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SLOVER & LOFTUS LLP

ATTORNEYS AT LAW

1224 SEVENTEENTH STREET, N. W.
WASHINGTON, D. C. 20036-3003

WILLIAM L. SLOVER
C. MICHAEL LOFTUS
JOHN E. LE SEUR
KELVIN J. DOWD
ROBERT D. ROSENBERG
CHRISTOPHER A. MILLS
FRANK J. PERGOLIZZI
ANDREW B. KOLESAR III
PETER A. PFOHL
DANIEL M. JAFFE
STEPHANIE P. LYONS
STEPHANIE A. ARCEULETA

TELEPHONE:
(800) 347-7170

FAX:
(908) 347-6619

WRITER'S E-MAIL:

cam@sloverandloftus.com

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OF COUNSEL
DONALD G. AVERY

BY E-FILING

Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423-0001

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Re: Docket No. FD 35393, Providence and Worcester Railroad
Company – Petition for Declaratory Order – Gardner Branch

Dear Ms. Brown:

Enclosed for filing in the above-referenced proceeding please find
National Grid's Reply to Providence & Worcester Railroad Company's Petition
for Declaratory Order.

Please provide electronic receipt of this filing. Thank you.

Respectfully submitted,



Christopher A. Mills
An Attorney for National Grid

CAM:lad
Enclosure

cc (w/enclosure): Counsel for parties of record per Certificate of Service

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Office of Proceedings
AUG 20 2011
Part of
Public Record

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PROVIDENCE AND WORCESTER)	
RAILROAD COMPANY – PETITION)	Docket No. FD 35393
FOR DECLARATORY ORDER –)	
GARDNER BRANCH)	
)	

**REPLY OF NATIONAL GRID TO
PROVIDENCE AND WORCESTER RAILROAD COMPANY’S
PETITION FOR DECLARATORY ORDER**

New England Power Company (“NEP”) d/b/a National Grid (collectively “National Grid”) hereby replies to the Petition for Declaratory Order filed by Providence and Worcester Railroad Company (“P&W”) on July 20, 2010 (“Petition”).

National Grid owns and is responsible for the day-to-day operation of the electric transmission line serving Worcester, MA that is the subject of P&W’s Petition, and thus has a substantial interest in this proceeding. National Grid opposes the declaratory order requested by P&W. The federal preemption issues raised and the factual background presented by P&W are not as simple as they appear from the face of the Petition. There are substantial factual and legal issues to consider in determining whether the state law in issue, designed to prevent the interruption of reliable electric service, unreasonably interferes with P&W’s use of its property for railroad purposes. Although not discussed in the Petition, there are also significant issues involving the interplay between STB jurisdiction over railroads and Federal Energy Regulatory Commission (“FERC”) oversight of electric transmission reliability, which is exercised in

accordance with state requirements and procedures implemented through state utility commissions such as the Massachusetts Department of Public Utilities (“MADPU”). National Grid, therefore, requests that the Board institute a proceeding to consider the merits of P&W’s Petition, and to establish a procedural schedule for the receipt of evidence and argument on the complex issues raised.

I. BACKGROUND

P&W’s Petition seeks a declaratory order to resolve a controversy as to whether Massachusetts General Laws, Chapter 164, Section 73 (“M.G.L. c. 164, § 73”) is preempted under 49 U.S.C. § 10501(b) given this Board’s exclusive jurisdiction to regulate certain aspects of railroad operations. M.G.L. c. 164, § 73 requires the consent of the MADPU to the removal or abandonment of any operating electric transmission line that has been lawfully constructed “within the location of a railroad,” *i.e.*, on railroad property.

