KAPLAN KIRSCH ROCKWELL

December 15, 2010

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

Re: *BNSF Railway Company - Abandonment Exemption – In King County, Washington*, Finance Docket No. AB-6 (Sub-No. 463X)
BNSF Railway Company - Abandonment Exemption – In King County, Washington, Finance Docket No. AB-6 (Sub-No. 465X)
GNP Rly Inc. – Acquisition and Operation Exemption – Redmond Spur and Woodinville Subdivision – Verified Petition for Exemption Pursuant to 49 U.S.C. § 10502, Finance Docket No. 35407

Dear Ms. Brown:

Enclosed please find for filing the Reply of King County, Washington Regarding Petitions of GNP Rly Inc.

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

Sincerely,

W. Eric Pilsk

Enclosures

cc: All Parties of Record

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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket No. AB-6 (Sub-No. 463X)

BNSF RAILWAY COMPANY – ABANDONMENT EXEMPTION – IN KING COUNTY, WASHINGTON
(Redmond Spur, MP 0.00 to MP 7.30)

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

BNSF RAILWAY COMPANY – ABANDONMENT EXEMPTION – IN KING COUNTY, WASHINGTON
(Woodinville Subdivision, MP 11.25 to MP 23.80)

STB Finance Docket No. 35407

GNP RLY INC. – ACQUISITION AND OPERATION EXEMPTION – REDMOND SPUR AND WOODINVILLE SUBDIVISION – VERIFIED PETITION FOR EXEMPTION PURSUANT TO 49 U.S.C. § 10502

REPLY OF KING COUNTY, WASHINGTON REGARDING PETITIONS OF GNP RLY INC.

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Dated: December 15, 2010

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REPLY OF KING COUNTY, WASHINGTON REGARDING PETITIONS OF GNP RLY INC.

Pursuant to the Surface Transportation Board's Request for Comments issued on September 15, 2010, as modified by the Board's December 1, 2010 Order, King County, Washington, a political subdivision of the State of Washington (the "County") hereby submits this Reply in order to (1) address certain Comments submitted in support of GNP Rly Inc. ("GNP") and (2) to bring to the Board's attention recent Board decisions that address issues raised by GNP's Petitions. This additional information further demonstrates that the Board should deny GNP's Petitions in their entirety.

DISCUSSION

I. Response To Comments In Support Of GNP

In early November, 2010, several entities submitted Comments in support of GNP's Petitions. Although the Comments are in the form of letters from third-parties, the letters were served and filed by GNP's counsel. The apparent purpose of these Comments was to show that there is demand for freight rail service on the Redmond Spur or to otherwise bolster the viability of GNP's proposed operations. Accordingly, these Comments should be seen as part of GNP's effort to support its Petitions. It is clear, however, that none of the Comments support GNP's position. To the contrary, the comments tend to underscore the absence of demand for freight service on the Redmond Spur.

Comment of Waste Management, dated Oct. 29, 2010 (served Nov. 1, 2010). Waste Management indicates that it is in the process of seeking local land use approvals to open a "commercial and demolition material recovery facility" adjacent to the Freight Portion of the Line, north of Woodinville in Snohomish County. Waste Management apparently intends to use GNP/Ballard's *existing* and *permitted* freight service on the Freight Portion. While potentially relevant regarding the viability of the *existing* freight operation, to which no one objects, Waste Management's Comment does not provide any evidence that there is any demand for freight service on the Redmond Spur or on the Woodinville Subdivision south of Woodinville, which are the subjects of GNP's Petitions. At most, Waste Management's Comment suggests that if it obtains approval for and develops its facility, and if it contracts with GNP for freight service, then the proposed facility may provide GNP with financial stability. But, the information about potential shipping volumes from Waste Management does not address GNP's long term

profitability, GNP's financial ability to rehabilitate and maintain the Redmond Spur or GNP's ability to attract sufficient business on the Redmond Spur to justify its proposed service.

