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THOMAS F. MCFARLAND

January 14, 2004

By UPS overnight mail

Vernon A. Williams, Secretary  
Surface Transportation Board  
Case Control Unit, Suite 713  
1925 K Street, N.W.  
Washington, DC 20423-0001

ENTERED  
Office of Proceedings

JAN 15 2004

Part of  
Public Record

Re: Finance Docket No. 34425, *City of Lincoln - Petition for Declaratory Order*

Dear Mr. Williams:

Lincoln Lumber Company (LLC) hereby moves for rejection of the Rebuttal Statement filed by the City of Lincoln (the City) on January 9, 2004 on grounds that (1) the statement was not filed on or before the due date contained in the Board's procedural decision served December 8, 2003; and (2) the Statement was not served by the same method and class of service used in serving the Board.

**1. Failure to Timely File the Statement**

It is provided in 49 C.F.R. § 1104.6 that documents must be received at the Board's offices in Washington, DC within the time limits set for filing. Pursuant to 49 C.F.R. § 1104.7(b), the Board can extend a time period, but such extension must be upon request and for good cause. That regulation requires that a request for extension must be filed not less than 10 days before the due date. It is provided in 49 C.F.R. § 1104.10(a) that the Board may reject a document submitted for filing if the Board finds that the document does not comply with the Board's rules.

The Board should reject the City's Rebuttal Statement because it does not comply with the requirement of the rules for timely filing in 49 C.F.R. § 1104.6 and because an extension of the required filing date was neither sought nor granted. Pursuant to the Board's procedural decision in this matter served December 8, 2003, the City's Rebuttal Statement was required to be filed on or before January 8, 2004. According to the Board's website, the City's Rebuttal Statement was filed on January 9, 2004. There is no indication in that Rebuttal Statement that the City sought an extension of the time limit for filing the Rebuttal Statement. No motion for an extension of that time limit or for leave to late-file the Rebuttal Statement has been served on

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LLC as of the time of LLC's filing of this motion for rejection. The Board's website does not reflect that such a motion has been filed.

Accordingly, the City's Rebuttal Statement does not comply with the Board's rules. The Statement should be rejected on that basis. It is appropriate that the City's Statement be rejected for untimely filing because the City itself has taken the position in this proceeding that timely filing is absolutely essential. When LLC asked the City to agree to a short extension of the December 29 filing date for LLC's Statement in view of the Christmas Holiday, the City flatly refused on the ground that timely filing was essential even if it resulted in hardship on LLC. As a result, LLC spent Christmas Eve, Wednesday, December 24, and the day after Christmas, Friday, December 26, preparing its Statement for timely filing on Monday, December 29. LLC also filed its response to discovery on a timely basis on Tuesday, December 30. Having insisted on strict time limits for filing statements, the City itself should be held to the January 8 filing date in the Board's procedural decision. That is especially warranted inasmuch as the City did not file a timely motion for an extension of that filing date, nor has the City sought leave to late file its Rebuttal Statement. For all of those reasons, the City's Rebuttal Statement should be rejected.

**2. Failure to Serve Parties by the Same Method and Class of Service used in Serving the Board**

It is provided in 49 C.F.R. § 1104.12(a) that service on the parties should be by the same method and class of service used in serving the Board.

The Board should reject the City's Rebuttal Statement because it does not comply with the requirement of the rules in 49 C.F.R. § 1104.12(a) in that it was not served on LLC by the same method and class of service used in serving the Board. Inasmuch as the City's transmittal letter to the Board for its Rebuttal Statement was dated January 7, 2004 and the Statement was filed at the Board on January 9, 2004, the Board apparently was served by second-day express delivery. In contrast, the certificate of service in the Rebuttal Statement states that it was served on LLC by "US mail, postage prepaid, first class or equivalent." As of January 14, 2004, the date on which this motion for rejection is being sent to the Board, the Rebuttal Statement still has not been delivered to LLC by mail. The Rebuttal Statement was received by fax late in the day on Monday, January 12, 2004, after LLC had twice contacted the City to complain about not having received the Rebuttal Statement. That was the equivalent of receipt by mail on Tuesday, January 13, 2004, a date four days later than the date on which the Board was late-served with the Statement.

The City's violation of Board rules in this respect also warrants rejection of the Rebuttal Statement in light of the City's insistence on strict compliance with time limits for filing and with other Board rules. The City may contend that timely service of the Rebuttal Statement is not important inasmuch as a reply to that Statement is not permitted. But timely service is

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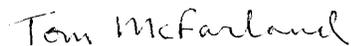
important to enable LLC to review the Statement promptly and to file, on a timely basis, whatever motions or other pleadings may be appropriate in relation to the Statement.

**3. Conclusion and Requested Relief**

What's good for the goose is good for the gander. The City would not agree to even a modest extension for LLC's Statement in the height of the Holiday Season. LLC will not agree to any extension or disregard of Board rules in regard to the City's late-filed and improperly-served Rebuttal Statement. That Statement should be rejected on the two grounds set forth herein.

Ten copies accompany the original of this motion. All parties are being served in accordance with 49 C.F.R. § 1104.12(a). Kindly acknowledge receipt by date stamping the enclosed duplicate copy of this letter and return in the self-addressed stamped envelope.

Very truly yours,



Thomas F. McFarland  
*Attorney for Lincoln Lumber Company*

*TMcF:kl:wp11\977\lrstb9*

cc: Charles H. Montange, *by UPS overnight mail*  
Daniel LaKemper, *by UPS overnight mail*  
Mr. Donald L. Hamill