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Chief, Section of Administration
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Washington, DC 20423-0001

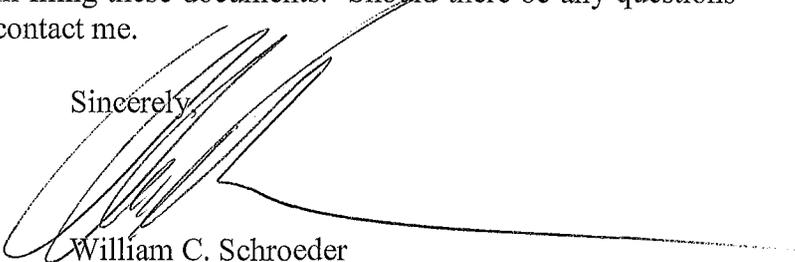
RE: **FD 35915**
Tri-City Railroad Company, LLC vs. The City Of Kennewick; and The City Of Richland

Dear Madam:

Enclosed please find Petitioner Tri-City Railroad Company's Rebuttal Brief re: Petition for Declaratory Order. It is being served both electronically, and by hard copy.

Thank you for your assistance in filing these documents. Should there be any questions or comments, please do not hesitate to contact me.

Sincerely,



William C. Schroeder

Enclosures

cc: Ms. Heather Kintzley (w/encs. - via email and hand delivery)
Ms. Lisa Beaton (w/encs. - via email and hand delivery)
Mr. P. Stephen DiJulio (w/encs. - via email and hand delivery)

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No. FD 35915

**Before the
SURFACE TRANSPORTATION BOARD**

TRI-CITY RAILROAD COMPANY, LLC, a Washington limited liability
company,

Petitioner,

vs.

THE CITY OF KENNEWICK, of the State of Washington, located in
Benton County, Washington; THE CITY OF RICHLAND, of the State of
Washington, located in Benton County, Washington,

Respondents.

**TCRY'S REBUTTAL BRIEF RE: PETITION FOR
DECLARATORY ORDER**

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I. INTRODUCTION

For the sake of clarity, Tri City Railroad LLC (“TCRY”) presents its Rebuttal Verified Statements in a format that allows the Surface Transportation Board (“Board”) to see specifically what testimony from witnesses for the City of Kennewick and the City of Richland (“Cities”) is being rebutted. Similarly, TCRY has organized its Rebuttal Brief so that the rebuttal provided generally corresponds to the order of arguments presented by the Cities in their Reply Brief.

II. THE CITIES’ BLANKET DENIALS OF FACTUAL ALLEGATIONS ARE INVALID UNDER 49 CFR 1112.6

On May 21, 2015, the Board’s Decision initiated modified proceedings, and treated TCRY’s pleadings as its opening statement. The Cities, in their Reply Brief, make the following statement: “The Cities deny all factual allegations contained in TCRY’s Petition, unless otherwise contained herein.” (Cities’ Reply Brief p. 5). The Cities’ blanket denials are contrary to 49 CFR 1112.6, which provides that “reply and rebuttal verified statements will be considered to have admitted the truth of material allegations of fact contained in their opponents’ statements unless those allegations are specifically challenged.”

The factual averments of TCRY’s witness Affidavits were largely not “specifically challenged” by the Cities’ witnesses. For example, none

of the Cities' witnesses challenged the Affidavit of Rhett Peterson, which provides the following unrebutted testimony:

Between the at-grade crossing at Steptoe Street in the northwest, and the at-grade crossing at Edison Street in the southeast, are approximately 2.6 miles of track which are uninterrupted by any at-grade crossings. TCRY, as lessee of the track west of Richland Junction, is responsible for dispatch and management of use of the track by TCRY, Union Pacific, and BNSF. Should the proposed at-grade crossing be constructed, it will bisect this uninterrupted stretch of track at near the halfway point, impacting the ability of TCRY, as dispatcher, to stop or stage a unit train at this location. Moreover, to accommodate expected future unit train traffic by both UP and BNSF, TCRY is exploring expanding the length of the existing 1900-foot passing track by as much as 10,000 feet, so that the parallel main and passing tracks can accommodate unit trains.

(March 19, 2015 Affidavit of Rhett Peterson re: Petition for Declaratory Order, ¶¶ 3, 4)

III. REBUTTAL EVIDENCE SUBMITTED BY TCRY

TCRY's Rebuttal is supported by the materials and Affidavits submitted with its Petition for Declaratory Order ("Petition"), portions of the materials submitted by the Cities in their Reply Brief, the following documents, and the Rebuttal Verified Statements:

1. The following document from the City of Richland, describing the Cities' agreements with Union Pacific and BNSF securing those

railroads' non-objection to the Cities' proposed Center Parkway at-grade crossing:

The city's economic development goals have long sought expanded industrial development in the Horn Rapids Industrial Park and expanded retail / commercial development in the Tapteal Business Center. City-provided infrastructure in the Horn Rapids Industrial Park includes two miles of city-owned industrial railroad track.

Since the late 1990's, Richland and Kennewick's transportation plans have included an extension of Center Parkway between Tapteal Drive in Richland and Gage Boulevard in Kennewick. Center Parkway is necessary to improve vehicle circulation opportunities and support highest and best use development of the Tapteal Business Center and west Gage Boulevard area. Since approximately 2000, the Tri-City Railroad (TCRR), Union Pacific Railroad (UPRR), and Burlington Northern Santa Fe Railroad (BNSF) have interchanged rail cars at Richland Junction, located on the alignment of the proposed Center Parkway. The railroads have refused city requests to relocate interchange operations and permit completion of Center Parkway using an at-grade railroad crossing.

In mid-2010, city staff, working with a consultant team, drafted a Horn Rapids Standard Form Track Use Agreement linking access to the city's industrial park railroad track to railroad cooperation on Center Parkway. The Agreement provided standard terms for all interested railroads to access the Horn Rapids track. In January 2011, the BNSF entered into the agreement. The proposed agreement represents completed negotiations with the UPRR, largely to the same terms agreed to by BNSF. The UPRR and BNSF agree to pay an annual access fee, indemnify the city for damages caused by railroad operations, operate under the city's authority to ensure fair access to both railroads and allow completion of Center Parkway, including an at-grade railroad crossing. In addition to the standard terms, the UPRR agreement includes compensation paid by the city, for UPRR assets at Richland Junction, a roadway easement across UPRR property and impacts to UPRR operating costs due to the interchange relocation. The city acquires railroad materials present on UPRR property at Richland Junction. These materials may be salvaged or reused by the city in its industrial park development.

