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

Re: Docket No. FD 36433, North County Transit District –
Verified Petition for Declaratory Order

The City of Del Mar (“Del Mar”) hereby replies in opposition to the unauthorized surreply that North County Transit District (“NCTD”) filed with the Surface Transportation Board (“Board” or “STB”) on July 6, 2022 (“Surreply”). It also replies to the newly filed “Comments” of the Northern Indiana Commuter Transportation District (“NICTD”) and the “Brief” of certain members of NCTD’s trade association, the Commuter Rail Coalition (“CRC”) (collectively “Commuter Railroads”), who support NCTD’s Petition.

Del Mar respectfully submits that the Board should promptly reject NCTD’s Surreply as an improper, unwarranted, and repetitive filing that misstates facts and law and constitutes an abuse of the Board’s processes, and provides nothing new to warrant issuance of a declaratory order, or a finding of preemption. Further, the Commuter Railroads’ untimely filings solicited by its trade association member NCTD¹ in a belated attempt to save NCTD’s Petition and improperly sway the Board, are predicated on a major misunderstanding of the actual facts of record, presumably based on the incorrect facts fed to them by NCTD, and ultimately, only serve to demonstrate that NCTD’s Petition is extremely broad and unending, and should not be granted.

¹ CRC’s website lists Matthew O. Tucker, Executive Director of NCTD as one of its founders. Commuter Rail Coalition, *About the CRC*, <https://www.commuterrailcoalition.org/about-the-crc> (accessed July 24, 2022).

A. The Board Should Not Consider NCTD's Surreply

NCTD's Surreply to Del Mar's July 1 Reply contravenes the Board's rules prohibiting a reply to a reply, NCTD did not seek leave to file it, and thus the Board should not consider it. *See* 49 C.F.R. § 1104.13(c) ("A reply to a reply is not permitted.")

Further, NCTD's prolonged, 15-page Surreply is not at all limited, nor focused on correcting alleged misstatements. NCTD raises additional facts and new arguments that it could have raised in its Petition or potentially in its first three supplements, but it did not. In fact, much of NCTD's Surreply is focused on its belated new assertion that its Petition should be granted because it is "of major significance to the rail industry." Surreply at 5. However, besides being flatly wrong, NCTD's desperate new "national significance" claims, combined with its solicitation of its fellow Commuter Railroads to intervene to support those claims, are belated and provide no valid basis for the filing of its Surreply. Accordingly, the Surreply should be disregarded in its entirety. *See E.W. Resort Transp., LLC et al. – Pet. for Decl. Order – Motor Carrier Transp. of Passengers in Colo.*, MC-F 21008, at 2 (STB served Apr. 8, 2005) (rejecting reply to reply); *Waterloo Ry. Co. – Adverse Abandonment – Lines of Bangor & Aroostook R.R. in Aroostook Cty., ME*, Docket No. AB-124 (Sub-No. 2), at 3 (STB served May 6, 2003) (same).

B. NCTD's Surreply Does Not Favor Granting the Petition

To the extent the Board considers NCTD's Surreply, Del Mar responds as follows.

First, it is noteworthy that NCTD finally admits in its Surreply that the San Diego Association of Governments ("SANDAG"), not NCTD, has jurisdiction over the Del Mar Bluffs Stabilization Project 5 ("Bluffs Stabilization Project" or "Project"), including "planning, programming, project development, and construction," and that SANDAG, the California Coastal Commission ("Coastal Commission"), and NCTD have reached agreement on the Commission's conditional concurrence of the Project. Surreply at 12-13. NCTD also admits that it agreed to participate in the Coastal Commission's Federal Consistency Review of the Project under the Coastal Zone Management Act ("CZMA"), as it has done with the previous Bluffs stabilization projects, but it asserts that "NCTD certainly never has agreed with SANDAG or any other entity about the legal propriety of this preempted review process." Surreply at 12. For the reasons Del Mar addressed in its July 1 Reply (at 7), the Board should reject NCTD's unwarranted request to enlist the Board's assistance in NCTD's attempts to disavow and end-run its disfavored contractual commitments and invalidate Project approval after-the-fact, especially where, as here, Project approval fully supports and furthers Bluffs and roadbed stabilization and the railroad, and in no way unreasonably interferes with rail operations.

Second, NCTD's contention that the matter is ripe for STB review, even though Project conditional concurrence has been reached, because CCC has "held SANDAG hostage" and "CCC has delayed and burdened this straightforward rail maintenance project, thereby making it almost impossible to complete," (Surreply at 6 n.5, 9) are preposterous and contradicted by SANDAG itself. As SANDAG has confirmed, the Coastal Commission's conditional approval under the CZMA was a "mutually agreeable solution" reached after "substantial collaboration," that fully supports and furthers continuing railroad operations, and public safety, and not the opposite as NCTD claims. *See* Del Mar July 1, 2022 Reply at 5-6. Also, a 10-month review of a complex, massive \$67,000,000+ Project consisting of thousands of feet of new stabilization structures, seawalls, and drainage infrastructure along the Del Mar Bluffs, being funded by multiple federal and state entities and grants, hardly constitutes an unreasonable delay. *Id.* at 6, 12.