The controversy stems from a 1966 license agreement between NEP and P&W’s predecessor, pursuant to which NEP (as licensee) constructed part of a 115 KV electric transmission line (the “O-141S line”), and a 1971 license agreement between NEP and P&W’s predecessor, pursuant to which NEP constructed another transmission line, the O-141 115 KV line, on and/or across P&W’s Gardner Branch right-of-way in Worcester, MA. The O-141S line and the O-141 line are part of the electric transmission grid and directly supply two National Grid substations that serve the Worcester area. For a distance of approximately one mile, the O-141S line occupies or parallels P&W’s railroad right of way containing the single main track currently in place, and the O-141

line crosses P&W's right of way in the same general area. At other locations, the O-141S line occupies both private land (including property of the Greendale Mall) and the right-of-way of Pan Am Railways ("Pan Am," formerly the Boston & Maine Railroad), which has a single-track railroad line parallel and adjacent to the 2.9-mile portion of P&W's Gardner Branch between Worcester and Barbers (referred to in the Petition as "Barbers Crossing"), MA. The Pan Am line begins in downtown Worcester and extends northeast to Ayer, MA, via Barbers.¹

Both the 1966 license, and the 1971 license, by their terms, are terminable on 30 days' written notice, and require the licensee to remove the transmission line and appurtenances within 10 days after termination becomes effective. If the licensee fails to do so, the railroad is authorized to remove and dispose of the materials at the expense of the licensee.

In March of 2009, P&W notified National Grid informally that it wanted the O-141S line removed from its right-of-way, with the subsequent explanation that the transmission line interfered with its ability to construct a second track to accommodate anticipated growth in rail traffic on the 2.9-mile segment of the Gardner Branch between Worcester and Barbers. National Grid responded by requesting a meeting to discuss the location of P&W's proposed second track. In subsequent correspondence sent on April 28, 2009, P&W indicated that it was moving forward with plans for the additional track

¹ The Pan Am single-track line between Worcester and Barbers is in disrepair, and part of the track has been removed. So far as National Grid has been able to determine, Pan Am has neither sought nor received Board approval to abandon or discontinue service on this line.

and that National Grid's poles interfered with the track layout. While noting that the 1966 license provides for 30 days notice to terminate the license, P&W did not provide notice of termination of the 1966 license at that time but indicated that it was providing National Grid with additional notice to allow for the orderly relocation of the transmission line. Another meeting and numerous discussions ensued between National Grid and P&W regarding either relocation of the O-141S line or negotiations for rights over adjacent land of Pan Am for construction of P&W's additional track that would allow the O-141S line to remain in its present location.²

On January 5, 2010, National Grid forwarded to P&W conceptual engineering plans for relocating the O-141S line within P&W's right-of-way to accommodate a second track. P&W did not provide National Grid with any comments regarding the conceptual plans, nor did it respond to National Grid's requests to meet to discuss the same. Instead, on March 3, 2010, P&W provided written notice to National Grid terminating the 1971 license and requiring National Grid to remove its lines and structures from P&W's property by May 3, 2010.³ National Grid responded that it wanted to continue to work with P&W to relocate the line but could not take the line out of service by May 3 due to the impact it would have on Worcester and the transmission network in the region. After the license termination, the parties continued to work toward an acceptable solution that would accommodate both National Grid's need for the high-

² See the Petition at 2 and the correspondence between the parties attached to the Conti V.S. as Exhibits 4, 5 and 6.

³ P&W's notice of termination erroneously referenced the 1971 license for the O-141 line instead of the 1966 license for the O-141S line.

voltage O-141S line as an essential element of the provision of electric power to the City of Worcester and the surrounding area,⁴ and P&W's desire to construct a second track on the right of way at this location or an adjacent location. National Grid even alerted P&W to the fact that it had terminated the wrong license. In response, on May 25, 2010, P&W terminated the 1966 license for the O-141S line but did not reinstate the 1971 license for the O141 crossing.⁵ Subsequent to the first license termination, National Grid developed a schedule, accepted by P&W in a meeting held on May 14, 2010, that would allow for completion of design to relocate the O-141S line in 2010 and completion of construction in 2011. Since P&W did not have a survey of the right-of-way or title information

