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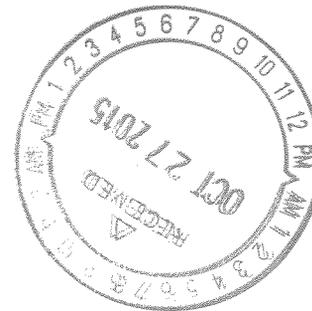
October 26, 2015

239438

## VIA FEDERAL EXPRESS

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W., Room 1034  
Washington, DC 20024

ENTERED  
Office of Proceedings  
October 27, 2015  
Part of  
Public Record



Re: **Docket No. FD 35905**  
**City of Woodinville, Washington --**  
**Petition for Declaratory Order**

Dear Ms. Brown:

Attached for filing in the above-captioned proceeding an original and ten copies of the **Petition of Eastside Community Rail, LLC for Clarification and Reconsideration**, dated October 26, 2015. A check in the amount of \$300, representing the appropriate fee for this filing, is attached.

One extra copy of this transmittal letter and of the Petition also are enclosed. I would request that you date-stamp those copies to show receipt of this filing and return them to me in the provided envelope.

Should any questions arise regarding this filing, please feel free to contact me. Thank you for your assistance on this matter. Kind regards.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "T. Paschalis".

Thomas C. Paschalis  
Attorney for Eastside Community Rail, LLC

FEE RECEIVED  
October 27, 2015  
SURFACE  
TRANSPORTATION BOARD

TCP:tjl

Enclosures

cc: Parties on Certificate of Service

FILED  
October 27, 2015  
SURFACE  
TRANSPORTATION BOARD

ORIGINAL

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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DOCKET NO. FD 35905

CITY OF WOODINVILLE, WASHINGTON --  
PETITION FOR DECLARATORY ORDER

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**PETITION OF EASTSIDE COMMUNITY RAIL, LLC  
FOR CLARIFICATION AND RECONSIDERATION**

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**ATTORNEYS FOR EASTSIDE  
COMMUNITY RAIL, LLC**

Dated: October 26, 2015

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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DOCKET NO. FD 35905

CITY OF WOODINVILLE, WASHINGTON --  
PETITION FOR DECLARATORY ORDER

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**PETITION OF EASTSIDE COMMUNITY RAIL, LLC  
FOR CLARIFICATION AND RECONSIDERATION**

Pursuant to 49 C.F.R. § 1115.3(b)(2), Eastside Community Rail, LLC ("ECR") seeks reconsideration of the Board's decision served on October 7, 2015 in this proceeding ("Woodinville"). Agency precedent is clear that:

[W]here, as here, the railroad opposes a plan to take part of a ROW and claims that the property is or will be needed for the conduct of rail operations, the burden is on the party seeking to take property away from the national transportation system to show that the entire ROW is not and will not be needed for rail purposes.

City of Creede, CO – Petition for Declaratory Order, Finance Docket No. 34376 (STB served May 3, 2005) at 6. Yet without discussing, distinguishing or even referencing the governing case law, the Board's decision in Woodinville reverses that burden of proof and imposes upon ECR the obligation to seek and justify further Board relief if the City of Woodinville (the "City") acts to radically partition ECR's existing railroad right-of-way – something the City has already proposed doing. The Board must correct this material error.

Additionally, the decision in Woodinville misstates ECR's position regarding the effect of Section 12.12 of the O&M Agreement. It is essential that the Board correct page 3 of the decision so that the record accurately reflects the parties' respective positions.

## **BACKGROUND**

In its original petition for declaratory order in this proceeding, filed on February 3, 2015 ("Original Petition"), the City sought a determination pursuant to Maine DOT -- Acq. Exempt. -- Maine Central R. Co., 8 I.C.C.2d 835 (1991) ("State of Maine") for the City's acquisition from the Port of Seattle (the "Port") of a rail line (the "Line") on which ECR holds the exclusive, permanent rail freight easement. The Port had previously obtained a State of Maine determination for its ownership of the Line in 2008. The Port of Seattle -- Acquisition Exemption -- Certain Assets of BNSF Railway Company, Finance Docket No. 35128 (STB served October 27, 2008). As proposed, the City's acquisition transaction would have partitioned the right-of-way of the Line into two parts and unilaterally terminated nearly three-fourths of ECR's supposedly permanent freight easement over the existing 100-foot railroad corridor. The City argued explicitly that this dissection of ECR's right-of-way was permitted by Section 12.12 of the Operations and Maintenance Agreement (the "O&M Agreement") between the Port and ECR's predecessor that would be assigned to the City in connection with the sale. Original Petition at 4-5, 7-9.

