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SERVICE DATE – OCTOBER 24, 2024

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36770

TOWNSHIP OF PILESGROVE, N.J.—PETITION FOR DECLARATORY ORDER

Decided: October 24, 2024

By decision issued on September 13, 2024, in response to a petition by Township of Pilesgrove, N.J. (Pilesgrove), the Board instituted a declaratory order proceeding to determine whether and to what extent 49 U.S.C. 10501(b) preempts certain local and state laws regarding land use and land development by SMS Rail Service, Inc. (SMS). Twp. of Pilesgrove, N.J.—Pet. for Declaratory Ord., FD 36770 (STB served Sept. 13, 2024). The Board also granted a petition to intervene filed by the Township of Mannington, N.J. (Mannington), and directed Pilesgrove, Mannington, and SMS to confer and jointly submit by October 8, 2024, a proposed procedural schedule to govern this proceeding. Id. at 2, 3. The decision also ordered that, if the parties failed to agree on a procedural schedule, each must file its own proposed schedule by that date. Id.

Counsel for the parties conferred but were unable to reach agreement on a proposed schedule. Consequently, each party submitted its own proposal. On October 4, SMS proposed the following procedural schedule: (1) opening statements by all parties due by November 29, 2024; (2) comments from other interested persons due by December 30, 2024; and (3) replies by all parties due by January 20, 2024. (SMS Req. 4.) SMS asserts that its proposed schedule will ensure a full and complete factual record. (Id. at 3.) According to SMS, there have been developments on the subject rail line since the townships' petitions were filed—including state court proceedings—and there is additional information about the line from the last two years related to preemption that should be provided to the Board. (Id. at 3-4.) SMS also asserts the townships have not adequately supported the allegations in their petitions and expresses concern that both townships may seek to introduce untimely evidence or argument on reply if they are not afforded an opportunity to submit opening statements. (Id. at 3-4, 3 n.2 (citing Mannington Pet. 8-9).)

On October 7, 2024, Pilesgrove and Mannington each submitted a request for the following proposed schedule: (1) SMS's reply brief due by November 15, 2024; (2) Pilesgrove's and Mannington's rebuttal briefs due by December 20, 2024. (Pilesgrove Req. 1; Mannington Req. 2.) Pilesgrove and Mannington each ask the Board to consider its previously filed petition as its opening statement. (Pilesgrove Req. 1; Mannington Req. 2.) Mannington asserts that the facts have been fully described and explained in the townships' petitions and contends that SMS should present any additional facts or clarifications before each of the parties files its legal analyses. (Mannington Req. 1.) In addition, Pilesgrove argues that the procedural schedule

should provide for submissions from Pilesgrove, Mannington, and SMS only. (Pilesgrove Req. 2.)

On October 7, 2024, SMS replied to Pilesgrove's and Mannington's requests. First, counsel for SMS states that his trial/arbitration schedule cannot accommodate the November 15 deadline proposed by Pilesgrove and Mannington. (SMS Reply 2.) SMS also asserts that Salem County (Salem) should be provided an opportunity to participate, noting that Salem may provide support for SMS's positions and reiterating its position that other interested persons should have an opportunity to file comments. (*Id.* at 2, 4.)¹

No party requests discovery and Mannington explicitly states it believes discovery in this case would be unnecessary. (Mannington Req. 2.) The Board typically does not provide for discovery in declaratory order proceedings, see, e.g., Metro Council—Pet. for Declaratory Ord., FD 36178, slip op. at 4 (STB served May 22, 2018), and, as no party has requested it, a discovery period will not be included in the procedural schedule adopted here. However, to ensure that the Board has a sufficient record, Pilesgrove and Mannington will be provided an opportunity to supplement the record with additional evidence and argument before SMS's reply is due, and submissions by other interested persons will be accepted, as provided below.

Based on the forgoing considerations, the following procedural schedule will be adopted: Pilesgrove and Mannington may file supplemental evidence and argument by November 8, 2024; SMS's reply evidence and argument, and submissions by other interested persons, will be due by December 9, 2024; rebuttal statements by Pilesgrove and Mannington, and SMS's response to submissions by other interested persons, will be due by January 7, 2025.

It is ordered:

1. The following procedural schedule is adopted:

- Pilesgrove and Mannington may file supplemental evidence and argument by November 8, 2024;
- SMS's reply evidence and argument, and submissions by other interested persons, are due by December 9, 2024; and
- Rebuttal statements by Pilesgrove and Mannington, and SMS's response to submissions by other interested persons, are due by January 7, 2025.

2. Notice of this decision will be published in the Federal Register.

¹ SMS asserts that Mannington's petition to intervene "joins" Salem County but notes that Salem County is not on the Board's service list. (*Id.* at 2.) However, neither Mannington's petition to intervene nor the Board's decision granting it includes Salem County, and Salem County has not itself petitioned to intervene. In any event, the procedural schedule adopted here provides an opportunity for other interested persons to participate.

3. This decision is effective on its service date.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.