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VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E. Street S.W., Room 1034
Washington, DC 20423-0001

**Re: *City of Tacoma, Department of Public Utilities d/b/a Tacoma Rail –
Discontinuance of Service Exemption – In Pierce County, Wash, AB 1239
(Sub-No. 3X)***

and

***City of Tacoma, Department of Public Works d/b/a Tacoma Rail Mountain
Division – Discontinuance of Service Exemption – In Pierce County, Wash.,
AB 1328X***

**Joint Request for leave to file Sur-reply, and Verified Sur-reply of City of
Tacoma, Department of Public Utilities d/b/a Tacoma Rail, and City of
Tacoma, Department of Public Works d/b/a Tacoma Rail Mountain Division
in Opposition to the Objections of Tacoma Steel Supply, Inc. and TSSI, LLC**

Dear Ms. Brown:

The City of Tacoma, Department of Public Utilities d/b/a Tacoma Rail (“Tacoma Rail”) and the City of Tacoma, Department of Public Works d/b/a Tacoma Rail Mountain Division (“TRMW”) – collectively the “TR Parties” – hereby jointly request leave to submit, and do submit, their Joint Verified Joint Sur-reply (the “Sur-reply”) to the “Response and Objection” (the “Objections”) of Tacoma Steel Supply, Inc. and TSSI, LLC (collectively, “Tacoma Steel”) filed in each of the above-referenced dockets on April 12, 2023. For the reasons supplied herein,

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Tacoma Steel's Objections lack merit, particularly given very recent developments, and, accordingly, the subject discontinuance of service petitions should be granted.

Request for leave to file a Joint Sur-reply

The TR Parties hereby request leave to file the following Sur-reply in defense of the petition each has filed in its respective docket (collectively, the "Petitions"). As petitioners seeking relief from the Board, Tacoma Rail and TRMW are entitled to address Tacoma Steel's Objections to the extent necessary, and to close the record. *See, e.g., Atlas Land and Building Corporation and Atlas Materials Recycling Corporation – Petition for Declaratory Order – Industry Spur in Pittsburgh, PA*, FD 36380 (STB served Aug. 17, 2020); *Illinois State Toll Highway Authority – Petition for Declaratory Order*, Docket No. FD 36075, slip op. at 1, n.1 (STB served Jan. 17, 2017); *Wisconsin Central Ltd. – Abandonment Exemption – In Winnebago County, WI*, AB-303 (Sub-No. 2X) (ICC decided Feb. 22, 1990, 1990 WL 287427, *1 n. 1 ("[W]e do, absent good cause, allow petitioner . . . to close the record, as petitioner has the burden of proof. Thus, typically, the petition prompts statements (replies) in support and/or opposition, which are followed by petitioner's rebuttal.")).

WHEREFORE, the TR Parties respectfully request that the Board grant them leave to file the immediately-following Sur-reply in keeping with agency practice.

Joint Verified Sur-reply to Tacoma Steel's Objections

Each of Tacoma Steel's Objections is identical in substance and scope (albeit with slightly different document formatting). It appears that the initial thrust of the Objections is to point out that Tacoma Steel did not consent previously, and now objects, to the proposed railroad service discontinuances that are the subject of the Petitions, despite the TR Parties expectations to the contrary. As the TR Parties have pointed out, Tacoma Steel was extended the courtesy of informal advance notice of the TR Parties' discontinuance plans (a gesture, incidentally, not required under the applicable discontinuance processes). The TR Parties have learned that Tacoma Steel's Objections and its primary interest in continued access to railroad service stem from the plans to sell the Tacoma Steel facility located along the subject Line in the future. Tacoma Steel is concerned that the discontinuances could diminish the facility's property value.¹ There is no agency precedent that the TR Parties are aware of to support the proposition that a

¹ Objections, 4 ("[T]he Line is not only an efficient means of transporting large loads of steel but has great value for Tacoma Steel and adds to the value of the real property for TSSI LLC, as well.").

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railroad must maintain service over a line to subsidize an erstwhile customer's business resale values. Such a position would conflict with the Rail Transportation Policy of 49 U.S.C. § 10101, particularly Section 10101 (5), and, as such, would be no basis for denial of the present Petitions.