Comment of Woodinville Lumber, dated Oct. 11, 2010 (served Nov. 5, 2010). Woodinville Lumber is a lumber business located adjacent to the Redmond Spur. Despite its location, BNSF has no record of serving Woodinville Lumber since at least 2000. Verified Statement of Susan Odom ("Odom V.S."), Exhibit 35 at ¶ 3, Ex. B (included in Exhibits in Support of Comments of King County, Washington Regarding Petitions of GNP Rly Inc., Volume II of II, Exhibits 27-48 (filed November 9, 2010)). Woodinville Lumber's letter provides no assurance that it will ever become a customer of GNP on the Spur. Woodinville Lumber is very clear that it is "not willing to commit to a certain volume of material." At most, Woodinville Lumber could "envision receiving at least one car per month once the economy improves and the line is open."

Far from supporting any actual demand for freight service, Woodinville Lumber's letter highlights the absence of such demand. Woodinville Lumber's location and the nature of its business would seem to make it a natural rail customer. Yet, it does not appear to have been a rail customer, has no present need for rail service and cannot even "envision" having future demand for much more than one car per month. Even combining the other traffic hypothesized by GNP with Woodinville Lumber's conjectural one car per month, there still would not be sufficient traffic to support a credible, viable rail operation.

Comment of Marketing Philharmonic, dated Nov. 1, 2010 (served Nov. 5, 2010). Marketing Philharmonic appears to be a marketing firm that conducted interviews regarding the Eastside Rail corridor. Marketing Philharmonic does not disclose who they interviewed, who retained them, what questions they posed, how the interviews were conducted or what the

complete answers were. In addition to the overall lack of foundation, Marketing Philharmonic's Comment focuses entirely on *commuter and excursion passenger* service; there is no mention of freight service. Marketing Philharmonic's letter further underscores that GNP's true interest in the Redmond Spur and Woodinville Subdivision is for providing intrastate passenger service, which is beyond the jurisdiction of the Board. As the tentative expressions of paltry demand for freight service make clear, there is no *bona fide* demand for freight service on the Redmond Spur and GNP's Petitions are pretexts to use the Lines to provide intrastate passenger services free from local environmental and land use regulation.

Comment of Eastside Rail Now!, dated Nov. 7, 2010 (served Nov. 10, 2010). As with the Comment of Marketing Philharmonic, the Comment of Eastside Rail Now! provides no evidence to support its conclusory statements regarding potential demand for rail service. It represents the unverified and unsupported opinion of its author. Indeed, the evidence presented by GNP from actual potential shippers demonstrates that, contrary to Mr. Zimmer's wishful statements, there is no *bona fide* demand for freight service on the Spur.

II. Recent Board Decisions Reaffirm Necessity For Petitioners To Describe Accurately Their Efforts To Acquire The Right Of Way

The Board recently issued two decisions that relate to the issues raised in GNP's decision, including specifically dismissal of a notice of exemption for containing material misrepresentations relating to purported negotiations to secure rights to use track and the necessity of obtaining a property or contract right to use track.[1] The decisions involve facts very similar to those presented by GNP and provide further authority for denying GNP's Petitions.

[1] King County filed its initial Comments on November 9, 2010, in accordance with the Board's procedural order in this proceeding. The two decisions discussed below were issued on December 6, 2010. Because the two decisions address legal issues that King County raised in its Comments, and therefore do not broaden the scope of this proceeding, the County is discussing them here in the interest of ensuring development of a complete record upon which the Board may base its decision.

In *San Francisco Bay RR – Mare Island – Operation Exemption – California Northern RR,* Docket Nos. FD 35303 and 35304 (Service Date Dec. 6, 2010), San Francisco Bay Railroad – Mare Island ("SFBRR-MI") filed a Notice of Exemption to operate on approximately eight miles of track from Mare Island to a junction with the Union Pacific main line near Vallejo. In its Notice, SFBRR-MI represented, pursuant to 49 C.F.R. § 1150.33(c), that it was negotiating to acquire access to operate over the track from the City of Vallejo, suggesting that the City was the only entity with whom SFBRR-MI needed to reach agreement for access to the track. The Board found that assertion materially misleading, therefore rendering the Notice *void ab initio* because (1) the City of Vallejo owned only a portion of the right-of-way, (2) SFBRR-MI failed to indicate clearly that a private developer, LMI, owned the remaining right-of-way, and (3) SFBRR-MI would be required to enter into an agreement with LMI. *Id.* Slip Op at 3-4.

