



THE COMMONWEALTH OF MASSACHUSETTS
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March 13, 2006

VIA ELECTRONIC FILING

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street NW
Washington, DC 20423

Re: New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway –
Petition for an Exemption from 49 U.S.C. § 10901 to Acquire, Construct and
Operate as A Rail Carrier on Tracks and Land in Wilmington and Woburn, MA
Finance Docket No. 34797

Dear Secretary Williams:

I attach for filing the Commonwealth of Massachusetts' Opposition to Petitioner's
Motion For Leave to File Consolidated Reply to Comments. Thank you for your assistance in
this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "Siu Tip Lam".

Siu Tip Lam
Assistant Attorney General
Environmental Protection Division

cc: Laura Swain, Esq.
Service List in STB Finance Docket No. 34797 (by first-class mail)

BEFORE THE SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34797

NEW ENGLAND TRANSRAIL, LLC, d/b/a WILMINGTON & WOBURN TERMINAL
RAILWAY – PETITION FOR AN EXEMPTION FROM 49 U.S.C. § 10901 TO ACQUIRE,
CONSTRUCT AND OPERATE AS A RAIL CARRIER ON TRACKS AND LAND IN
WILMINGTON AND WOBURN, MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS' OPPOSITION TO PETITIONER'S MOTION
FOR LEAVE TO FILE CONSOLIDATED REPLY TO COMMENTS

MASSACHUSETTS DEPARTMENT OF
ENVIRONMENTAL PROTECTION

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Dated: March 13, 2006

BEFORE THE SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34797

**COMMONWEALTH OF MASSACHUSETTS' OPPOSITION TO PETITIONER'S MOTION
FOR LEAVE TO FILE CONSOLIDATED REPLY TO COMMENTS**

The Commonwealth of Massachusetts ("Commonwealth"), acting by and through its Department of Environmental Protection ("MassDEP") and the Attorney General, hereby respectfully submits this opposition to New England Transrail, LLC's ("NET") Motion for Leave to File Consolidated Reply to Comments. NET's proposed Reply attached to its motion purports to provide a "road map" to "the various issues raised by the commenters [including the Commonwealth] and NET's responses." Rather than assisting the Surface Transportation Board ("Board") in understanding the issues raised by the Commonwealth in its Reply to NET's Petition, the proposed Reply mischaracterizes the Commonwealth's position and confuses the issues raised by the other parties. NET's proposed Reply is nothing more than a reply to the Commonwealth's Reply as well as those of the other parties. Because a reply to a reply is not permitted under the Board's rule, 49 CFR 1104.13(c), NET's motion for leave to file the proposed Reply should be denied.

NET's impermissible reply mischaracterizes and confuses the Commonwealth's position and the issues in several respects. Contrary to NET's mischaracterizations that the Commonwealth "does not criticize NET for not agreeing to comply with the Massachusetts Site Assignment and Waste Ban regulations," NET's Proposed Reply to Replies at 12, the Commonwealth, in its Reply, argued at length that NET's proposed solid waste processing facility and associated activities are subject to all requirements under the Massachusetts Solid

Waste Management Act, M. G.L. c. 111, § 150A, including the Site Assignment, Permitting, and Waste Bans requirements. See Commonwealth's Reply at 9-11, 13-17. Despite NET's attempt to recharacterize its proposed solid waste processing facility as an "intermodal transload facility," see NET Proposed Reply to Replies at 4, 6, and 7, its Petition for Exemption clearly described the proposed facility as not merely loading and unloading intermodal containers but also sorting, grinding and baling of solid wastes, which are clearly solid waste processing activities.¹ Petition at 11 and 12. As such, these activities can be done at a permitted processing facility anywhere in Massachusetts before the waste is hauled to and transloaded at NET's facility to be transported by rail. The processing activities including the sorting, grinding and baling of solid wastes proposed by NET are distinct from and are not integrally related to rail transportation. See Commonwealth's Reply at 9-10.

