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ENTERED  
Office of Proceedings  
July 21, 2015  
Part of  
Public Record

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July 21, 2015

## VIA ELECTRONIC FILING

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W., Room 1034  
Washington, DC 20423-0001

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

Dear Ms. Brown:

We are in receipt, on behalf of Eastside Community Rail, LLC ("ECR"), of the "Reply" filed in the above-captioned proceeding on July 1, 2015 by the City of Woodinville (the "City"). While purporting to address an ECR "request for condition," the City's filing is (as it acknowledges) a "reply to a reply" in support of the City's pending amended petition for declaratory order. City Reply at 2. If the Board accepts the City's Reply for filing, ECR requests that the Board also accept the following brief response.

The City now claims that no further Board consideration of the issues presented by the City's proposed State of Maine transaction is necessary because the existing Operations and Maintenance Agreement ("O&M Agreement") on the rail line at issue includes a binding arbitration clause to "resolve disputes between the parties." City Reply at 4. But it is manifestly the Board's responsibility and prerogative -- not that of a private arbitrator -- to decide if State of Maine principles have been satisfied in a particular case and if exercise of the Board's authority over a transaction is required.

Moreover, it is clear what the City, left to its own devices, would argue to such an arbitrator -- that the Board has already determined that the unilateral termination of large swaths of a supposedly permanent rail freight easement pursuant to Section 12.12 of the O&M Agreement is acceptable under State of Maine. See City Reply at 3 ("The sale of such ancillary parcels is specifically permitted under the O&M Agreement . . . . The terms of the O&M Agreement were approved by the Board when the Port of Seattle acquired the Subject Line . . . and again recently when the Board approved . . . partial assignment of the O&M Agreement, to Snohomish County." (citations omitted)); City Reply at 4 (the terms of the O&M Agreement "have previously been approved by the Board as providing sufficient protection for the rail

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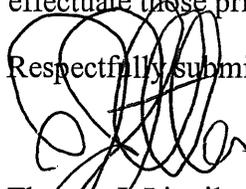
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operator and freight rail operations."). The Board, of course, has determined no such thing with respect to Section 12.12 of the O&M Agreement or a potential attempt to excise three-fourths of an existing railroad right-of-way from the "permanent" easement retained by the rail carrier. That is the very issue presented by the City's Amended Petition. The Board went to pains in 2008 to explain that "[t]he Port does not indicate, nor does the draft quitclaim deed suggest, that the exclusive freight easement retained by BNSF is anything other than permanent."<sup>1</sup> The question now is the continued viability of that predicate statement.<sup>2</sup>

The City's professed "skepticism" as to ECR's future use of the right-of-way, City Reply at 4, n.1, also rings hollow. ECR detailed its plans for use of the entire right-of-way, including the construction of a maintenance road and second track, to the City during the course of a September 2014 meeting attended by just one City representative and, tellingly, three City lawyers. Since that meeting, ECR has reached out to the City on several occasions to hold additional conferences in order to foster a collaborative relationship, yet the City has declined all such meetings. The City has no basis to question ECR's future uses of the right-of-way when it has taken no interest in ECR's plans -- which, importantly, have never been solely contingent on the reactivation of other segments of this corridor or commuter transit.

What apparently cannot be questioned is the City's motivation for seeking to acquire the ECR rail line -- it wants to appropriate three-fourths of the right-of-way solely for its own bridge and roadway expansion. That's a far cry from the Port of Seattle's initial representations that it was acquiring the line "to preserve it as a rail and transportation corridor." Finance Docket No. 35128, Verified Notice of Exemption of The Port of Seattle, filed June 4, 2008 at 3. It is also plainly contrary to State of Maine principles and to a supposedly "permanent" rail freight easement utilized to effectuate those principles.

Respectfully submitted,



Thomas J. Litwiler  
Attorney for Eastside Community Rail, LLC

TJL:tl

cc: Parties of Record

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<sup>1</sup> The Port of Seattle -- Acquisition Exemption -- Certain Assets of BNSF Railway Company, Finance Docket No. 35128 (STB served October 27, 2008) at 4.

<sup>2</sup> The issue of permanence is compounded by the term of the O&M Agreement, which expires in four years with provision only for a single ten-year renewal. Amended Petition, Attachment 2 at §12.1.