Similarly here, GNP represented, pursuant to 49 C.F.R. § 1150.33(c), that it was negotiating with the County to acquire the right-of-way, implying that GNP could obtain all the rights it needed from the County. GNP Petition at 13. But the County does not own the right-of-way – the Port and City of Redmond do – so whatever discussions GNP was having with the County were necessarily insufficient to acquire the right-of-way. Moreover, there were (and are) no meaningful negotiations between the County and GNP regarding GNP's use of the Lines. Verified Statement of Pam Bissonnette, Ex. 11 at ¶¶ 19-24 (filed Nov. 9, 2010). Indeed, GNP expressly disavowed that it was seeking to acquire any property interest in the Lines. *Id.* at ¶ 20. Accordingly, GNP's Petition is materially misleading in precisely the same manner as SFBRR-MI's Notice was misleading, and the Board should deny GNP's Petition on the same grounds.

In a companion decision issued the same day, *San Francisco Bay RR – Mare Island Petition for Emergency Service Order and Petition for Declaratory Order – Lennar Mare Island,*

LLC, Docket No. FD 35360 (Service Date Dec. 6, 2010), the Board further underscored the necessity of having a property interest in the right-of-way *before* asserting the right to use the right-of-way to provide rail service. In that proceeding, SFBRR-MI sought (1) an emergency service order, and (2) a declaratory order that SFBRR-MI had the right and obligation to provide service and that the Board may impose the terms for such service. *Id.* Slip Op. at 3. After rejecting the emergency service order request because there was no demonstrated need for emergency service, the Board stated that even if SFBRR-MI had obtained operating authority on the line from the Board, it would not be entitled to a declaration that it had a right and obligation to provide service "because the recipient must secure an agreement with the underlying owner before it can begin service." *Id.* Slip Op. at 4. "Here, the record is clear that [SFBRR-MI] has neither any legal property interest nor contractual rights to operate over this track. Thus, even if [SFBRR-MI] were to hold operating authority from the Board, [SFBRR-MI] would not have the ability to exercise it." *Id.*

Although the facts of *Mare Island* differ from the facts here in many respects, the Board's decision underscores the critical point that an entity, even a railroad with Board authority to operate, cannot force its way onto a line without first obtaining sufficient property interests or contractual rights. The *Mare Island* cases further make clear that the Board will not declare that a railroad may use a line unless and until a railroad acquires rights in the line from the line's owners. Here, GNP has not acquired from the owners of interests in the right-of-way – the Port of Seattle, the City of Redmond and King County – any property or contractual right to use the Lines for freight service. Those entities have, in their comments to the Board in this proceeding, made clear that they have not, and do not intend to, convey such rights to GNP. Accordingly, GNP does not have, and cannot obtain, any property or contractual right to use the Lines for

freight service. As the Board's decision in *Mare Island* makes clear, the Board cannot authorize GNP to sidestep those basic principles of property law and force its way onto a line of railroad in which it has no legal rights. Accordingly, GNP's Petitions should be denied.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Comments of King County, Washington Regarding Petitions of GNP Rly Inc. filed on November 9, 2010, King County respectfully submits that GNP's Petitions should be denied.

Respectfully submitted,

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Dated: December 15, 2010

CERTIFICATE OF SERVICE

I hereby certify that I am providing a copy of the foregoing REPLY OF KING COUNTY, WASHINGTON REGARDING PETITIONS OF GNP RLY INC. upon the following parties of record by first class mail with postage prepaid and properly addressed:

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Dated this 15th day of December, 2010