Third, NCTD's bold assertion that the review process unfairly "risk[ed] another bluffs collapse and possible rail disaster" (Surreply at 6), is false. It also completely ignores the uncontradicted factual record in this proceeding that CCC (and Del Mar) has continuously permitted emergency Bluff repairs without prior authorization. In fact, the consistency certification specifically authorizes SANDAG's request for *after-the-fact* emergency repairs of existing seawalls and cutoff walls started in March 2021. Ironically, it is NCTD that has reversed course on its conditional concurrence agreement, and is now actively seeking to block and delay the Project, and potentially jeopardizing public safety, by proclaiming that "NCTD shall not authorize SANDAG to advance construction" of the Project as approved. NCTD Third Supp. (filed June 14, 2022) at 12.

Fourth, while the exact contours of NCTD's preemption claims still remain unclear and everchanging, NCTD's main complaint with the conditional approval of the Project appears to be that certain pedestrian crossing and beach access improvements "*have absolutely no relationship to how the Project will impact coastal access in this area.*" Surreply at 7-8 (emphasis in original). However, besides being untrue and contrary to SANDAG's findings, NCTD's complaints about Project impacts on coastal access have no bearing on ICCTA preemption. They instead appear to pertain solely to whether such conditions are authorized under the CZMA, matters that are not under the Board's jurisdiction. As Del Mar explained in its July 1, 2022 Reply, if it is true that the Project will not actually impact coastal access as NCTD claims, its remedy is to seek review of the matter before the National Oceanic and Atmospheric Administration under 15 C.F.R. § 930.125. Also, while NCTD complains that SANDAG may not yet have secured full funding of these Project aspects (Surreply at 7 n.6, 12-13), project funding matters do not implicate ICCTA preemption and are not subject to the jurisdiction of the Board. NCTD candidly admits this when it asserts its agreements with SANDAG "allows SANDAG to assume responsibility for solely funding and implementing project conditions that are outside of CCC's authority . . . *have no bearing whatsoever on the preemption argument here.*" Surreply at 14 (emphasis added).

Finally, NCTD complains about SANDAG's continuing pursuit of future line relocation off the eroding Bluffs, necessary to preserve future rail service and the long-term viability of the rail corridor, and an alleged lack of *any* identified funding required to support such relocation. Surreply at 12. However, as NCTD knows, but fails to inform the Board, five days prior to the filing of its Surreply, California Governor Gavin Newsom signed into law infrastructure funding highlighted by *\$300 million* for the Del Mar Bluffs line realignment initiative² that all stakeholders, apparently except NCTD, believe is imperative to preserving rail service, reducing travel times, enhancing safety, supporting National Defense,³ and adding needed capacity. Notably, given NCTD's opposition to line realignment initiatives as repeatedly expressed in this proceeding, if the Board were to grant NCTD's expansive preemption requests, that Order can be expected to be used by NCTD, or possibly other interested persons, to seek to block this important regional rail line realignment initiative, on the grounds that the funding of rail line relocation planning and engineering initiatives, and ultimately line realignment itself, unreasonably interferes with NCTD's operations on its existing line. Respectfully, the Board should avoid actions that might risk such unintended, dangerous, and absurd results.

C. NCTD's New "National Significance" Claim is Belated and Unavailing

NCTD's Surreply includes one additional new claim in support of its Petition, wherein NCTD asserts that its Petition should be granted because "the preemption issues that this case raises are of national significance to the rail industry." Surreply at 10. NCTD's belated "national significance" contentions are largely based on two filings of its fellow trade association members, NICTD, styled as "Comments," and CRC, styled as a "Brief." However, if the Petition actually raised real issues of national significance to commuter railroads, many of whom are not common carriers, certainly they should not have waited until after NCTD already agreed on Project conditional concurrence, but in a desperate attempt to save its Petition, sought their last minute support to help convince the Board that NCTD's Petition is somehow still ripe and not rendered moot by its agreement.

On September 23, 2020, the STB authorized a short extension for any interested party to file a reply to NCTD's Petition, due October 5, 2020, over the strong

² SANDAG, *SANDAG Projects Win Big in State Transp. Deal* (July 1, 2022), <https://www.sandag.org/index.asp?newsid=1347&fuseaction=news.detail> (accessed July 24, 2022).

