years of the date of the dedication of the extension to the authority in accordance with the following provisions:

(i) Reimbursement shall be equal to the distribution or collection part of each tapping fee collected as a result of subsequent connections. An authority may deduct from each reimbursement payment an amount equal to 5% of it for administrative expenses and services rendered in calculating, collecting, monitoring and disbursing the reimbursement payments to the property owner.

(ii) Reimbursement shall be limited to those lines which have not previously been paid for by the authority.

(iii) The authority shall, in preparing necessary reimbursement agreements with a property owner for whose benefit reimbursement will be provided, attach as an exhibit an itemized listing of all sewer and water facilities for which reimbursement shall be provided.

(iv) The total reimbursement which a property owner may receive may not exceed the cost of labor and material, engineering design charges, the cost of performance and maintenance bonds, authority review and inspection charges as well as flushing and televising charges and any and all charges involved in the acceptance and dedication of such facilities by the authority, less the amount which would be chargeable to the property owner based upon the authority's collection and distribution tapping fees which would be applicable to all lands of the property owner directly or indirectly served through extensions if the property owner did not fund the extension.

(v) An authority shall notify by certified mail, to the last known address, the property owner for whose benefit a reimbursement shall apply. This shall be done within 30 days of the authority's receipt of the reimbursement payment. If a property owner does not claim a reimbursement payment within 120 days after the mailing of the notice, the payment shall become the sole property of the authority with no further obligation on the part of the authority to refund the payment to the property owner.

(32) Deleted by 2003, Dec. 30, P.L. 404, No. 57, § 1, effective June 30, 2005.

(33) Provisions of paragraphs (30) and (31) shall apply to residential customers in a municipality where the sewer service is being purchased by the municipality or sewer authority from another municipality or sewer authority having excess sewage capacity.

(e) Prohibition.—

(1) An authority may not pledge the credit or taxing power of the Commonwealth or its political subdivision.

(2) The obligations of an authority are not obligations of the Commonwealth or its political subdivision.

(3) Neither the Commonwealth nor a political subdivision shall be liable for the payment of principal of or interest on obligations of an authority.

(f) Authorization to control airports.—Nothing in this chapter shall be construed to prevent an authority which owns or operates an airport as a project from leasing airport land on a short-term or long-term basis for commercial, industrial or residential purposes when the land is not immediately needed for aviation or aeronautical purposes in the judgment of the authority.

(g) Authorization to make business improvements and provide administrative services.—An authority may be established to make business improvements or provide administrative services in districts designated by a municipality or by municipalities acting jointly and zoned commercial or used for general commercial purposes or in contiguous areas if the inclusion of a contiguous area is directly related to the improvements and services proposed by the authority. The authority shall make planning or feasibility studies to determine needed improvements or administrative services.

(1) The authority shall be required to hold a public hearing on the proposed improvement or service, the estimated costs thereof and the proposed method of assessment and charges. Notice of the hearing shall be advertised at least ten days before it occurs in a newspaper whose circulation is within the municipality where the authority is established.

At the public hearing any interested party may be heard.

(2) Written notice of the proposed improvement or service, its estimated cost, the proposed method of assessment and charges and project cost to individual property owners shall be given to each property owner and commercial lessee in benefited properties in the district at least 30 days prior to the public hearing.

(3) The authority shall take no action on proposed improvement or service if objection is made in writing by persons representing the ownership of one-third of the benefited properties in the district or by property owners of the proposed district whose property valuation as assessed for taxable purposes shall amount to more than one-third of the total property valuation of the district. Objection shall be made within 45 days after the conclusion of the public hearing. Objections must be in writing, signed and filed in the office of the governing body of the municipality in which the district is located and in the registered office of the authority.

2001, June 19, P.L. 287, No. 22, § 1, imd. effective. Amended 2001, Dec. 17, P.L. 926, No. 110, § 3, retroactive effective June 19, 2001; 2003, Dec. 30, P.L. 404, No. 57, § 1.

1 53 P.S. § 68007.

2 "act" in enrolled bill.

§ 5620. Exemption from taxation and payments in lieu of taxes

The effectuation of the authorized purposes of authorities created under this chapter shall be for the benefit of the people of this Commonwealth, for the increase of their commerce and prosperity and for the improvement of their health and living conditions. Since authorities will be performing essential governmental functions in effectuating these purposes, authorities shall not be required to pay taxes or assessments upon property acquired or used by them for such purposes. Whenever in excess of 10% of the land area of any political subdivision in a sixth, seventh or eighth class county has been taken for a waterworks, water supply works or water distribution system having a source of water within a political subdivision which is not provided with water service by the authority, in lieu of such taxes or special assessments the authority may agree to make payments in the county to the taxing authorities of any or all of the political subdivisions where any land has been taken. The bonds issued by any authority, their transfer and the income from the bonds, including any profits made on their sale, shall be free from taxation within the Commonwealth.

2001, June 19, P.L. 287, No. 22, § 1, imd. effective.