The City's proposal – already opposed by ECR -- drew additional concern from King County, which holds a trail use easement on the Line. In response to the County, the City asked the Board to suspend consideration of the Original Petition, and subsequently the City filed its Amended Petition seeking a State of Maine determination for a revised transaction that involved no present-day partition of the right-of-way or reduction in the width of ECR's permanent freight easement. While the City provided little explanation for the structural changes, independent evidence of record submitted by ECR provided insight:

At the request of the City of Woodinville, the Port Commission previously authorized transfer of portions of the Eastside Corridor

to the City in two separate transactions, including a segment of the Corridor the City intended to use solely for bridge and roadway expansion and other non-freight public purposes (included in the Ancillary Agreement). Most recently, the City has determined that bifurcation of the sale creates other complications related to ownership rights existing on the corridor and other regulatory approvals. As a result, the City is requesting termination of the Ancillary Agreement and inclusion in the PSA of the property currently in the Ancillary Agreement.

Port of Seattle Memorandum, April 28, 2015 Commission Agenda, Item No. 4e (attached as Exhibit C to ECR's June 18, 2015 Reply to Amended Petition for Declaratory Order ("ECR Reply"))).

ECR's reply to the Amended Petition evidenced ECR's obvious concern that the City had simply postponed its plan to unilaterally dismember the ECR railroad right-of-way until after Board proceedings on the declaratory order petition are concluded. If the Amended Petition was granted, ECR asked the Board to provide that the City could not terminate any part of ECR's permanent rail freight easement on the Line without the consent of ECR or further order of the Board. ECR Reply at 10.

In Woodinville, the Board granted the City's Amended Petition and indicated that "ECR may petition the Board to take further action should it experience undue interference in its ability to perform common carrier duties over the Line – including an attempt by the Port or the City to use Section 12.12 [of the O&M Agreement] to convey a parcel needed for current or future rail service." Woodinville at 5.

#### **CLARIFICATION**

Initially, ECR notes the Board's decision incorrectly ascribes to ECR the position that Section 12.12 of the O&M Agreement authorizes the Port or the City to unilaterally terminate substantial portions of ECR's supposedly permanent freight easement. Woodinville at

3 ("ECR maintains that Section 12.12 allows . . ."); Id. ("Specifically, ECR interprets Section 12.12 as granting the landlord the unfettered power . . ."). Those are not ECR's interpretations of Section 12.12 – they are the City's. See Original Petition at 4-5, 7-9. ECR was explicit in this regard: "The City's belief, outlined in detail in its Original Petition, is that Section 12.12 of the O&M Agreement will allow the City to terminate the 'permanent' rail freight easement on any part of the corridor that does not currently have a railroad track on it . . . ." ECR Reply at 6. ECR was similarly explicit about its own position on Section 12.12: "The idea that Section 12.12 of the O&M Agreement . . . legitimately empowers a non-carrier landlord to unilaterally eliminate wide and long swaths of such easements is unsupportable and inconsistent with fundamental State of Maine principles." ECR Reply at 7.

As written, the Woodinville decision indicates that ECR has conceded something that, in reality, it has vigorously contested. It is of the utmost importance that the Board amend the language on page 3 of the Woodinville decision to make clear that the issues in this proceeding arose from the City's interpretation and invocation of Section 12.12, not ECR's.

### **RECONSIDERATION**

The Board's decision improperly leaves it to ECR to initiate further proceedings at the agency if and when the City follows through on its previously-expressed intention to utilize Section 12.12 of the O&M Agreement to excise up to 72 feet from ECR's existing and supposedly permanent 100-foot rail freight easement. ECR would necessarily bear the burden of proof in such a proceeding. City of Lincoln v. STB, 414 F.3d 858, 862 (8<sup>th</sup> Cir. 2005) ("[B]y statute the burden of proof is on the petitioner seeking a declaratory order from an administrative agency.").