⁴ At page 3 of the Petition P&W speculates that the O-141S line is used only "as a backup for another transmission line serving the City of Worcester." The use of the word "backup" is very misleading. The O-141S line is one of two high voltage lines that provide electricity to two of National Grid's substations serving the City of Worcester – the Nashua Street substation and the Greendale substation. Lower voltage distribution lines serving many thousands of industrial and residential customers originate at these two substations. If one of the two high voltage transmission lines were removed, both substations could lose service in the event of a lightning strike or other outage on the remaining line. The ability to conduct maintenance requiring a planned outage of one of the lines could also be lost with only one line serving these substations. Thus, in order to avoid loss of electric service to the customers served by these two substations, redundancy is designed and built into National Grid's transmission system. In addition to being one of two sources of electricity for two vital substations, loss of the O-141S line can impact the regional transmission system that serves not only Worcester, but all of New England. Permanent removal of the O-141S may result in overload of other transmission lines in the area, either on a pre- or post-contingency basis, that could result in a serious negative impact on the reliability of electric service to the region.

⁵ P&W's termination of both the 1966 license and the 1971 license, if enforced without allowing time to design and construct a relocation of the terminated lines, will have the effect of discontinuing the only two sources to National Grid's Nashua Street substation which serves 53 megawatts (MW) of load consisting of large industrial customers including a hospital, a university, a business center, an insurance company, a shopping mall, a hotel, several large retailers, and numerous other customers.

related to its ownership thereof, National Grid also completed a survey needed for the preliminary engineering design, obtained a complete title work-up on the subject property stretching back over a hundred years, and has provided preliminary engineering plans for the relocation to P&W.

Despite National Grid's efforts to move forward with relocation of the O-141S line, on July 20, 2010, P&W filed its Petition in this proceeding, claiming that the requirement for MADPU approval to remove the transmission line on P&W's right-of-way under state law is preempted by 49 U.S.C. § 10501(b). The Petition implies that National Grid has been dilatory in responding to P&W's request that National Grid remove or relocate the O-141S line. The facts are otherwise. De-energizing and removing or relocating a high-voltage electric transmission line is not a simple process. As described above, National Grid and P&W representatives have had many communications and National Grid has expended considerable effort and funds over the past year toward designing a relocation that would accommodate P&W's needs.

At meetings in mid-April and on May 14 of this year, the parties discussed the conceptual engineering plans that National Grid had provided in early January for the relocation of part of the O-141S line to accommodate a second track on the P&W right-of-way. The schedule prepared by National Grid under which project completion was targeted for December of 2011 was also discussed at the May 14 meeting. The schedule also provided for performing a survey of the property involved, obtaining a title report and an appraisal for the property, finalizing the relocation plans, obtaining the necessary approvals, and proceeding with permitting and construction. The P&W representatives

expressed no objection to the preliminary relocation plans, and in fact stated they were pleased with what they characterized as the “aggressive” schedule posited by National Grid. National Grid continues to exert good-faith efforts to honor the schedule discussed at the parties’ May 14 meeting.

The Petition acknowledges that the parties have continued to discuss possible resolution of the dispute by agreement, but states that a declaration of federal preemption is being sought so that P&W can go forward with its plans to expand its operations along the affected rail corridor. *Id.* at 5-6. Given the ongoing discussions between the parties, National Grid was surprised at the filing of the Petition, of which it received no advance notice.⁶ Neither P&W’s Petition nor the statements made at the May 14, 2010 meeting with respect to completion of the relocation by December 2011 indicates an “immediate” need to construct a second track. In any event, without confirmation of P&W’s ability to construct a second track within this section of its right-of-way, the necessity of relocating the O-141S line to accommodate the additional track has not yet been definitively established.