The Kennewick's City Council is considering a budget adjustment at their April 5th meeting to support this agreement.

UPRR will provide approximately \$15,000 annually to support track maintenance. The Agreement requires compensation to UPRR totalling \$2,100,000. Staff proposes that Kennewick provide \$1,000,000 and Richland provide \$1,100,000 because Richland will own the salvaged railroad materials. In addition, Richland's share of consultant and legal fees adds \$65,000. Staff proposes to fund Richland's share with \$415,000 from the LTGO 98 fund, \$250,000 from the Industrial Development Fund and \$500,000 from the Center Parkway project.

(See **Exhibit 1** to the Rebuttal Verified Statement of John Miller)

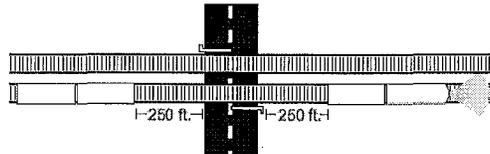
This evidence rebuts the suggestion in the testimony submitted by the Cities that Union Pacific and BNSF did not oppose the proposed crossing because it did not interfere with their railroad operations.

2. Relevant excerpts from the General Code of Operating Rules ("GCOR"), Seventh Edition, Effective April 1, 2015, attached as **Exhibit 2** to the Rebuttal Verified Statement of Foster Peterson. GCOR 6.32.4, 6.32.5, and 6.32.6 provide:

6.32.4 Clear of Crossings and Signal Circuits

Leave cars, engines, or equipment clear of road crossings and crossing signal circuits.

When practical, avoid leaving cars, engines, or equipment standing closer than 250 feet from the road crossing when there is an adjacent track.



[Diagram A.]

6.32.5 Actuating Automatic Warning Devices Unnecessarily

Avoid actuating automatic warning devices unnecessarily by leaving switches open or permitting equipment to stand within the controlling circuit. If this cannot be avoided and if the signals are equipped for manual operation, a crew member must manually operate the signal for movement of traffic. A crew member must restore signals to automatic operation before a train or engine occupies the crossing or before it leaves the crossing.

6.32.6 Blocking Public Crossings

When practical, a standing train or switching movement must avoid blocking a public crossing longer than 10 minutes.

This is to rebut the Cities' testimony and argument that the construction of the proposed Center Parkway at-grade crossing would not interfere with current or planned railroad operations. As described by railroad operations expert Foster Peterson, construction of the crossing, by operation of applicable GCOR rules, will exclude the use of nearly 600 feet of TCRY's 1900 foot passing track for car storage, will significantly impede switching operations near the proposed crossing, and will interfere with TCRY's ability to pause or hold a manifest or any unit train without violating best railroad practices by fouling an at-grade crossing for unknown lengths of time.

3. Relevant excerpts from the testimony of Mr. Gary Ballew, City of Richland's Economic Development Manager, on November 20, 2013, before Administrative Law Judge Torem of the Washington State Utilities and Transportation Commission ("UTC"), as elicited by counsel for the Cities, Mr. Stephen DiJulio, (**Exhibit 3** to the Rebuttal Verified Statement of John Miller), as well as the following excerpt from the order quoted in TCRY's Petition at pp. 15-16:

Gary Ballew, the City of Richland's Economic Development Manager, testified that the Richland City Council recently approved a series of development agreements to construct a rail loop of sufficient size to service unit trains in the Horn Rapids area. Mr. Ballew expects this new rail loop will be operational by summer 2015 and able to process the equivalent of two and a half unit trains per week (approximately one unit train entering or leaving the facility each day).

This testimony is to rebut the contention in Mr. Rogalsky's Verified Statement that "the City of Richland never made this rail traffic projection" of "as many as 12,500 inbound and 12,500 outbound railcars per year". Since a unit train has an average of 100 to 120 cars, and "two and a half unit trains per week" would constitute about 12,500 carloads, or as many as 12,500 inbound and 12,500 outbound railcars per year on TCRY's tracks.

4. Photographs of TCRY's railyard and the industrial lead to the Preferred Freezer Services plant, showing the refrigerated railcars delivered to TCRY in early June, 2015, in anticipation of the opening of the plant. (**Exhibit 3** to the Rebuttal Verified Statement of Rhett Peterson; **Exhibit 3** to the Rebuttal Verified Statement of Foster Peterson)

These photographs rebut the contention that the establishment of the proposed at-grade crossing will not interfere with TCRY's current or planned railroad operations, as the fact that TCRY's railyard and the industrial lead to the Preferred Freezer Services plant are already over capacity means that it is critical for TCRY's parallel main and 1900 foot passing track remain available and unimpeded by the restrictions upon railcar storage and switching, as well as train pausing and holding, inherent in the presence of an at-grade crossing, regardless of the safety equipment.

5. 2013 Tri-City Railroad Carload by Interchange Road Report, 2014 Tri-City Railroad Carload by Interchange Road Report, and 2015 year-to-date Tri-City Railroad Carload by Interchange Road Report. (**Exhibit 1** to the Rebuttal Verified Statement of Lisa Anderson)

These documents demonstrate that TCRY handled 2,247 carloads in 2013, 2,626 carloads in 2014, and 1,067 as of June 17, 2015. This is to

rebut the testimony and contentions that the testimony of John Miller in his March 19, 2015 Affidavit to this Board concerning TCRY's railcar counts for 2014, 2015, and 2015 were "inflated", "unsupported", and "misleading".

6. 2015 Cash Flow Forecast – Handling Carrier Revenue Calculation. (**Exhibit 2** to the Rebuttal Verified Statement of Lisa Anderson) TCRY's 2015 Cash Flow Forecast projects 1,550 carloads through July 30, 2015, and an additional 2,625 from July 31 through December 31 (proprietary financial information has been redacted from the Exhibit). The reason for this projection is the anticipated opening of the Preferred Freezer Services plant in July, 2015. At this juncture, TCRY is on target to meet these projected numbers.

