



KAPLAN KIRSCH ROCKWELL

April 12, 2013

234069
234070

E-FILING

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

ENTERED
Office of Proceedings
April 12, 2013
Part of Public
Record

Re: *BNSF Railway Company - Abandonment Exemption – In King County, Washington, Finance Docket No. AB-6 (Sub-No. 465X)*
Ballard Terminal Railroad Company, L.L.C. – Acquisition and Operation Exemption – Woodinville Subdivision – Verified Petition for Exemption Pursuant to 49 U.S.C. § 10502, Finance Docket No. 35731

Dear Ms. Brown:

Enclosed please find for filing in the above-captioned proceedings the Motion to Extend Time to Respond of King County, Washington, City of Kirkland, Washington, and Central Puget Sound Regional Transit Authority.

Please do not hesitate to contact me if you have any questions.

Sincerely,

W. Eric Pilsk

Enclosures

cc: All Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. AB-6 (Sub-No. 465X)

**BNSF RAILWAY COMPANY – ABANDONMENT EXEMPTION – IN KING COUNTY,
WASHINGTON (Woodinville Subdivision)**

STB Finance Docket No. 35731

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

**MOTION OF KING COUNTY, WASHINGTON, CITY OF KIRKLAND,
WASHINGTON, AND CENTRAL PUGET SOUND REGIONAL TRANSIT
AUTHORITY TO EXTEND TIME TO RESPOND**

Communications with respect to this pleading should be addressed to:

Charles A. Spitulnik
W. Eric Pilsk
Allison I. Fultz
KAPLAN KIRSCH & ROCKWELL
LLP
1001 Connecticut Avenue, N.W.
Suite 800
Washington, DC 20036
(202) 955-5600
cspitulnik@kaplankirsch.com
epilsk@kaplankirsch.com
afultz@kaplankirsch.com

Counsel for King County, Washington

Matthew Cohen
Hunter Ferguson
STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, WA 98101
(206) 386-7569
mcohen@stoel.com
hoferguson@stoel.com

Counsel for the City of Kirkland, Washington

Jordan Wagner
Jennifer Belk
Central Puget Sound Regional Transit Authority
401 S. Jackson Street
Seattle, WA 98104
(206) 398-5224
jordan.wagner@soundtransit.org
jennifer.belk@soundtransit.org

Counsel for Central Puget Sound Regional Transit
Authority

Dated: April 12, 2013

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. AB-6 (Sub-No. 465X)

**BNSF RAILWAY COMPANY – ABANDONMENT EXEMPTION – IN KING COUNTY,
WASHINGTON (Woodinville Subdivision)**

STB Finance Docket No. 35731

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

**MOTION OF KING COUNTY, WASHINGTON, CITY OF KIRKLAND,
WASHINGTON, AND CENTRAL PUGET SOUND REGIONAL TRANSIT
AUTHORITY TO EXTEND TIME TO RESPOND**

King County, Washington, a political subdivision of the State of Washington (the “County”), the City of Kirkland, Washington, a municipal corporation of the State of Washington (“City”), and Central Puget Sound Regional Transit Authority, a regional transit authority of the State of Washington (“Sound Transit”), hereby jointly submit this Motion to Extend Time to Respond to the initial pleadings of Ballard Terminal Railroad Company, L.L.C. (“Ballard”) in the above-listed proceedings, which Ballard filed on April 2, 2013. In those pleadings Ballard seeks to (1) vacate the notice of interim trail use (“NITU”) pursuant to which the County is the trail sponsor for the Line, as defined below, and (2) acquire the County’s right

to restart freight rail operations on a portion of the Line owned by the City, the County, and Sound Transit.¹

Pursuant to the Board's rules at 49 C.F.R. § 1104.13(a), a reply to Ballard's submissions would be due no later than April 22, 2013. Because of the variety of public interests at stake in these proceedings, and the complexity of legal and factual issues to be addressed, the County, City, and Sound Transit respectfully request a 60-day extension of time, to June 21, 2013, to respond to Ballard's assertions and arguments, and to conduct discovery in accordance with 49 C.F.R. Part 1114, Subpart B, in order to enable the County, the City, and Sound Transit to respond fully to the legal and factual issues framed by Ballard's pleadings so that the Board may have a fully developed record on which to base its decision in this important matter.

Background

This motion relates to the portion of the Woodinville Subdivision between MP 23.8 in Woodinville, WA and MP 12.6 in Bellevue, WA (the "Line"). Prior to 2009, the Line was owned by BNSF Railway Company ("BNSF") as part of the complete Woodinville Subdivision and connected track, including the Redmond Spur. In 2008, BNSF sought and obtained permission to abandon the Woodinville Subdivision, including the Line, and the Redmond Spur. On November 28, 2008, the Board issued a NITU covering the Line and naming the County as the interim trail sponsor. *Decision and Notice of Interim Trail Use or Abandonment – BNSF Ry. Co. – Abandonment Exemption – In King County, WA*, STB Docket No. AB-6 (Sub-No. 465X) (Service Date Nov. 28, 2008). In granting the abandonment and issuing the NITUs, the Board

