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July 1, 2020

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

ENTERED
Office of Proceedings
July 1, 2020
Part of
Public Record

Matthew Cohen
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Re: Docket No. FD 35692
Eastside Community Rail, LLC - Acquisition and Operation Exemption - GNP Rly, Inc.
Docket No. FD 35730
Ballard Terminal Railroad Co. LLC - Lease Exemption - Eastside Community Rail, LLC

Dear Ms. Brown:

Enclosed for e-filing in the above-referenced dockets are:

City of Woodinville, Washington's Motion for Leave to File a Reply to Reply filed by Snohomish County, and

City of Woodinville, Washington's Reply to Snohomish County Reply.

Thank you for your assistance. If you have any questions, please contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Matthew Cohen', with a stylized, flowing script.

Matthew Cohen

cc: Joshua Brower
James H. Savage
Douglas Engle
Charles H. Montange
Charles A. Spitulnik
W. Eric Pilsk
Allison I. Fultz
Richard Welsh
Myles L. Tobin

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 35692

**EASTSIDE COMMUNITY RAIL, LLC-ACQUISITION AND
OPERATION EXEMPTION - GNP RLY, INC
(Woodinville Subdivision, MP 23.8 to MP 38.25)**

Finance Docket No. 35730

**BALLARD TERMINAL RAILROAD COMPANY, LLC - LEASE
EXEMPTION -
EASTSIDE COMMUNITY RAIL, LLC
(Woodinville Subdivision, MP 23.8 to MP 38.25)**

**CITY OF WOODINVILLE, WASHINGTON -
MOTION FOR LEAVE TO FILE A REPLY TO REPLY FILED BY
SNOHOMISH COUNTY**

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July 1, 2020

**BEFORE THE
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**CITY OF WOODINVILLE, WASHINGTON -
MOTION FOR LEAVE TO FILE A REPLY TO REPLY FILED BY
SNOHOMISH COUNTY**

The City of Woodinville, Washington, respectfully seeks leave to file a Reply to the Reply filed by Snohomish County on June 11, to address recent developments affecting the rail corridor that have occurred since the City briefed Snohomish County's default motion in August 2018. The City's short reply will not delay the proceedings or otherwise prejudice the parties or burden the Board. The remand of this matter to the Board from the D.C. Circuit in May 2020 renewed the proceedings in these dockets and spurred several parties to file pleadings *sua sponte* to which the City would welcome an opportunity to respond.

The Board has the discretion to accept an otherwise impermissible reply to a reply under those circumstances. *See Ulster & Delaware Railway Revitalization Corp. – Petition For Declaratory Order*, FD 36164, slip op. at 4 (STB served June 29, 2018); *BNSF Railway*

Company -Abandonment Exemption-In Kootenai County, ID, Docket No. AB-6 (Sub-No. 468X), slip op. at 1 (STB served Nov. 27, 2009).

July 1, 2020

Respectfully Submitted,

/s/Matthew Cohen

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Attorneys for the City of Woodinville, Washington

CERTIFICATE OF SERVICE

I certify that on July 1, 2020 I served by email an e-filed copy of the foregoing document upon all parties of record in this proceeding as listed below per the STB service list.

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DATED: July 1, 2020.

/s/Sharman D. Loomis

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 35692

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**CITY OF WOODINVILLE, WASHINGTON -
REPLY TO SNOHOMISH COUNTY REPLY**

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**CITY OF WOODINVILLE, WASHINGTON -
REPLY TO SNOHOMISH COUNTY REPLY**

Snohomish County filed petitions to revoke the acquisition and operating exemptions of Eastside Community Rail (ECR) and Ballard Terminal Railroad (Ballard) to provide common carrier service on a line of railroad between MP 23.8 in Woodinville, Washington and MP 38.25 in Snohomish, Washington (“the Freight Segment”).¹ On June 8, 2020 Ballard filed a comment letter expressing support for revocation of both exemptions. Comment Letter of J. Brower for Ballard, FD 35692 and FD 35730 (filed June 8, 2020). On June 11 Snohomish filed a reply to Ballard’s comment letter. Snohomish County Reply, FD 35692 and FD 35730 (filed June 11, 2020).

¹ Petition to Revoke, *Eastside Community Rail, LLC – Acquisition and Operation Exemption – GNP Rly Inc.*, FD 35692 (filed July 12, 2018) Petition to Revoke, *Ballard Terminal Railroad Company, LLC – Lease Exemption – Eastside Community Rail, LLC*, FD 35730 (filed July 12, 2018) (hereafter “County Petition To Revoke”).