This is to rebut the contentions that the opening of the Preferred Freezer Services plant will not have an effect on TCRY's business or its railroad operations.

7. February 2, 2015 to June 17, 2015 Railcars On Line graph. (**Exhibit 3** to the Rebuttal Verified Statement of Lisa Anderson). This document depicts the increase in empty railcars being stored on TCRY's

line, which increased significantly in early June, 2015, in anticipation of the opening of the Preferred Freezer Services plant.

This is to rebut the contentions that the opening of the Preferred Freezer Services plant will not have an effect on TCRY's business or its current and planned railroad operations; that TCRY "inflates" its numbers; and that TCRY is "misleading."

8. April 13, 2015 to June 21, 2015 BNSF Railcar Count to Horn Rapids Rail Loop. (**Exhibit 1** to the Rebuttal Verified Statement of Rhett Peterson). This document depicts, on a week to week basis, the number of railcars BNSF is taking across TCRY's tracks to serve customers at the City of Richland's still-in-development Horn Rapids rail loop.

This is to rebut the contention that the construction of the Horn Rapids rail loop will not affect on the number of railcars sent across TCRY's tracks, or on TCRY's railroad operations on those tracks.

9. October 19, 2006 Railroad Crossing Agreement. (**Exhibit 4** to the Rebuttal Verified Statement of John Miller) This document is an agreement among the Cities and the Port of Benton concerning the proposed at-grade crossing and provides in pertinent part:

3. The Cities acknowledge and agree that the easement is subject to the rights of TC&ORR set forth in the Lease Agreement attached as Exhibit 2. The Cities must obtain additional authority from TC&ORR, either by contract or by exercise of authority granted by law, for the extension of The Center Parkway, construction of the crossing, installation of equipment and maintenance and operation of the crossing and safety equipment.

This is to rebut the contention that the Cities have the approval of the Port of Benton for construction of the proposed at-grade crossing over TCRY's objection.

10. May 1, 2015 Brief of Appellant in Washington State Court of Appeals, Division III No. 330311. (**Exhibit 2** to the Rebuttal Verified Statement of John Miller). This document describes TCRY's pending appeal of the UTC's approval of the proposed at-grade crossing. The matter on appeal is one of statutory interpretation under Washington law.

TCRY's appeal does not concern the question of whether the proposed at-grade crossing would unreasonably interfere with current or planned railroad operations, as that issue was not before the UTC.

This rebuts the contentions that TCRY 'has already made' and/or 'has already lost' the issue presented by the Petition in another forum.

11. The Rebuttal Verified Statement of Counsel, with the **Exhibits** listed below, to rebut the contention by the Cities set forth in page 27 of

their Reply Brief that TCRY did not file the Petition with the Board until after the Cities had initiated state court condemnation proceedings. As the documents establish, the Cities filed their state court condemnation action nearly two months after TCRY filed the Petition. The documents further demonstrate that the Cities did not inform the Benton County Superior Court of the pendency of the Petition:

- April 13, 2015 letter from TCRY's counsel to each councilmember of the City of Kennewick;

- April 15, 2013 letter from TCRY's counsel to the mayor and each councilmember of the City of Richland;

- April 21, 2015 Council Agenda Item Coversheet, with attached condemnation ordinances;

- May 7, 2015 Summons and Petition for Condemnation in State of Washington, County of Benton Superior Court No. 15-2-01039-2;

- May 29, 2015 email exchange;

- June 1, 2015 email exchange;

- June 2, 2015 email exchange;

- June 3, 2015 email exchange;

- June 5, 2015 email exchange.

(Rebuttal Verified Statement of Counsel, **Exhibits 1 - 11**)

As noted by the Board in its May 18, 2015 Decision, “[a]lthough the Cities were scheduled to consider the condemnation ordinances in April, the record is silent concerning the outcome.”

On April 13, 2015, TCRY served each member of the City of Kennewick’s City Council a letter explaining that TCRY had filed a Petition for Declaration Order with the Surface Transportation Board concerning jurisdiction over establishing the proposed at-grade crossing, and asked the City of Kennewick to hold their consideration of the condemnation ordinance in abeyance until after the Board ruled. On April 15, 2015, TCRY served the Mayor and council members of the City of Richland a letter describing the existence of TCRY’s Petition for Declaratory Order, and asked the City of Richland to hold in abeyance their consideration of the proposed condemnation ordinance until after the Board had considered the matter.

Despite having been informed of the pendency of these proceedings before the Board, both Cities adopted their respective condemnation ordinances, and, significantly, the documents concerning the adoption of the ordinances do not mention the existence of the pendency of these proceedings before the Board.

On May 7, 2015, TCRY was served with a Summons and Complaint, State of Washington, County of Benton Superior Court No.

15-2-01039-2. These condemnation pleadings are signed by the same attorneys representing the Cities of Kennewick and Richland in the instant matter before the Board. The condemnation pleadings do not mention the pendency of TCRY's Petition, though the condemnation pleadings were filed and served nearly two months after TCRY filed its Petition. The condemnation pleadings, by their terms, request expedited consideration pursuant to certain Washington State statutes.

On May 18, 2015, the Board issued its decision initiating a modified proceeding in the instant matter.

On May 29, 2015, TCRY received, via e-mail, a request for a one week extension on the City's Reply Brief to the Board. TCRY informed the Board that it had no objection.

On June 1, 2015, TCRY requested of the Cities, as well as the Port of Benton and the County of Benton, which are co-defendants in the state court condemnation matter, whether the Cities would agree to stay the state court condemnation matter during the pendency of the Board's consideration of the Petition. The Cities declined, though the Cities represented they would not proceed in the condemnation action until the Board rules.

12. Copy of *BNSF Ry. Co. v. Tri-City & Olympia R. Co. LLC*, 835 F.Supp.2d 1056 (2011) (**Exhibit 12** to the Rebuttal Verified Statement of Counsel) and the cover and signature page of a June 9, 2014 Petition for Reconsideration of Final Order, Petition for Rehearing and Petition for Stay of Order (**Exhibit 13** to the Rebuttal Verified Statement of Counsel).