Tacoma Steel's Objections do not undercut the Petitions' evident merits. There is no dispute that the Line has hosted very little local traffic over the past several years. The Objections highlight 2007 (16 years ago), when Tacoma Steel generated "as many as ten (10) carloads" over the roughly 3.5-mile Line – an apparent high water mark of less than three carloads per mile per year. But the Objections omit mention of Tacoma Steel's sparing-to-nonexistent use of the Line more recently, offering no words of assurance about future freight traffic prospects, and no traffic commitments despite two full years of rail shipping inactivity.²

On that note, the TR Parties certify here (pursuant to the attached verification) that – (a) *as of April 23, 2023, no traffic – local or otherwise – has traversed the Line for two consecutive years, the last known local shipment having been transported on April 23, 2021;* (b) *no user of the Line has filed with the Board or with any U.S. District Court a complaint against either of the TR Parties regarding cessation of service, no such complaint is currently pending, and no such proceeding has been decided in a rail user's favor in the past two years against either of the TR Parties;* and (c) *currently non-existent overhead traffic could in any event be handled via an alternative route. See 49 C.F.R. § 1152.50(b).* Accordingly, the circumstances are such that Tacoma Rail and TRMW each would be eligible, as of yesterday, to invoke the discontinuance of service class exemption procedures at 49 C.F.R. part 1152, subpart F, which procedures, applied to the present facts, would automatically presume the discontinuances' merits, Tacoma Steel's Objections notwithstanding.³ Under the circumstances, it would be legally and procedurally incongruous for the Board to deny the Petitions (especially on the

² Id. ("There is nothing to suggest that the Line will not be utilized in the future based upon the negotiation of future domestic steel transactions.").

³ TRMW has invoked the Board's individual petition for exemption procedures in the AB 1328X proceeding out of an abundance of caution. As a non-operating entity, TRMW has never operated over the Line, including for well more than two straight years, and, in counsel's view, it should be entitled to use the discontinuance of service class exemption procedures from the outset. The Board's recent decision in *Austin Area Terminal Railroad, Inc. – Discontinuance of Service Exemption – In Bastrop, Burnet, Lee, Llano, Travis, and Williamson Counties, Texas*, AB 578X (STB served Dec. 30, 2022) ("AATR"), however, sheds some doubt on TRMW's access to the class exemption procedures (until April 23, 2023) pending the outcome of an active appeal of the Board's rejection of the certification made in the AATR proceeding.

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dubious evidence of shipper need contained in the Objections) when each of the TR Parties would, as of now, qualify for a discontinuance exemption as a matter of course.

Tacoma Steel also argues that the Board should deny the Petitions, because granting the TR Parties the relief they seek could impair future re-deployment of the Line as part of the Sound Transit commuter rail system (the local transit agency that Tacoma Steel appears to have referred to in its Objections under the undefined acronym “TSA”). But this line of argument is unavailing for two reasons. First the local commuter rail system prospects for the Line are beyond the scope of the Board’s Congressionally-prescribed regulatory mandate, and, therefore, are no basis for denial of any request for discontinuance authorization. Second, Tacoma Steel conflates abandonment of a railroad line (involving, typically, the salvage of the track and the elimination of the railroad right-of-way) with discontinuance (which, as in this case, does not entail track salvage or disposition of railroad right-of-way).⁴ The current Petitions seek only discontinuance authorization, not abandonment. They do not contemplate elimination of the subject railroad corridor, nor could they. Accordingly, the prospect of corridor re-deployment – however remote that may be, as the TR Parties are unaware of any current plans for commuter rail use of the Line, and Tacoma Steel has listed none – remains a possibility.

WHEREFORE, the TR Parties respectfully submit that the Board should grant the subject Petitions in the ordinary course.

Respectfully submitted,

R.A. Wimbish

Robert A. Wimbish

City of Tacoma, Department of Public Utilities d/b/a Tacoma Rail; and the City of Tacoma, Department of Public Works d/b/a Tacoma Rail Mountain Division

Attachments

cc: All parties of record

⁴ Objections, 5 (“While it is anticipated that Tacoma Rail will argue that even if the Line is abandoned or cut, it could be reconnected in the future, practically speaking, it is respectfully argued that once that Line is cut or abandoned, it will never be reconnected again.”).

VERIFICATION

I, Alan Matheson, hereby verify under penalty of perjury that – (a) I am the Assistant Superintendent for Tacoma Rail, an entity of City of Tacoma, Department of Public Utilities d/b/a Tacoma Rail (“TMBL”); (b) I have read the foregoing Sur-reply; (c) I know the facts asserted therein, and that the same are true as stated to the best of my knowledge, information, and belief; and (d) I am authorized to offer this verification on behalf of TMBL.



Name

City of Tacoma, Department of Public
Utilities D/B/A Tacoma Rail

Dated: April 20, 2023

VERIFICATION

I, Alan Matheson, hereby verify under penalty of perjury that – (a) I am the Assistant Superintendent for Tacoma Rail, operator of the City of Tacoma, Department of Public Works d/b/a Tacoma Rail Mountain Division (“TRMW”); (b) I have read the foregoing Sur-reply; (c) I know the facts asserted therein, and that the same are true as stated to the best of my knowledge, information, and belief; and (d) I am authorized to offer this verification on behalf of TRMW.



Name

City of Tacoma, Department of Public Works
D/B/A Tacoma Rail Mountain Division

Dated: April 20, 2023