Subject to the Board’s authorization, the City of Woodinville (“the City”) files this reply to Snohomish County’s reply. The City owns the real estate and physical assets comprising the southern segment of the Freight Segment, between MP 23.8 and 26.38, subject to a rail freight easement.² The Board granted the City’s petitions to intervene in both dockets on December 11, 2018.³

Woodinville supports revocation of both exemptions. Snohomish County’s petition documents Douglas Engle’s surreptitious conveyance of the rail freight easement authorizing freight operations on the Line to members of his family without notice to or pre-authorization by the Board. County Petition to Revoke at 4-5. The U.S. Court of Appeals outlined the ways in which Mr. Engle and ECR potentially misled the Board by presenting conflicting accounts at different times of who owned the freight easement: “The record before the Board contained ample evidence of potential misleadingness, including the omissions and inconsistencies in Engle’s account that the County and others flagged.” *Snohomish County v. Surface Transportation Board*, 954 F.3d 290, 302 (D.C. Cir. 2020).

Ballard’s notice of exemption to operate on the Line recited that Ballard would “lease and operate ECRR’s rail line . . .”⁴ In rejecting a request to stay the effective date of Ballard’s exemption the Board noted that “Ballard can only proceed with its transaction, and therefore

² *City of Woodinville – Petition For Declaratory Order*, FD 35905 (STB served Oct. 7, 2016) slip op. at 1.

³ FD 35692 and FD 35730 (STB served Dec. 13, 2018) (hereafter “Decision Denying Petitions To Revoke”).

⁴ Verified Notice of Exemption of Ballard Terminal Railroad Company, LLC, FD 35730 (filed April 2, 2013).

exercise the exemption authority, once there is a lease agreement in effect . . .”⁵ Ballard’s property right to operate on the Line derives entirely from the ECR lease. Ballard’s comment letter of June 8 acknowledges all of the foregoing points, portrays Ballard as the victim of Mr. Engle’s “less than honest behavior,” and concurs with Snohomish County’s contention that Ballard’s exemption is void *ab initio* “because one depends on the other.” Comment Letter of J. Brower for Ballard, FD 35692 and FD 35730 (filed June 8, 2020).

The foregoing contentions are now beyond dispute. Woodinville sought leave to file this reply to add two simple points. First, 49 U.S.C. § 10502(d) requires a prompt decision on Snohomish County’s petitions. The County filed its revocation requests on July 12, 2018. The statute gives the Board nine months from the institution of a revocation proceeding to issue a decision. In accordance with § 10502(d) the Board started a proceeding on September 24, 2018, and denied the County’s petitions to revoke on December 11, 2018. Decision Denying Petitions to Revoke, slip op. at 9. A reconsideration request followed, culminating in a decision denying reconsideration on May 16, 2019.⁶ On March 27, 2020 the U.S. Court of Appeals vacated the Board’s initial order and remanded the matter for further proceedings. *Snohomish County*, *supra*, 954 F.3d at 303. Assuming that the nine month deadline to act on a revocation request was stayed during the pendency of judicial review the Snohomish petitions nevertheless have been pending before the Board for longer than nine months, counting the months before and after the judicial appeal. As a local government saddled with a decrepit rail line and a carrier that

⁵ *Ballard Terminal Railroad Company, LLC – Lease Exemption – Eastside Community Rail, LLC*, FD 35730 (STB served May 1, 2013), slip op. at 2.

⁶ Decision Denying Request For Reconsideration, FD 35692 and FD 35730 (STB served May 17, 2019).

disavows any obligation to protect the City from liability for rail operations on City property, Woodinville would welcome a prompt decision from the Board.

The City's second point echoes a concern raised by King County⁷ and Woodinville⁸ in 2018. The Freight Segment provides the main connection to the interstate rail system for roughly 32 miles of railbanked rail lines. Local governments have invested millions of dollars in the development of public transit and trail infrastructure on those lines, while preserving the rights of way for future rail use. The ICCTA provides options, including reversion of the common carrier obligation to GNP,⁹ discontinuance and railbanking, to preserve federal common carrier authority over the Freight Segment. Following King County, Woodinville urges the Board "to assure that any relief provides ample opportunity, through railbanking or otherwise, to avoid abandonment of the Freight Segment" ¹⁰

With these considerations in mind the City supports prompt revocation of the ECR and Ballard exemptions.

⁷ King County, Washington Reply To Reply Filed By Douglas Engle at 3-6, FD 35692 and FD 35730 (filed Sept. 5, 2018).

⁸ City of Woodinville -- Petition To Intervene at 3, FD 35692 and FD 35730 (filed Aug. 1, 2018).

⁹ Kevin Kucera, the owner of GNP, certified on July 1, 2020 that "I am ready, willing and able to negotiate an agreement with Snohomish County for the restoration of the rail line and freight rail service as well as such other matters upon which the parties may agree." Certification of Kevin Kucera, *Eastside Community Rail, LLC – Acquisition and Operation Exemption – GNP Rly Inc.*, FD 35692 and FD 35730, (filed July 1, 2020).

¹⁰ King County Reply to Reply Filed by Douglas Engle at 2, note 7 *supra*.

July 1, 2020

Respectfully Submitted,

/s/Matthew Cohen

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DATED: July 1, 2020

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