Present counsel for TCRY was retained in the summer of 2014 after the conclusion of the UTC administrative proceeding. Present counsel for TCRY was likewise not counsel in the above-referenced *BNSF v. TCRY* matter.

The Cities imply in their Reply Brief that TCRY and its counsel should not be trusted in the recitation of the facts and the law in the present matter because, the Cities assert, TCRY misled or misstated certain things in the above-referenced proceedings.

These arguments are disappointing, and, more importantly, unfounded for two reasons. First, the portions of the federal case referred to by the Cities (ironically) do not stand for the proposition they claim. Second, neither TCRY's present counsel, nor its primary affiant John Miller, nor its railroad operation expert Foster Peterson, were associated with TCRY during either of the cases / proceedings referenced by the Cities.

Specifically, this is being offered to rebut the contentions in the Cities' Reply Brief, as well as ¶ 3 **Exhibit A** of the DiJulio Verified Statement.

13. Picture of the camera set up in what appears to be a supply closet on the third floor of the Holiday Inn Express near the proposed crossing, for what the Cities refer to as a "field study". (Approximately time stamp 2015/03/28 05:00:04 of Exhibit A to the Verified Statement of Rogalsky; screen shot attached as **Exhibit 3** to the Rebuttal Verified Statement of Foster Peterson).

Picture showing the camera angle from the supply room in the hotel as part of the Cities' "field study". (Approximately time stamp 2015/03/09 12:12:58 of **Exhibit A** to the Verified Statement of Rogalsky; screen shot attached as **Exhibit 3** to the Rebuttal Verified Statement of Foster Peterson).

Picture showing the hotel from which the Cities' "field study" was conducted. (**Exhibit 3** to the Rebuttal Verified Statement of Foster Peterson).

These pictures demonstrate that the Cities were conducting their "field study" primarily while hidden in the supply closet of a Holiday Inn

Express. These exhibits are to rebut the contentions of the Cities witnesses that TCRY “staged” railcars to “mislead” the Board.

14. Rebuttal Verified Statement Foster Peterson.¹ Foster Peterson is an expert consult in railroad operations. He is also presently the manager of operations of several railroads, as described more specifically in his rebuttal verified statement. He is the author of numerous publications on railroad operations, as detailed in his Rebuttal Verified Statement. His Rebuttal Verified Statement is being offered to rebut ¶¶ 8, 14, 16, 18, 19, 25, 26 of the Rogalsky Verified Statement, ¶¶ 11, 13, 17, 18, 19, 20, 21, 22, 23, 24 of the Grabler Verified Statement, and ¶¶ 13, 14, 15, 18, 19, 20, 21, 22, 23 of the Jeffers Verified Statement.

15. The Rebuttal Verified Statement of John Miller is being offered to rebut ¶¶ 5, 6, 7, 8, 9, 11, 12, 13, 14, 16 of the Rogalsky Verified Statement, ¶¶ 2, 9, 10, 11, 15, 16, 17, 19, 23, 24 of the Grabler Verified Statement, and ¶¶ 2, 5, 6, 10, 12 of the Jeffers Verified Statement.

16. The Rebuttal Verified Statement of Rhett Peterson is being offered to rebut ¶¶ 14, 16, 18, 19, 25, 26 of the Rogalsky Verified

¹ As noted in Foster Peterson’s Rebuttal Verified Statement, he is unrelated to the Peterson family which owns TCRY.

Statement, ¶¶ 13, 17, 18, 19, 23, 24 of the Grabler Verified Statement, and ¶¶ 11, 16, 17 of the Jeffers Verified Statement.

17. The Rebuttal Verified Statement of Lisa Anderson is being offered to rebut ¶¶ 11, 12 of the Rogalsky Verified Statement, ¶¶ 14 of the Grabler Verified Statement, and ¶¶ 13, 14 of the Jeffers Verified Statement.

18. The Rebuttal Verified Statement of Randolph Peterson is being offered to rebut ¶¶ 10 of the Rogalsky Verified Statement, and ¶¶ 8-9 of the Jeffers Verified Statement.

IV. "STANDARD OF REVIEW"

TCRY requested that the Board initiate proceedings and grant its Petition, finding that the proposed at-grade crossing over TCY's parallel main and 1900 foot passing tracks would unreasonably interfere with TCY's current or planned railroad operations.

As provided in the Board's May 21, 2015 Decision, "[t]he Cities did not file a reply to the petition for declaratory order[.]" The Board then ruled that it "has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 to issue a declaratory order to eliminate a controversy or remove uncertainty." "Here," the Decision continued, "a controversy

exists as to whether the proposed condemnation action to construct an at-grade crossing is preempted under § 10501(b), and the record is incomplete.”

V. REBUTTAL FACTUAL AND PROCEDURAL BACKGROUND

A. TCRY’s Lessee status is immaterial to the question of whether the proposed at grade crossing will unreasonably interfere with current or planned railroad operations.

One of the principle arguments made by the Cities, referenced throughout their Reply Brief, is that TCRY leases the track at issue from the Port of Benton. The Cities then go on to imply that because TCRY operates on leased track this is a factor the Board should consider in determining the issues before it.

As Foster Peterson testified in his Rebuttal Verified Statement: “it is common in the railroad industry to lease tracks for railroad operations.” (Foster Peterson Rebuttal Verified Statement at ¶6, 13) “Of the four short line railroads I manage in Tennessee, three of them either lease or operate upon track they do not own. Class I railroads also often operate on leased track; one of Norfolk Southern’s main lines through the state of North Carolina is owned by the state, and is leased and operated upon by that railroad.” (Foster Peterson Rebuttal Verified Statement at ¶6, 13)

John Miller “...was formerly the Manager of Short Line Development for Union Pacific, managing the relationship between Union

Pacific and about 60 short line railroads. In [his] experience, it is common for railroads, including short lines, to operate on leased track.” (John Miller Rebuttal Verified Statement at ¶ 7, 17).