As National Grid demonstrates below, there are substantial fact questions whether the requirement for the MADPU’s approval for removal of the O-141S line prevents or unreasonably interferes with P&W’s present or future operations on its Gardner Branch, and whether P&W can proceed with its project to construct a second

⁶ P&W states at page 5 of the Petition that National Grid has “threatened to institute proceedings at the MADPU to prevent P&W from forcing the removal of the O-141S line. . . .” National Grid has made no such threat, but merely called the requirements of M.G.L. c. 164, § 73 to P&W’s attention. National Grid has made it clear to P&W that it would prefer to resolve the matter through good-faith negotiations.

track regardless of the existence of the O-141S line at its current location. There is also a substantial question whether removal of the transmission line without the approval of the MADPU is permissible under FERC's oversight of regulation of the reliability of electricity transmission in the region. These are issues largely of first impression, which need to be explored before the Board can make a reasoned decision on the merits of P&W's Petition. Accordingly, the Board should institute a proceeding to take evidence and argument on the issues implicated by the Petition. In the meantime, National Grid intends to continue its discussions with P&W in an attempt to find an appropriate solution short of removal of the O-141S line.⁷

II. ARGUMENT

A. **The Board Needs Additional Evidence to Determine Whether Continued Existence of the Transmission Line Will Unreasonably Interfere with P&W's Present or Future Rail Operations**

The thesis of P&W's Petition is that the Board's regulatory jurisdiction over railroads preempts M.G.L. c. 164, § 73's requirement for pre-approval by the MADPU for the removal of an existing electric transmission line from a railroad right-of-way. In essence, P&W's argument is that "the law is clear that the Board has exclusive jurisdiction over a railroad's right to full use of its right-of-way." Petition at 7.

However, federal preemption law is more complex than this.

⁷ The best solution – and probably the only feasible one – would be for P&W to acquire the parallel Pan Am line between Worcester and Barbers and rehabilitate the track on the Pan Am property. If Pan Am is unwilling to sell its Worcester-Barbers line voluntarily or for a reasonable price, given the deteriorated condition of the track, P&W could seek adverse abandonment of the line and then acquire it from Pan Am pursuant to 49 U.S.C. §§ 10903-10904.

Under the express terms of 49 U.S.C. § 10501(b), the preemptive authority of the Interstate Commerce Commission Termination Act (“ICCTA”) is limited. As the Board has explained:

The federal preemption provision contained in 49 U.S.C. § 10501(b), as broadened by the ICC Termination Act of 1995 . . . protects railroad operations that are subject to the Board’s jurisdiction from state or local laws or regulations that would prevent or unreasonably interfere with those operations . . . *But this broad Federal preemption does not completely remove any ability of state or local authorities to take action that affects railroad property.* To the contrary, state and local regulation is permissible where it does not interfere with interstate rail operations, and localities retain certain police powers to protect public health and safety.

STB Finance Docket No. 34354, *Maumee & W. R.R. Corp. and RMW Ventures, LLC – Petition for Declaratory Order*, STB served March 2, 2004, at 2 (emphasis added) (finding the STB did not have exclusive jurisdiction over, and the ICCTA did not preempt, a city’s ability to acquire an easement to construct an at-grade crossing over, and install utilities under, an active railroad right-of-way).

There is a general presumption against preemption of state law. *Bldg. & Constr. Trades Council v. Assoc. Builders & Contractors*, 507 U.S. 218, 224 (1993) (“consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law”) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)). Where a state acts “in a field which the States have traditionally occupied,” such as land use for legitimate objectives related to health, safety or general welfare of the community, there is an assumption that the historic police powers of the state have not been superseded unless it was the clear purpose of Congress to do so.

Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996). A presumption against preemption limits “congressional intrusion into the States’ traditional prerogatives and general authority to regulate for the health and welfare of their citizens.” *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

The courts and Congress have recognized the need for oversight of railroad operations at the federal level. *City of Auburn v. United States*, 154 F.3d 1025, 1029 (9th Cir. 1998). However, the courts are split on the scope of preemption under ICCTA, with some jurisdictions finding preemption applies only to state laws that regulate rail transportation. *Fla. E. Coast R.R. Co. v. City of West Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001) (application of zoning and occupational license ordinances against private entity operating on railroad’s property did not constitute “regulation of rail transportation” and was not preempted by ICCTA; laws that have a remote or incidental effect on rail transportation are not preempted); *Fort Worth and W. R.R. Co. v. Enbridge Gathering, L.P.*, 298 S.W.3d 392, 401 (Tex.App.-Fort Worth 2009) (exclusive federal jurisdiction applies only when state action is regulatory in nature or would otherwise impede rail operations; laying of gas pipelines under railroad did not involve regulation of rail operations); *Iowa, Chicago & E. R.R. v. Wash. County*, 384 F.3d 557, 560-61 (8th Cir. 2004) (ICCTA did not preempt Iowa Department of Transportation proceedings as to whether railroad should be ordered to replace unsafe bridges). Routine uses of railroad property such as non-exclusive easements for at-grade road crossings, wire crossings, and sewer crossings are not preempted so long as they do not impede railroad operations. *Franks Investment Company, LLC v. Union Pacific R. Co.*, 593 F.3d 404, 407-15 (5th Cir.