NET's proposed facility is subject to all applicable state regulations regardless of whether NET has offered to comply voluntarily with some of them. NET is not entitled to pick and choose which regulations it will comply with. See Commonwealth's Reply at 9-11. Moreover, NET now incorrectly claims in its proposed Reply that it "offer[ed], in writing, to enter into a voluntary agreement pursuant to which MADEP could exercise inspection and enforcement authority at the NET facility." NET's Proposed Reply to Replies at 2. In fact, NET's letter indicated merely that it would abide by "substantive state regulations regarding health and safety." See Letter from Jeffrey Porter, Counsel to NET, to Susan Ruch, MassDEP at 4 (October 14, 2005), attached to NET's December 16, 2005 Response to MassDEP's Motion for

¹ NET's reliance on Coastal Distribution LLC v. The Town of Babylon, No. 05 CV 2032, slip op., 2006 WL 270252 (E.D.N.Y. January 31, 2006) and Canadian National Railway Co. v. City of Rockwood, No. COV/04-40323, 2005 WL 1349077 (E.D. Mich. June 1, 2005) and the line of cases concerning intermodal transportation is misplaced. These cases reiterate the point that intermodal transloading facilities lie within the Board's jurisdiction. In contrast to the facilities in Coastal Distribution and Canadian Railway, NET's proposed facility is not merely transloading wastes; it is also sorting, grinding, baling and wrapping the wastes in plastic. These activities constitute a solid waste processing facility subject to state regulation.

an Extension of Time to File Reply: NET has not demonstrated that its vague offer to comply with selective requirements would include subjecting itself to the Commonwealth's enforcement authority, including statutory penalties, that apply to other solid waste facilities. But even if NET makes a firm offer, such offer would not give the state the full enforcement authority that is necessary to protect public health, safety, and environment. As explained in the Commonwealth's Reply to NET's Petition for Exemption, a facility operating under a voluntary agreement and without the full oversight of state and local authorities would be prone to create severe public health, safety, and environmental problems. See Commonwealth's Reply to NET's Petition at 11.

Finally, NET's proposed Reply to the replies incorrectly asserts that the NET facility can be safely constructed and operated on the Olin Property even if the Olin Site is listed on the National Priorities List. NET's Proposed Reply to Replies at 14. In fact, the United States Environmental Protection Agency ("EPA") has not supported such assertion. On the contrary, EPA has stated that it "can not consent to any activity at this Site until it makes its own determination that the Site is safe for human health and the environment, and that the proposed use will not exacerbate Site conditions or hinder EPA's remaining investigation and cleanup." EPA Reply at 1. The Commonwealth reiterated this point in its Reply. Commonwealth's Reply at 19. So, once again, NET's Reply incorrectly states the positions of the agencies involved.

Where NET's proposed Reply confuses rather than clarifies and otherwise fails to provide a good reason to allow for a reply in this case, its proposed Reply to the Commonwealth's Reply as well as the replies of the other parties is not permitted under the Board's rules. 49 CFR 1104.13(c) ("A reply to a reply is not permitted"); see also New England Transrail, LLC, d/b/a Wilmington and Woburn Terminal Railroad Co. – Construction,

Acquisition, and Operation Exemption – in Wilmington and Woburn, MA, STB Finance Docket
No. 34391, at 3 n.3 (served May 3, 2005) (declining to consider additional filings because the Board's rules do not permit replies to replies). Therefore, the Board should deny NET's motion for leave to file its Reply and should not consider NET's proposed Reply.

Respectfully submitted by,

MASSACHUSETTS DEPARTMENT OF
ENVIRONMENTAL PROTECTION

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By his attorney,



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Dated: March 13, 2006

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CERTIFICATE OF SERVICE

I, Siu Tip Lam, hereby certify that on March 13, 2006, I served the foregoing the Commonwealth of Massachusetts's Opposition to Petitioner's Motion for Leave to File Consolidated Reply to Comments by causing a copy thereof to be delivered via first class mail, postage prepaid, to:

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