As TCRY quoted in its Petition at 3: “The Board has jurisdiction over rail transportation, regardless of whether the property upon which that transportation is being conducted is owned, leased, or held in easement by the operating railroad.” *Norfolk Southern Railway Company and the Alabama Great Southern Railroad Company – Petition for Declaratory Order*, STB Finance No. 35196, 2010 WL 691256 at *5 (March 1, 2010).

TCRY advised the Board when it filed the Petition that it operates on approximately 16 miles of track, which is owned by the Port of Benton.

As the Board explained in the *Norfolk Southern* case quoted above, it is settled law that it has jurisdiction over railroad operations regardless of the specific property interest any given railroad has in the track it is operating upon. Therefore, the Cities’ arguments are immaterial to the question presented of whether the proposed at-grade crossing will unreasonably interfere with current or planned railroad operations.

B. The Cities' Assertions Concerning the *BNSF v. TCRY* Case Are Disappointing And Irrelevant.

In TCRY's Petition at p. 5 note 2, TCRY provides the Board with the citation to *BNSF v. TCRY*, 835 F.Supp.2d 1056 (E.D. Wash 2011) and noted: "That case also provides a summary of the history of portions of this trackage, from its construction related to the development of the Hanford area in the late 1940s up through the early 2000s." (Petition, p. 5 note 2).

Present counsel for TCRY were retained in summer 2014, after the completion of the UTC administrative proceedings. (Rebuttal Verified Statement of Counsel ¶ 12). Present counsel for TCRY likewise did not represent TCRY in its 2011 federal civil suit against BNSF. (Rebuttal Verified Statement of Counsel ¶ 12). According to the published *BNSF v. TCRY*, counsel for the respective parties in that suit were:

Leland Barrett Kerr, Patrick J. Galloway, Kerr Law Group, Kennewick, WA, Matthew R. Brodin, Timothy R. Thornton, Briggs and Morgan, PA, Minneapolis, MN, for Plaintiff.

Tim D. Wackerbarth, Lane Powell, P.C., Rob J. Crichton, Keller Rohrback, LLP, Seattle, WA, Lucinda Jean Luke, Thomas A. Cowan, Jr., Cowan, Moore, Stam, Luke & Petersen, Richland, WA, for Interveners Plaintiffs.

David Lawrence Meyer, Morrison & Foerster, LLP, Washington, DC, Derek F. Foran, Morrison & Foerster, LLP, San Francisco, CA, Nicholas D.

Kovarik, Dunn & Black, PS, Spokane, WA, Paul J. Petit, Kennewick, WA, Robert A. Dunn, Dunn & Black, PS, Spokane, WA, Brandon L. Johnson, Minnick Hayner, P.S., Walla Walla, WA, for Defendant.

The Cities, at p. 8 of their Reply Brief, assert that TCRY “misstated case law” in the *BNSF v. TCRY* case and imply that TCRY’s present counsel was involved in the misstatement. To support this contention, the Cities fail to provide a copy of this published federal case which lists the counsel involved. Instead, the Cities, through the Verified Statement of Counsel, Stephen DiJulio, provide a copy of the case, apparently obtained through PACER, which does not list counsel (See **Exhibit A** to the Verified Statement of Stephen DiJulio).

BNSF v. TCRY concerned a dispute over the interpretation of an Indenture from the Atomic Energy Agency which granted BNSF’s predecessor in interest a contractual right to use the trackage leased by TCRY without an interchange agreement. The case speaks for itself and does not bear upon the issue before the Board.

The Cities claim that TCRY, through its counsel at the time, “misstated the law,” is also unsupported. The BNSF court found at p. 1066 that it disagreed with Counsel as to whether a particular case cited by TCRY supported a contention concerning federal injunctive relief.

It appears the Cities are asserting that based on the *BNSF v. TCRY* case TCRY and its present counsel should not be trusted in its recitation of facts and law. That the Cities have chosen to engage in this style of advocacy is disappointing, is unhelpful, and, most importantly, is without underlying merit. Not only is such style of advocacy disappointing, but it also has no basis in fact.

C. The Proposed Crossing Will Interfere With Current And Planned Railroad Operations.

The question before the Board is whether the proposed at-grade crossing would unreasonably interfere with current or planned railroad operations. The Cities offer no testimony from a railroad operations expert. Instead, the Cities offer the opinions of traffic engineers as to railroad operations. Based on these opinion, the Cities contend that TCRY is “misleading” the Board with respect to its railroad operations.

As described by Lisa Anderson, Corporate Secretary and Vice President of Administration, “TCRY needs to keep careful records of carloads handled for a number of business reasons.” (Rebuttal Verified Statement of Lisa Anderson at ¶ 4). “All cars which enter TCRY’s tracks must be tracked, and the information sent to the Union Pacific for payment purposes, to the railcar owners and leasing companies, who use the information to track where their railcars are and how much time they spent

in the TCRY system.” (Id.) “To track and send out this information, we use software and services provided by ShipXpress.” (Id.)

As demonstrated in **Exhibit 1** to Lisa Anderson’s Rebuttal Verified Statement, the Carload by Interchange Road Reports for 2013, 2014, and 2015 through June 17 provide that in 2013 TCRY handled 2,247 carloads, in 2014, TCRY handled 2,626 carloads, and in 2015 through June 17, TCRY has handled 1,067 carloads. (Id.)

“With respect to 2015, TCRY’s carloads are not consistent through the year, being affected by the economy and the season. However, when TCRY prepares its forecasts each year for revenue purposes, it tries to anticipate how many carloads it will have at various times of the year.” (Id.) TCRY 2015 Cash Flow Forecast projects 1550 carloads through July 30, 2015, and an additional 2,625 from July 31 through December 31. (Id.) “The reason for this projection is the anticipated opening of the Preferred Freezer Services plant in July, 2015.” (Id.)

As described by Rhett Peterson, Manager of Operations at TCRY, “There are two separate sources of the projected increase in railcar traffic across TCRY’s tracks. The first is the Horn Rapids rail loop, built by the City of Richland, which will primarily serve the grain industry.” (Rebuttal Verified Statement of Rhett Peterson at ¶ 3). As detailed in his verified

statement, railcars are already serving the Horn Rapids rail loop. (Id. at ¶ 3, **Exhibit 1**).