2010) (*en banc*); *Fla. East Coast R.R. Co.*, 266 F.3d at 1330-31; STB Finance Docket No. 34354, *Maumee & W. R.R. Corp. and RMW Ventures, LLC—Petition for Declaratory Order*, STB served March 3, 2004, at 2.

The Massachusetts statute at issue here, M.G.L. c. 164, § 73, governs pipes, mains, wires and conduits crossing railroads and provides:

If such [transmission corporation] has lawfully constructed . . . poles, towers or similar structures within the location of such railroad . . . then it shall not thereafter be required to remove, abandon, or cease to operate such facilities without the consent of the department. If the department, after notice and public hearing, determines that *the continued operation of such facilities will serve the public convenience and is consistent with the public interest*, it shall specify the terms and conditions for the continued operation thereof.

(emphasis added). Where there is a conflict between a railroad and a gas or electric utility over the continuation of use of utility infrastructure lawfully constructed within the railroad right-of-way, the statute grants the MADPU the authority to decide what is best for the public interest and convenience in terms of assuring that utility service is not interrupted as a result of the failure of the railroad and the utility to reach an agreement for the continued occupation.

To National Grid's knowledge, the Board has not heretofore addressed federal preemption of a statute such as M.G.L. c. 164, § 73, which on its face does not directly regulate railroad operations. The state's regulation of the removal of *existing* electric transmission lines from railroad rights-of-way is very important from a public policy perspective, as a finding of preemption would have a very real impact on the public interest in the uninterrupted operation of the electric grid not only in

Massachusetts, but throughout New England. Significant fact issues are also implicated, as the Board must also determine whether the provisions of M.G.L. c. 163, § 73 prevent or unreasonably interfere with P&W's operations. STB Finance Docket No. 34425, *City of Lincoln – Petition for Declaratory Order*, STB served August 11, 2004, at 3, *aff'd City of Lincoln v. S.T.B.*, 414 F.3d 858 (8th Cir. 2005). P&W itself acknowledges this at page 8 of its Petition.

The specific preemption inquiry here is whether the continued existence of the O-141S line will unreasonably interfere with or "regulate" P&W's operations. The Board cannot find that M.G.L. c. 164, § 73 is preempted by ICCTA without making a factual determination as to whether the requirement for MADPU approval of the removal of an existing electric transmission line from P&W's property regulates or unreasonably interferes with P&W's ability to construct a second track to accommodate projected rail traffic increases. This question is very much up in the air at this stage because:

1. P&W has not demonstrated that it requires the property in issue in connection with its rail operations. Specifically, there is no evidence as to whether P&W can construct a second track between Worcester and Barbers without removal of the O-141S line, which occupies approximately one mile along the west side of P&W's right-of-way.
2. There are other obstructions along P&W's right-of-way between Worcester and Barbers that effectively prevent P&W from constructing a second track without acquiring additional right-of-way. The obstructions in the area where the O-141S line occupies the P&W right-of-way include inadequate horizontal clearance under a bridge carrying Interstate Highway 190 over the track and for adjoining parking facilities for Greendale Mall, and an easement for a buried telecom line. South of the O-141S line's occupancy, there is a long underpass known as the Lincoln Square Tunnel that does not have adequate clearance for a second track on P&W's property (the only

option here would be to acquire Pan Am's adjoining property where it passes through this underpass).⁸