³ Del Mar agrees with the U.S. Army's July 21 filing that the NCTD rail line is important to National Defense, with the Coastal Commission reply of that same date that the approved Bluffs Stabilization Project will ensure the safety of the rail line until the tracks can be relocated as SANDAG plans to do by 2035, and that both initiatives fully support the military's current and future freight rail requirements.

objections of NCTD. It did also not authorize interested parties to file any other filings, “Comments,” or “Briefs.” Each of the Commuter Railroads’ filings violate the Board’s September 23, 2020 decision and are tardy, by over 21 months. Also, the Commuter Railroads have no valid basis for seeking leave to intervene at this time, nor did they even attempt to do so under the Board’s intervention rules at 49 C.F.R. § 1113.7.⁴ Additionally, the Commuter Railroads’ arguments are extremely broad, repetitive, and cumulative, and presented in a vacuum, largely ignoring the fact that the same, or similar arguments have already been made by NCTD, and have been fully addressed and refuted. Further, even if the Board were inclined to accept these filings, their consideration will likely only serve to create further complications and issues for the Board’s consideration of the Petition.⁵

If the Board ultimately decides to accept these belated filings, they raise no new or helpful arguments for NCTD. For example, none of Commuter Railroads are a party to the Del Mar Bluffs stabilization projects, or the Federal Consistency Review. None have been involved as parties or intervenors to the pending state/federal court actions, or the matters leading up to them. Moreover, none of them are in a position to show that the involved state and federal law actions unreasonably interferes with NCTD’s operations. The NCTD-solicited filings provide no new specific relevant facts or arguments that would favor the granting of NCTD’s Petition, because the only information that they have has obviously been spoon fed to them by NCTD.

Instead, the Commuter Railroads jump to completely unwarranted and absurd general conclusions. For example, CRC contends that “[the] Board must act to prevent other localities from usurping the Board’s authority” (CRC Brief at 12); that the Coastal Commission is attempting “to prevent NCTD from improving the rail line and prevent further accidents for the railroads its line serves” (*id.* at 5); that “Del Mar’s local authority is clearly preempted by ICCTA” (*id.* at 9); that “NCTD is unable to properly maintain and

⁴ A major portion of the Commuter Railroads’ new filings consist of arguments in opposition to the Coastal Commission’s Motion to hold the proceeding in abeyance, filed April 26, 2022, which NICTD also incorrectly asserts is “[t]he Commission’s latest filing,” probably because it has failed to closely review the record. However, even as to that aspect of these filings, each of the Commuter Railroads’ submissions are made almost two months too late under the Board’s rules governing replies. 49 C.F.R. § 1104.12.

⁵ For example, pursuant to 5 C.F.R. § 2635.502 and § 5001.103, individual Board Members who have worked for and represented interested parties to Board proceedings, as is the case here with respect to individual members of the Commuter Railroads, must determine, in consultation with the Board’s General Counsel and the Board’s Designated Agency Ethics Official, whether to recuse themselves. *See, e.g.,* Letter of Board Member Michelle A. Schultz, *Petition by the Se. Pa. Transp. Auth. for Relief Under 49 U.S.C. § 24903*, FD 36281 (filed Feb. 18, 2021).

secure the line and susceptible to FRA violations if this Board finds in favor of the Commission” (*id.* at 10); and even that “[t]o find otherwise, allows local laws to control the railroad and infringe on the very structure the STB was created to protect.” Similarly, NICTD blithely and generically suggests that “[a] ruling in favor of the Commission would overturn years of precedent” (NICTD Comments at 5), and that “[t]he application of the Commission’s and Del Mar’s requirements would unreasonably burden interstate transportation services” (*id.* at 12).

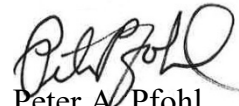
The Commuter Railroads urge the Board to “send[] a clear message that the STB defends rail operators from ad hoc regulations.” CRC Brief at 12. However, the Commuter Railroads’ submissions, at best, only serve to demonstrate that NCTD’s Petition is indeed extremely broad and unending, and a clear attempt by NCTD to enlist the Board to assist it in its attempt to broadly dictate and control all state planning, funding, and non-conflicting uses in and around railroad rights of way, and to contravene its longstanding voluntary agreements.

If NCTD’s Petition is granted, it is clear that other trade association members, at least those that are common carriers, will similarly run to the Board and use ICCTA, and the Board’s assistance, in an attempt to unilaterally dictate all control to their liking a myriad of matters that have little or no relation to any actual interference with railroad operations, even on matters far outside a railroad’s right-of-way. Del Mar respectfully submits that such an open-ended request for blanket preemption protection is a dangerous proposition that the Board should strongly resist. This is especially the case here with the relevant parties’ long history and continuing, cooperative agreement on multiple Bluffs stabilization projects, and their recent agreement on Project conditional concurrence that fully supports and sustains rail operations, and which does not unreasonably interfere with those operations in any way.

Del Mar respectfully reiterates its request that NCTD’s Petition be denied.

Respectfully submitted,

CITY OF DEL MAR



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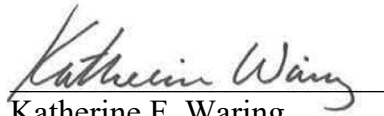
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CERTIFICATE OF SERVICE

I hereby certify that this 25th day of July, 2022, I caused a copy of the foregoing document to be served by U.S. First Class Mail or by more expeditious means on all parties of record. Copies of this document are also being sent electronically to the individuals listed below:

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