“Shortly after May 26, 2015, (a few days after the cut off date of the material supplied by the Cities from the hotel supply room “field study”) the pending opening of the Preferred Freezer Services plant resulted in 142 empty refrigerated railcars being sent by Union Pacific to TCRY to store until the opening of the plant in July.” (Id.) As demonstrated by **Exhibit 2** to the Rhett Peterson Verified Statement, the spike in empty railcars being stored on line by TCRY in early June represents the increase in refrigerated cars in anticipation of the Preferred Freezer Services plant opening in July. (Id.)

“Additional refrigerated railcars have since arrived, resulting in TCRY’s rail yard, and nearby industrial lead being overcapacity with awaiting empty refrigerated railcars.” (Id.) “The tremendous amount of activity seen is indicative of the increasing capacity of TCRY operations.” (Id.) “In this 15 year history of TCRY, we have never been inundated with railcars in this fashion.” (Id.) The Rhett Peterson Verified Statement provides as **Exhibit 3** a series of photographs depicting the refrigerated railcars at TCRY’s railyard, and lined up on the industrial lead going to the Preferred Freezer Services plant. (Id.)

Additionally, as of June 1, 2015, TCRY is the contractual rail services manager for Preferred Freezer Services, meaning TCRY will be responsible for the management and dispatch of all railroads which provide service to the Preferred Freezer Services plant. (Id.)

The Cities contend that its “field study” “showed only TCRY and BNSF trains and not UPRR trains during the study period (February 10, 2015 to May 26, 2015).” (Jeffers Verified Statement ¶ 17). As noted by Rhett Peterson, Mr. Jeffers appears not to understand the relationship between Union Pacific and TCRY. As Union Pacific’s handling carrier, TCRY interchanges with Union Pacific in Kennewick, so by the time the railcars enter TCRY’s tracks, the Union Pacific railcars are being handled by TCRY. (Rebuttal Verified Statement of Rhett Peterson at ¶ 17).

The basis for the Cities’ contention that TCRY’s 2015 car count projections are “inflated” is the following quote from the Jeffers Verified Statement: “TCRY’s petition states that ‘TCRY is expected to handle approximately 4,175 carloads on this trackage in 2015.’ Actual track usage does not support TCRY’s estimate.” (Jeffers Verified Statement ¶ 14).

Operations Manager, Rhett Peterson, and Railroad Operations Expert, Foster Peterson explain that Mr. Jeffers reaches his conclusion based upon his lack of knowledge and experience of the railroad industry. First, a short line railroad, such as TCRY, which serves customers

predominantly linked to the agriculture season also experiences the high and low seasons of its customers. Second, as testified by Foster Peterson, it appears that “Mr. Jeffers believes rail traffic is both static and uniform throughout the year. Neither assumption is valid.” (Rebuttal Verified Statement of Foster Peterson at ¶ 24). As described above, TCRY is now the rail manager for the Preferred Freezer Services plant, and has already received a full railyard of several hundred refrigerated cars in anticipation of the plant’s July 2015 opening. Further, as discussed in the Lisa Anderson Rebuttal Verified Statement, the 2015 projection is based upon the assumption that the Preferred Freezer Services plant will result in a spike of rail traffic. The 2015 projection was for approximately 1500 carloads by July 30, 2015. As of the time of this filing, TCRY has already handled approximately 1100 carloads in 2015. TCRY projects handling approximately 2500 carloads between July 31 and December 31, 2015, due almost entirely to the Preferred Services Freezer plant. TCRY recent inundation of its railyard to overcapacity with refrigerated cars is consistent with its projections of a spike in railcars handled beginning and after July 31, 2015.

D. The Proposed Crossing Will Interfere with Current and Planned Railroad Operations Regardless Of The Label Affixed To TCRY's 1900 Foot Passing Track.

The Cities argue strenuously, though without citation to a GCOR, or a CFR promulgated by the FRA, that TCRY's 1900 foot parallel siding, which TCRY refers to as its passing track, is not a passing track. One of the Cities' experts, Ms. Grabler, an engineer, though whom has no disclosed experience in railroad operations, has offered the following opinion:

The siding track is not being used as a typical railroad passing track, because of the parked rail cars that the TCRY is parking on the siding track. There appears no reason for such conduct other than an attempt to mislead the STB. And, TCRY is parking rail cars on the siding tracks for several days at a time, which would preclude the TCRY Railroad from using the siding as a passing track (as TCRY apparently asserts).

(Grabler Verified Statement ¶ 19).

In rebuttal Rhett Peterson describes the use of the passing track as follows:

Ms. Grabler contends that the siding was not used as a "passing" track during their hotel supply closet "field study" – I think by 'passing', Ms. Grabler means a time in which both tracks were clear, one train was directed onto the siding, and another train either overtook or passed from the opposite direction. Since TCRY routinely uses either one end or the other of the passing track for railcar storage, it is likely accurate during the time

period of the hotel supply closet “field study” that no direct overtaking occurred. The misunderstanding, though, seems to be one of operations terminology. This siding is parallel to a main track, outside of a railyard, has switches at both ends, and is of sufficient length (1900 feet) that it is a ‘passing’ track, as opposed to a different type of siding or auxiliary track (*e.g.* spur, industrial lead). As I have described, and as John Miller and Foster Peterson described, a siding like this passing track has a number of uses in railroad operations. The focus on the term ‘passing’ in the phrase ‘passing track’ simply misunderstands the terminology (much as one does not necessarily drive on a driveway or park on a parkway).

Moreover, from a railroad operations standpoint, Ms. Grabler’s statement that parking railcars would ‘preclude...[use] as a passing track’ is incorrect. First, it is not unusual for TCRY spot and store cars for varying lengths of time on that siding, and normal operations are to spot the cars near the switch. Second, the parallel siding has switches at both ends. Given that configuration, railcars can be switched, spotted, and stored at one end, while the other is kept clear for moving and holding trains, to allow passing. So, rather than ‘precluding’ use as a passing track, TCRY’s practices are consistent with normal railroad operations, making a variety of uses of the 1900 foot siding, and able to change those uses as circumstances call for. If, on the other hand, the proposed crossing is built, it will eliminate use of 1/3rd of the 1900 foot siding, so TCRY will not have the ability in the future to simultaneously store cars and hold and pass trains at that location, and TCRY has no other equivalent siding to relocate its operations. As a result, the construction of the proposed crossing will have a substantial impact upon TCRY’s current and planned railroad operations.