3. There is an existing track on part of the Pan-Am right-of-way, which parallels and adjoins the P&W right-of-way (on the east side thereof) over the entire distance between Worcester and Barbers. National Grid understands that P&W has the ability to acquire the Pan Am property (including the track) under the Board's adverse-abandonment and financial assistance procedures, at a cost (net liquidation value) that is likely to be substantially less than the cost to National Grid of removing or relocating the transmission line.
4. National Grid's understanding is that the MADPU's procedures for determining whether to approve the removal of a transmission line already lawfully in existence on railroad property take into account the views and needs of the railroad involved, as well as the need to maintain the reliability of the electric transmission grid in the area under FERC standards. On August 27, 2010, the MADPU filed its notice of intent to participate in this proceeding.

The Board should institute a proceeding to take evidence and argument with respect to these issues, as well as the public interest concerns raised above, which must be resolved before the Board can make a reasoned decision on the merits of P&W's Petition.

B. Granting the Petition Would Conflict With Other Federal Laws and Regulations Governing Reliability of the Electric Transmission Grid

P&W's Petition portrays this controversy as a simple matter where the federal law of interstate commerce/railroads trumps the Massachusetts state regulation of the location of electric transmission lines. However, P&W's discussion ignores the fact that recent legislation, the Energy Policy Act of 2005 ("EPAct"), Pub. L. No. 109-58, 119

⁸ The P&W line from Worcester to Barbers, as well as the adjoining Pan AM right-of-way to the east (right), as viewed from a P&W locomotive cab, is shown on <http://www.youtube.com/watch?v=r2YezOlgJyw>. The area where the O-141S line occupies P&W property on the west (left) side of the right-of-way begins at approximately minute 6:37 of the video.

Stat. 594 (2005) (codified in relevant part at 16 U.S.C. §§ 824n *et seq.*), makes the reliability of the bulk-power system, including National Grid's O-141S transmission line at issue, a matter of federal concern and intrudes upon the subject matter jurisdiction of another federal agency, FERC. Matters involving conflicts between sister agencies cannot be dismissed on the simplistic basis proposed by P&W, as doing so could be in contravention of FERC's requirements.

Historically, state regulatory bodies such as the MADPU exercised jurisdiction over electric transmission system reliability and the siting of transmission lines.⁹ However, following the blackout of November 9, 1965, which left much of New York, New England and Ontario in the dark,¹⁰ Congress, the Federal Power Commission (the "FPC," FERC's predecessor), the states, and the electric utility industry undertook reviews of the reliability of the electric power system, often referred to as the "grid." The approach that emerged was a system of voluntary self-regulation undertaken by the electric utility industry itself, with considerable awareness and monitoring by the Congress, the FPC/FERC, and the states. Specifically, the industry formed the North American Electric Reliability Council ("NERC") in 1968, along with nine regional

⁹ See, e.g., U.S. Energy Information Administration, *The Changing Structure of the Electric Power Industry 2000: An Update*, available at http://www.eia.doe.gov/electricity/chg_stru_update/chapter2.html#N_2_ ("Changing Structure"); Little, Vance, *Using the Commerce Clause to Short-Circuit States' Ability to Pass Power Costs Onto Neighbors*, 2008 U. Ill. J.L. Tech. & Pol'y 149, 161.

¹⁰ See Federal Power Commission, *Northeast Power Failure: November 9 and 10, 1965 2* (1965), available at http://www.blackout.gmu.edu/archive/pdf/fpc_65.pdf. The blackout was attributed to a single safety relay that was improperly set. The relay tripped and caused a cascading failure in the electric transmission system for the region.

reliability entities, including the Northeast Power Coordinating Council (“NPCC”), which was responsible for New York, the six New England states, four Canadian provinces, and Prince Edward Island.