¹ Ballard also filed a Verified Notice of Exemption pursuant to 49 C.F.R. § 1150.41 to lease and operate a line of railroad of Eastside Community Rail, LLC extending from Woodinville, WA to Snohomish, WA. *Ballard Terminal Railroad Company, LLC – Lease Exemption – Line of Eastside Community Rail, LLC*, STB Finance Docket No. 35730, (filed April 2, 2013). The County, the City, and Sound Transit do not oppose that Notice.

found that abandonment was appropriate because there was no demand for freight rail service on the Woodinville Subdivision. *Id.* Subsequently, BNSF conveyed to the County BNSF's remaining common carrier rights and obligations on the Line, including its reserved right to restart rail service. *King County, WA – Acquisition Exemption – BNSF Railway Company*, STB Finance Docket No. 35148 (service date Sept. 18, 2009). On March 8, 2010, the County submitted Notices that it had executed trail use agreements covering the Line with BNSF. Accordingly, the process required by this Board for establishing the right to build and operate a trail has been completed and the County is fulfilling its obligations as the Interim Trail Sponsor.

In December 2009, BNSF disposed of its property interests in the Line (as well as other connected lines of railroad) through a series of transactions involving a number of parties, including the Port of Seattle and the County. BNSF conveyed its property rights in the Woodinville Subdivision and the Redmond Spur to the Port of Seattle in a bargain sale for \$81 million and other consideration. The Port conveyed a multipurpose public easement to the County for trail and related purposes. Pursuant to those transactions, the Port also acquired fee title to a portion of the Woodinville Subdivision north of MP 23.8, which portion remained in active freight service and is not subject to a NITU. BNSF conveyed a freight easement to GNP Rly, Inc. (“GNP”) over that portion of the Woodinville Subdivision, and Ballard operated freight rail service there, apparently as an agent for GNP. GNP has since gone bankrupt and its freight easement and other interests in the Woodinville Subdivision recently were acquired by East Side Community Rail, LLC (“ECR”) from GNP's bankruptcy estate. The Managing Director of ECR is Doug Engle, who was also one of the principals in GNP. Ballard apparently is continuing to provide freight service on behalf of ECR under an interim operating agreement. ECR, like GNP before it, has been actively promoting the use of the Line and the Redmond Spur for future

passenger excursion rail operations; there currently is no excursion service on the Line or the Redmond Spur.

In April 2012, the Port conveyed to Sound Transit a high-capacity transportation easement over the majority of the railbanked Line, as well as fee title to approximately 1.1-miles of the railbanked Line in Bellevue, Washington, all subject to the County's multipurpose public easement. On April 13, 2012, the Port conveyed its interest in a 5.75 mile portion of the railbanked Line (from approximately MP 14.6 to approximately MP 20.3) to the City, subject to the County's multipurpose easement and Sound Transit's high-capacity transportation easement. In February 2013, King County acquired the Port's remaining interests in the railbanked portions of the Line. The Port retains title to the freight portion of the Woodinville Subdivision north of MP 23.8.

In February 2013, the City solicited bids to remove the rails on the Line within the City. Ballard waited until the City was preparing to sign a contract with the winning bidder to file these Petitions. At the same time, Ballard filed a suit against the City in the United States District Court for the Western District of Washington seeking to enjoin the City from removing the rails within the City. *Ballard Terminal Railroad Co. v. City of Kirkland*, Case No. 13-cv-00586-MJP (Complaint filed April 1, 2013). Kirkland expects to file a Motion to Dismiss the case for lack of subject matter jurisdiction on April 12, 2013. A hearing on Ballard's request for the temporary restraining order is scheduled for May 3, 2013.

Although Sound Transit was not served with copies of Ballard's Petitions, Sound Transit's interest in this matter is substantial. Sound Transit purchased the portion of the Line between MP 12.4 and MP 13.5 to construct a portion of its \$2.8 billion Eastlink light rail project. Sound Transit also acquired an easement for high-capacity transportation purposes over the

remainder of the railbanked corridor. Regional voters approved and funded the Eastlink project in 2008, and Sound Transit is scheduled to begin construction activities as early as 2014. The Eastlink project provides a critical link in the region's high-capacity transit connection between Washington's two largest job centers, Bellevue and Seattle.

Argument

Ballard seeks (1) authority to acquire the County's reactivation right on the Line, and (2) to vacate the NITU on the Line. Ballard seeks this relief through an individual exemption procedure that presumes the requests can be granted with minimal scrutiny. In making that argument, Ballard has oversimplified the issues raised in this case. The City, the County, and Sound Transit intend to show that Ballard's Petitions lack merit and, further, are not appropriate under the individual exemption procedure. In order to demonstrate the lack of merit to Ballard's Petitions, however, the County, the City, and Sound Transit require more time than permitted under the Board's usual procedures.

First, the legal issues Ballard raises are more complex than Ballard's Petition suggests. Ballard states that its Petition "presents an important question: where the petitioning carrier does not own the right-of-way or hold the common carrier right to reactivate service, whether the Board must approve a request by an authorized rail carrier to restore to active common carrier service a rail line that has been converted to trail use under the National Trails Act" STB Finance Docket No. 35731 at 4. Ballard's argument implicitly recognizes that (1) the Board has never directly addressed this issue, and (2) there is no precedent for Ballard's theory that an entity can vacate a NITU and obtain operating authority when it lacks both the reactivation rights and the property rights needed to carry out its proposal. The County, the City, and Sound Transit intend to fully brief the issue.