Such an outcome is directly contrary to every prior pronouncement by the STB on the subject. It contravenes the explicit directive of Creede, quoted at the opening of this petition. It further contravenes the holding in City of Lincoln – Petition for Declaratory Order, Finance Docket No. 34425 (STB served August 12, 2004), a decision affirmed by the Eighth Circuit in City of Lincoln v. STB, *supra*. The Board itself has understood the implications of Creede and Lincoln, explaining that "those two cases addressed the burden on the party seeking to take property out of the national rail transportation network (to show that the entire right-of-way is not and will not be needed for rail purposes) . . . ." Holrail LLC – Construction and Operation Exemption – In Orangeburg and Dorchester Counties, SC, Finance Docket No. 34421 (STB served February 12, 2007) at 7.

Indeed, the Board has recently required parties seeking to reduce the width of an unused, railbanked right-of-way to demonstrate that the potential future restoration of rail service would not be affected. Union Pacific Railroad Company – Abandonment – In Harris, Fort Bend, Austin, Wharton and Colorado Counties, Tex., Docket No. AB-33 (Sub-No. 156) (STB served September 19, 2014) at 2. It is not clear why the Board would be more protective of a 100-foot right-of-way on a rail line abandoned fifteen years ago than it is of a State of Maine easement, which this Board has deemed permanent, on a line that is in service today. The Port of Seattle -- Acquisition Exemption -- Certain Assets of BNSF Railway Company, Finance Docket No. 35128 (STB served October 27, 2008) at 3-4.

Yet the Woodinville decision lowers the bar for involuntary right-of-way diminishment for a single category of lines – those operated pursuant to a State of Maine easement -- effectively demoting those lines to second class status.

Nor is it clear how the process suggested by Woodinville would work on a practical level. ECR will have little ability to know if or when the City affects a property transfer of supposedly "ancillary" parcels from out of the "permanent" easement that ECR holds. That decision may not be evident until the day that construction equipment appears on the right-of-way to commence road or bridge construction or whatever other non-rail function the City envisions for ECR's railroad right-of-way. At that point, ECR would apparently be left to seek emergency judicial and then administrative relief, seeking to undo whatever the City had been able to achieve up to that point. There is no rational basis to impose such a process on railroads seeking to protect their existing rights-of-way. And, of course, that is not the process that has governed in any prior case the Board has confronted.

ECR relied explicitly on the burden of proof standards of Creede and Lincoln in its reply to the City's Amended Petition. ECR Reply at 7-8. The Board's decision, however, makes no reference to that precedent, nor to any other precedent on the issue. It reverses Creede and Lincoln sub silentio, and imposes the burden of proof to defend the existing right-of-way width on ECR without explanation or justification. On reconsideration, the Board should adhere to its prior jurisprudence and make clear the City may not unilaterally expropriate any portion of ECR's existing permanent rail freight easement without a further Board determination that the entire right-of-way is not and will not be needed for rail purposes. See Creede at 6.

WHEREFORE, ECR respectfully requests that Board reconsider and clarify its decision served October 7, 2015 in this proceeding in the manner discussed herein.

Respectfully submitted,

By: \_\_\_\_\_



Thomas J. Litwiler

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(312) 252-1500

**ATTORNEYS FOR EASTSIDE  
COMMUNITY RAIL, LLC**

Dated: October 26, 2015

**CERTIFICATE OF SERVICE**

I hereby certify that on this 26<sup>th</sup> day of October, 2015, a copy of the foregoing **Petition of Eastside Community Rail, LLC for Clarification and Reconsideration** was served by overnight delivery upon:

Eric M. Hocky, Esq.  
Clark Hill, PLC  
One Commerce Square  
2005 Market Street, Suite 1000  
Philadelphia, PA 19103

and by first class mail, postage prepaid, upon:

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

Isabel R. Safora, Esq.  
Deputy General Counsel  
Port of Seattle  
P.O. Box 1209  
Seattle, WA 98111.



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Thomas C. Paschalis