NERC and the regional entities adopted a variety of guidelines for utilities to follow in modeling, planning, and operating the grid. While compliance was generally not mandatory, the standards were widely followed as “rules of the road” and undoubtedly had considerable effectiveness in maintaining reliability.¹¹ Nonetheless, the system of voluntary self-regulation was not entirely effective. For example, a single tree made contact with a power line in Idaho in 1996, causing a power outage that spread to eight western states and parts of Canada and Mexico.¹² California experienced rolling blackouts in 2001 as part of the power crisis that affected that state and the western region as a whole. In 2003, a blackout in the eastern United States and Canada knocked out power to New York City and some 50 million customers in total in Ohio, New York, Michigan, Pennsylvania, Vermont, Massachusetts (including National Grid customers in Worcester), Connecticut, New Jersey and Ontario. The events of September 11, 2001 added a national security dimension to concerns about the reliability, safety, and security of the grid, as have developments regarding computer and communications cybersecurity.

¹¹ See generally, U.S.-Canada Power System Outage Task Force, *Final Report on the August 14, 2003 Blackout in the United States and Canada: Causes and Recommendations* 10-11 (2004), available at <https://reports.energy.gov/BlackoutFinal-Web.pdf> (“2003 Blackout Report”).

¹² See *2003 Blackout Report* at 105-06.

Accordingly, Congress passed the EPAct in 2005 addressing a broad array of energy, environmental, and related issues. In particular, Section 1211 of the EPAct called for the establishment of mandatory reliability standards that would be developed, administered, and enforced by the Electric Reliability Organization (“ERO”) and related regional entities. While the ERO and the regional entities remained industry self-regulatory organizations, EPAct made their activities – including the composition, operation, and funding of the ERO and the regional entities and the development, administration and enforcement of the reliability standards – subject to FERC oversight and approval. *See* 16 U.S.C. § 824n. Moreover, FERC has the independent power to assess penalties for violations of ERO standards. *See* 16 U.S.C. § 825n. These penalties can include fines of up to *\$1 million per violation per day*. *See* 16 U.S.C. § 825o.

FERC approved the reconstituted NERC as the ERO.¹³ NERC, the NPCC, ISO New England (the Independent System Operator for the high-voltage transmission system in New England and the operator of the spot power markets in the region), National Grid, other regional utilities, generators, transmission and distribution providers and load-serving entities, and FERC have worked together to develop and strengthen the electric reliability requirements in the region. *See* http://www.iso-ne.com/rules_proceeds/isone_plan/index.html.

¹³ *Order Certifying North American Electric Reliability Corporation as the Electric Reliability Organization and Ordering Compliance Filing*, 116 FERC ¶ 61,062 (2006). NERC was reconstituted as the *North American Electric Reliability Corporation*, to reflect its changed role and membership.

Simply stated, immediate removal of the O-141S transmission line in the manner contemplated in P&W's Petition puts National Grid at risk of being in violation of numerous NERC/NPCC reliability standards. One of the central requirements of the reliability standards is redundancy, that is, the network must be able to survive various contingencies, consisting of a loss of generation resources and/or transmission facilities, without experiencing a loss of load. The ability to survive such a contingency applies to requirements for modeling, planning, and operating the system, and its individual elements, across a range of time horizons. Removing the O-141S transmission line would thus subject National Grid to potential penalties of as much as \$1 million per violation per day, even in the absence of any disruption to service. National Grid also has numerous contracts that require National Grid to adhere to "good utility practice," which generally requires an entity to be in compliance with the applicable reliability standards. Furthermore, elimination of the redundancy required by the standards for serving the Worcester area would increase the potential for an outage that would affect not only Worcester,¹⁴ but which could also cascade into additional areas within and beyond New England.

Even removal and relocation of the line requires substantial coordination in the electric operations throughout the state to assure that the grid remains stable, that there is no loss of load, that redundancy is maintained, and that any disruptions do not

¹⁴ Worcester is the second largest city in Massachusetts, and the third largest city in New England. Loss of service to the city as a result of removal of the O-141S line would impact thousands of commercial and residential customers in the area (including P&W itself).

cascade. Such activities cannot be conducted properly without advance preparation. The requirement for MADPU approval of the removal of existing transmission lines on railroad property furthers the federal interest in maintaining a reliable transmission system in the region.