(Id.)

As described by railroad operations expert Foster Peterson:

[F]rom a railroad operations standpoint, her statement that parking railcars would 'preclude...[use] as a passing track' is incorrect. First, it is not unusual for a small, Class III railroad with only one parallel siding outside of its railyard to spot and store cars for varying lengths of time on that siding, and as I've described above, normal operations would be to spot the cars near the switch. Second, the significance of this parallel track to TCRY is that it has switches at both ends. Given that configuration, railcars can be switched, spotted, and stored at one end, while the other is kept clear for moving and holding trains, to allow passing. So, rather than 'precluding' use as a passing track, TCRY's practices are consistent with normal railroad operations, making a variety of uses of the 1900 foot siding, and able to change those uses as circumstances call for. If, on the other hand, the proposed crossing is built, it will eliminate use of 1/3rd of the 1900 foot siding, so TCRY will not have the ability in the future to simultaneously store cars and hold and pass trains at that location if it chooses or needs to, and TCRY has no other equivalent siding to relocate its operations. As a result, the construction of the proposed crossing will have a substantial impact upon TCRY's current and planned railroad operations.

(Rebuttal Verified Statement of Foster Peterson, ¶ 17)

E. TCRY Uses The Passing Track For Car Storage, Switching, And Other Railroad Purposes On A Daily Basis And It Is Integral To Its Railroad Operations.

The Cities' argument concerning the usage of the siding appears to be an amalgamation of two arguments: 1) that TCRY is untruthful about its car counts; and 2) TCRY is being untruthful concerning its use of the siding.

The Cities' "field study" confirms that TCRY frequently, if not daily, stores railcars at or near the location of the proposed at-grade crossing. As described above, the Cities' actual complaint seems to be semantic, in that the Cities do not like that a 1900 parallel siding with switches at both ends is called a "passing track." As described in the Rebuttal Verified Statements of Foster Peterson, Rhett Peterson, and John Miller, this siding is appropriately called a "passing track" because of its specific characteristics and configuration – unlike a spur or auxiliary storage track, this siding is parallel to a main, has switches at both ends, and is of sufficient length to hold a train.

More importantly, the Cities' contention concerning the label placed on this siding is irrelevant to the question of whether the proposed at-grade crossing will unreasonably interfere with current or planned railroad operations.

F. Kennewick Municipal Code And Controlling GCOR Provisions Demonstrate That The Proposed Crossing Would Unreasonably Interfere With Current Or Planned Railroad Operation.

As described by Railroads Operation Expert Foster Peterson, if a train being held at the proposed crossing location is there for more than 10 minutes, the train would have to be broken in order to clear the crossing. (Rebuttal Verified Statement of Foster Peterson at ¶ 8) Once a train is cut, there will be a delay for the reconnection proportional with the length of the train. (Id.) If the train sits broken for longer than four hours, a brake test must be done before moving the train. (Id.) This federal brake test delays the train for an amount of time proportional with the train's length. (Id.)

Foster Peterson further explains, that broken trains sitting too close to an at grade crossing can create a visual hazard (restricting motorist ability to see past railcars parked), meaning the railcars must be spotted at least 250 feet from each side of the new crossing, meaning that use of 550-600 feet of the parallel main and passing track are being eliminated (*i.e.* the width of the vehicular right of way, plus 250 feet to either side). (Id.)

In the present case, the Cities do not dispute that the Kennewick Ordinance exists or purports to regulate the subject matter of railroad operations. More importantly, though, the Cities do not dispute, and

cannot dispute lacking a railroad operations expert, that pursuant to standard railroading operation procedure, establishment of the proposed at-grade crossing is exclusive of normal railcar storage and switching operations at that same location, and therefore would unreasonably interfere with the current or planned railroad operations.

G. The Cities' Claim Of Essential Regional Improvement Does Not Trump Federal Law.

The Cities contend that “the crossing project is an essential regional improvement.” (Cities Reply Brief p. 15). The Cities cite no authority in support of their contention that if a project is an “essential regional improvement” the issue of whether the crossing unreasonably interferes with current or planned railroad operations is subsumed by local authority. The section of the Cities' Reply Brief discussing that topic is immaterial to the question presented before the Board.

H. The Cities' Claim Concerning “Extensive Review” Is Both Inaccurate And Immaterial.

As set forth in TCRY's Petition, the Cities have made several petitions to permit an at-grade crossing at this location, though circumstances at the location have changed in the previous decade. The petition to which they are presumably referring has undergone precisely the same (as-yet-incomplete) review as any other petition under state law.

There was a petition; there is presently an appeal; the appeal, under state law, is pending.

Separate, and independent from the state law appeal of the interpretation of Washington State statutes, is the question presented before the Board whether the proposed at-grade crossing unreasonably interferes with railroad operations.

I. In Planning For The Proposed Crossing, The Cities Failed To Consider Federal Law

The Cities contend that “the planning process for the crossing was thorough.” (Cities Reply Brief at p. 19). However, it should be noted that the Cities apparently did not consider federal law in its planning process, nor the role the Board plays in the regulation of interstate commerce by rail.

“Congress has delegated to the [Board] exclusive jurisdiction to regulate ‘transportation by rail carriers’ and ‘the construction, acquisition, operation, abandonment, or discontinuance’ of rail facilities . . . with the instruction that the agency ‘ensure the development and continuation of a sound rail transportation system’ [citation omitted].” *City of South Bend, IN v. Surface Transp. Bd.*, 566 F.3d 1166, 1168 (D.C. Cir. 2009).

J. The Cities Failed To Demonstrate The Proposed Crossing Would Not Unreasonably Interfere With Current Or Planned Rail Operations

There is no disagreement that the controlling statute is 49 USC 10501, nor that the question is whether the Cities' pending state law condemnation action, which was filed on May 7, 2015, during the pendency of the instant matter before the Board, is preempted.