Second, the factual issues raised by Ballard will require substantial investigation by the City, the County and Sound Transit, including the likely need for discovery, in order to allow the Board to have a full and accurate picture of the facts related to Ballard's Petitions. Among the issues that will require investigation and discovery are (1) Ballard's efforts to use its putative freight service as a stalking horse for the conceptual excursion train service originally touted by GNP and now promoted by ECR and its proxies; (2) the nature and viability of Ballard's business plan for reactivated freight services; and (3) the factual basis for the alleged demand for freight service on the Line. The County, the City, and Sound Transit believe that the facts of this case, once discovered and disclosed, will demonstrate that Ballard's requests lack merit under any standard and, at a minimum, are not appropriate for an exemption process. The Board should allow additional time for interested parties to respond and to conduct discovery into the bases of Ballard's proposal, so that the record may be fully developed for careful consideration by the Board.

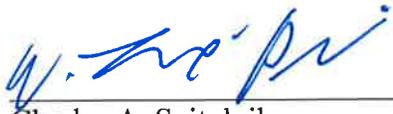
Third, the need to develop fully the record is particularly important here because Ballard's proposal would have a significant impact on the Puget Sound region. Since BNSF disposed of the railbanked Line in December 2009, a group of local governments and regional entities has invested a great deal of time and substantial public funds in a joint planning effort for the shared use of the railbanked portion of the Woodinville Subdivision, including the Line and the Redmond Spur, while the property is subject to interim trail use. Pursuant to Metropolitan King County Council Motion 13801, a Regional Advisory Council (consisting of all the public entities and utilities with ownership interests in the railbanked portions of the Woodinville Subdivision and the Redmond Spur) was established in early 2013 and is actively developing

recommendations to coordinate planning and development activities to ensure effective use of the railbanked Line and the Redmond Spur for benefit of the public as a whole.

These joint efforts have identified a number of important public uses, including future high-capacity transit and light rail, bicycle and pedestrian trails, and power and wastewater utility services. The local governments and entities participating in this process include King County, Sound Transit, the City of Kirkland, the City of Redmond, and Puget Sound Energy. Other local cities, in which portions of the Woodinville Subdivision are located, are participating in the Regional Advisory Council process to varying degrees and otherwise cooperating with the regional stakeholders in the corridor.

Each of these parties fully recognizes that, as a railbanked corridor, such plans are subject to the possibility that freight rail service could be reintroduced in all or parts of the corridor. The County, the City, and Sound Transit intend to show the Board, however, that (1) Ballard's proposal is not a *bona fide* proposal to provide freight rail service, and (2) the circumstances are not appropriate to vacate the NITU and destroy the important regional planning and development process underway. Because of the range of significant public interests affected by Ballard's requests, and the number of public entities whose interests would be affected, the County, City, and Sound Transit need additional time to fully illuminate these interests for the Board's consideration.

WHEREFORE, because the default deadline for response of April 22, 2013, does not provide sufficient time to fully evaluate and comment on Ballard's requests, the County, the City, and Sound Transit respectfully request that the Board grant this Motion to Extend Time to Respond and allow the County, the City, and Sound Transit to conduct discovery, in order that a thorough record can be compiled in the above-captioned proceedings.



Charles A. Spitulnik
W. Eric Pilsk
Allison I. Fultz
KAPLAN KIRSCH & ROCKWELL
LLP
1001 Connecticut Avenue, N.W.,
Suite 800
Washington, DC 20036
(202) 955-5600
cspitulnik@kaplankirsch.com
epilsk@kaplankirsch.com
afultz@kaplankirsch.com

Counsel for King County, Washington

Respectfully submitted,



Matthew Cohen
Hunter Ferguson
STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, WA 98101
(206) 386-7569
mcohen@stoel.com
hoferguson@stoel.com

Counsel for the City of Kirkland, Washington



Jordan Wagner
Jennifer Belk
Central Puget Sound Regional Transit Authority
401 S. Jackson Street
Seattle, WA 98104
(206) 398-5224
jordan.wagner@soundtransit.org
jennifer.belk@soundtransit.org

Counsel for Central Puget Sound Regional Transit
Authority

Dated: April 12, 2013

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served a copy of the foregoing MOTION OF KING COUNTY, WASHINGTON, CITY OF KIRKLAND, WASHINGTON, AND CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY TO EXTEND TIME TO RESPOND, upon the following parties of record in the above-captioned proceedings by first class mail with postage prepaid and properly addressed:

Craig Watson, Esq.
General Counsel
Port of Seattle
Pier 69
P.O. Box 1209
Seattle, WA 98111

Myles L. Tobin, Esq.
Fletcher & Sippel LLC
29 North Wacker Drive
Suite 920
Chicago, IL 60606-2832



W. Eric Pilsk

Dated this 12th day of April, 2013