As the foregoing discussion demonstrates, the order sought by P&W implicates other federal law and not just state law. The Board cannot grant P&W's request for a declaratory order without giving full consideration to the competing federal interests at stake.

C. The Board Should Issue a Procedural Schedule and Protective Order to Govern Discovery and the Submission of Evidence

As demonstrated above, P&W's Petition raises significant legal and factual issues requiring the institution of a proceeding for the submission of evidence and argument. National Grid suggests the following procedural schedule for this case:

- [Day 1] Entry of Board order commencing proceeding.
- [Day 60] Close of discovery.
- [Day 90] P&W, National Grid and other interested parties file simultaneous Opening Evidence and Argument.
- [Day 130] P&W, National Grid and other interested parties file simultaneous Reply Evidence and Argument.
- [Day 150] P&W, National Grid and other interested parties file simultaneous Rebuttal Evidence and Argument.

National Grid requires discovery from P&W in order to develop a complete factual record, and because P&W may regard at least some of the information to be sought by National Grid to be proprietary or confidential, the Board should also issue a

protective order to govern the production and use of confidential and highly confidential information. Simultaneously with the filing of this Reply, National Grid is also filing a Motion for Protective Order. The proposed protective order is set forth in Exhibit A to that Motion.

Counsel for National Grid has conferred with counsel for P&W with respect to the schedule proposed above, and has been advised that P&W does not agree that a procedural schedule (or a companion protective order) is needed. P&W has expressed no position with respect to the specific schedule proposed by National Grid.

D. Mediation

Given the parties' apparently-mutual desire to find a satisfactory solution to their dispute, thus avoiding the need for resolution of the merits of P&W's Petition, National Grid believes that non-binding mediation by the Board pursuant to 49 CFR § 1109.1 would be beneficial. Accordingly, National Grid hereby advises the Board that it consents to such mediation. Counsel for National Grid has also contacted counsel for P&W concerning mediation, and has been advised that P&W does not consent to Board mediation at this time.¹⁵

III. CONCLUSION

For the reasons stated above, the Board should institute a declaratory order proceeding and establish a procedural schedule as set forth herein.

¹⁵ If P&W ultimately consents to mediation, all due dates under the procedural schedule would be postponed by 90 days. However, to avoid undue delay, National Grid would be willing to conduct discovery during the mediation period.

Respectfully submitted,

NEW ENGLAND POWER COMPANY
d/b/a NATIONAL GRID

By: Bess B. Gorman
Megan F. S. Tipper
National Grid USA Service
Company, Inc. d/b/a National Grid
40 Sylvan Road
Waltham, MA 02451

Christopher A. Mills
Daniel M. Jaffe
Stephanie P. Lyons
Slover & Loftus LLP
1224 Seventeenth Street, NW
Washington, DC 20036
(202) 347-7170
cam@sloverandloftus.com



Of Counsel:
Slover & Loftus LLP
1224 Seventeenth Street, NW
Washington, DC 20036
(202) 347-7170

Dated: August 30, 2010

Its Attorneys

VERIFICATION

I, Mark Browne, verify under penalty of perjury that I am the Director of Transmission Line Engineering of National Grid, that I have read the foregoing Reply to Petition for Declaratory Order and know the factual statements set forth therein, and that the same are true as stated to the best of my knowledge, information and belief. Further, I certify that I am qualified and authorized to file this statement.



Mark Browne

Executed on August 30, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of August, 2010, I caused a copy of the foregoing Reply to Petition for Declaratory Order to be served by email on counsel for Petitioner Providence & Worcester Railroad Company and other interested parties, as follows:

Edward D. Greenberg, Esq.
David K. Monroe, Esq.
GKG Law, P.C.
Canal Square
1054 31st Street, NW
Washington, DC 20007
egreenberg@gkglaw.com
dmonroe@gkglaw.com

James A. Buckley, Esq.
Stephen August, Esq.
Massachusetts Department of Public Utilities
One South Station
Boston, MA 02110
james.a.buckley@state.ma.us
stephen.august@state.ma.us



Christopher A. Mills