There is further no disagreement that the applicable test is whether the exercise of state condemnation powers in this instance will unreasonably interfere with current or planned railroad operations.

The Cities' argument that the proposed at grade crossing will not 'block' TCRY's parallel main and 1900 foot passing track misunderstands the issue, from a railroad operations perspective. The proposed crossing runs across a parallel siding, rather than across one or two main tracks. As described above, and in the Rebuttal Verified Statements of Foster Peterson, Rhett Peterson, and John Miller, the existence of an at-grade crossing at this location is exclusive of railcar storage, and significantly impedes switching operations at the switch near that end of the passing track. Further, a new at-grade crossing at this location interrupts what is otherwise a 2.6 mile long stretch of main track sufficient to hold a unit train; TCRY does not have that ability elsewhere in its territory, which is

significant given the expected increase in the number of unit trains crossing TCRY's tracks.

Currently, no at-grade crossing exists at this location. The safety features described by the Cities are only made necessary by the creation of the new crossing. As noted by Foster Peterson:

Not having an at-grade crossing is, from a railroad operations standpoint, safer than installing a new at-grade crossing given that the separation of track and roadway removes the possibility of train / motor vehicle interaction. Describing establishing a new at-grade crossing, and then describing the warning systems protecting the crossing, only describes mitigating the safety risk you create by installing the new crossing in the first place. I agree with the quotation from the UTC in TCRY's Petition at page 20, that "the benefits to public safety alleged by the Cities are too slight on their own to support the [proposed crossing], even though the inherent risks are mitigated to a large extent by the project design."

(Rebuttal Verified Statement of Foster Peterson, ¶18).

VI. POINTS AND AUTHORITIES

As framed by the Board in its May 18, 2015 Decision, the issue is whether the proposed at-grade crossing would unreasonably interfere with TCRY's current or planned railroad operations. TCRY set forth the applicable case law in its petition, and the Cities, having cited many of the same cases, do not dispute that this is the right law, but only its applicability to the present case. The cases cited by TCRY as well as the

Cities on this issue speak for themselves, and will not be repeated. It is noteworthy that while TCRY referred the Board to several cases where the attempt to condemn a crossing over parallel main and siding tracks was preempted because the crossings unreasonably interfered with current or planned railroad operations, the Cities have not cited an example where the use of state condemnation over a parallel main and siding which would be exclusive of railcar storage and switching was not preempted.

TCRY has presented evidence through its own operations employees, and through the expert opinions of railroad operations expert, Foster Peterson, that building this particular at-grade crossing over TCRY's parallel main and 1900 foot passing track would unreasonably interfere with TCRY's operations because of the size and nature of TCRY's Class III operation, and the fact that this is TCRY's only uninterrupted parallel passing track outside of its yard.

The Cities reply focuses on road design and traffic safety. Given that the issue is whether the proposed crossing is exclusive of current uses of the siding for railcar storage and switching, and given that the Cities presented no evidence from a witness with experience or expertise in railroad operations, the Cities' descriptions of light, gates, and safety features do not address the issue, nor do they establish that the proposed

crossing is non exclusive, which is a requirement of the Board's "routine crossing" case law.

As described in the Petition, in the Rebuttal Verified Statement of Foster Peterson, and above, the only public safety this proposed crossing contributes to is mitigating the inherent danger its establishment creates in the first place. The Cities are not proposing to improve public safety by signaling an existing at-grade crossing. Rather, they are proposing establishing a new at-grade crossing within a half mile on either side of respectively a grade separated crossing and an at-grade crossing with lights and gates over only a main track north of TCRY's switch. That the Cities propose to mitigate with modern devices the danger inherent in a new at-grade crossing does not result in a net benefit to public safety. Further, it does not provide an independent justification responsive to the issue of whether the proposed at-grade crossing unreasonably interferes with current or planned railroad operations.

Since the parallel passing track in question is a siding and under the exclusive control of TCRY, 49 USC 10906 is also implicated. As the Board is aware, and as described in the case law cited by TCRY in its petition, 49 USC 10501 is a jurisdictional statute and 49 USC 10906 is an authority statute. The statutes have been read together to simultaneously deprive state courts of jurisdiction and the Board authorization to regulate

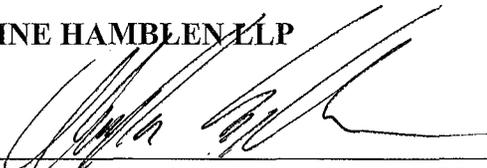
railroad management decisions over sidings. TCRY was unable to locate a case factually on point to the present issues which discusses the interplay of these two statutes under these circumstances. However, the jurisdictional question always returns to whether the proposed at-grade crossing unreasonably interferes with current or planned railroad operations.

VII. CONCLUSION

The proposed at-grade crossing will unreasonably interfere with TCRY's current and planned railroad operations, and is therefore preempted. TCRY asks the Board to issue a Declaratory Order finding that the Cities' pending state condemnation action, filed May 7, 2015 in Benton County Superior Court in the State of Washington, is preempted.

RESPECTFULLY SUBMITTED this 24th day of June, 2015.

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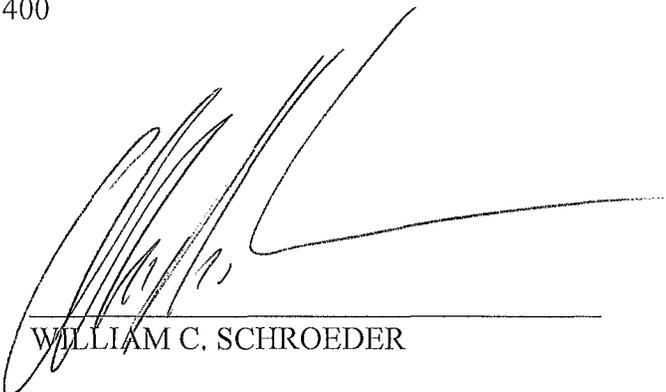
CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of June, 2015, I caused to be served a true and correct copy of the foregoing **REBUTTAL BRIEF**, by the method indicated below and addressed to the following:

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