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May 17, 2018

VIA E-FILING

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

Re: FD 36178, Metropolitan Council - Petition for Declaratory Order

Dear Ms. Brown:

Enclosed are the Rebuttal Comments of Twin Cities & Western Railroad Company ("TCW") in support of TCW's request to dismiss The Metropolitan Council's Petition for Declaratory Order filed on April 4, 2018. If there are any questions about this matter, please contact me directly, either by telephone: (202) 663-7823 or by e-mail:

wmullins@bakerandmiller.com.

Sincerely,



William A. Mullins

cc: Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36178

METROPOLITAN COUNCIL – PETITION FOR DECLARATORY ORDER

**REBUTTAL COMMENTS OF TWIN CITIES & WESTERN RAILROAD COMPANY IN
SUPPORT OF ITS REQUEST TO DISMISS THE METROPOLITAN COUNCIL'S
PETITION FOR DECLARATORY ORDER**

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Dated: May 17, 2018

**Counsel for Twin Cities & Western
Railroad Company**

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SURFACE TRANSPORTATION BOARD**

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Twin Cities & Western Railroad Company (“TCW”) hereby files these rebuttal comments (“Rebuttal Comments”) in support of its request to dismiss the Petition for Declaratory Order (“Petition”) filed on April 4, 2018 by the Metropolitan Council (“Met Council”). In the Petition, Met Council requests the Board to find that certain proposed transactions involving Met Council, Hennepin County Regional Railroad Authority (“HCRRA”) and Soo Line Railroad Company d/b/a Canadian Pacific (“CP”) (collectively, the “Transaction Parties”) would not require Surface Transportation Board (“Board or STB”) authorization and would not result in Met Council becoming a rail common carrier.¹

On April 24th, TCW filed Initial Comments in opposition to the Petition (“TCW’s Initial Comments”). Those comments requested, in part, that the Board dismiss the Petition outright because on its face the Project did not qualify for a standard State of Maine² transaction. Met

¹ The various railroad construction, rail relocation, and rail reconfiguration actions to be undertaken by the Transaction Parties, along with the various transfers of ownership and other actions that are described and set forth in the various agreements attached in this proceeding and in FD 36177 will be referred to as the “Project.”

² State of Maine, Department of Transportation – Acquisition and Operation Exemption – Maine Central R. Co., 8 I.C.C. 2d 835 (1991) (“State of Maine”).

Council replied to those Initial Comments on May 2, 2018 ("Met Council Reply"). TCW hereby files these Rebuttal Comments in support of its request to have the Petition dismissed.³

Remarkably, while continuing to assert the Project is a routine State of Maine situation, the comments of Met Council and the comments of HCRRA in FD 36177 actually confirm precisely the opposite. The proposed transaction is unprecedented in several significant ways. A similar structure has never before been approved in any previous State of Maine determination. First, in no previous State of Maine case will the transfer of the common carrier obligation fundamentally alter that obligation so as to result in a de facto abandonment of that obligation because the entity purporting to acquire the common carrier obligation (HCRRA) has already been granted a complete exemption from Subtitle IV. HCRRA is not legally required to quote a rate or provide service nor seek abandonment or discontinuance authority unless the exemption is first revoked. Second, never before has the entity that is going to hold the common carrier obligation (HCRRA) actually contracted away the management of and obligation to fulfill that common carrier obligation to the very entity (Met Council) that will own the physical assets and who seeks a determination that it will not be a common carrier. Finally, in no previous State of

³ TCW is mindful of the Board's general rule at 49 C.F.R. §1104.13(c) prohibiting replies to a reply. To the extent these Rebuttal Comments can be considered a reply to a reply, TCW hereby requests leave to file these Rebuttal Comments and that the Board accept them in the interest of developing the record. See Savannah Port Terminal Railroad, Inc. – Petition For Declaratory Order – Certain Rates And Practices As Applied To Capital Cargo, Inc., FD 34920 (STB served May 30, 2008) (accepting rebuttal in support of motion to dismiss); DesertXpress Enterprises, LLC – Petition for Declaratory Order, FD 34914 (STB served May 7, 2010) (allowing rebuttal comments); see also City of Alexandria, Va.--Pet. for Declaratory Order, FD 35157, slip op. at 2 (STB served Nov. 6, 2008) (allowing reply to reply in the interest of compiling a full record); Keokuk Junction Railway Company – Feeder Line Acquisition – Line of Toledo, Peoria, and Western Railway Corporation between La Harpe and Hollis, IL, FD 34335 (STB served Feb. 7, 2005) (noting that the Board's rules are to be construed liberally and accepting a reply to a reply); SMS Rail Service, Inc.--Petition for Declaratory Order, FD 34483, slip op. at 3 (STB served Jan. 24, 2005).

Maine transaction has the government entity who will own the physical assets not only be the manager of and implementer of the common carrier obligation but will also actually indemnify the common carrier from all violations of the common carrier obligations and ensure the purported common carrier will never have any expense whatsoever. In these extremely unique and unprecedented circumstances, the Board cannot make a finding that “there will be no alteration of any common carrier obligations here” or that HCRRA has “both the intent and unconditional ability to continue to assume and exercise its common carrier rights and obligations.” State of Maine, at *5.

ARGUMENT

Under the circumstances of the proposed structure, for all intent and purposes Met Council will possess and control whatever common carrier obligation remains. It will own the physical assets. HCRRA will have no obligation to provide common carrier service due to its Subtitle IV exemption. In the rare event the exemption is first revoked, the obligation to comply with any Subtitle IV requirements falls not on HCRRA, but to Met Council, who has contractually obligated itself to manage and implement any common carrier obligations asserted against HCRRA. Met Council also will indemnify HCRRA from any violations of the common carrier obligations. The proposed structure does not fit within any State of Maine precedents. Indeed, Met Council is plainly the “carrier,” not HCRRA. As such, the Board cannot find that Met Council does not need authority to acquire the physical assets of the Bass Lake Spur or the Kenilworth Corridor. The Board should either dismiss the Petition until such time as the transaction can be properly restructured under the standard State of Maine precedent, or it should

require Met Council to submit itself to STB authority and seek approval for its acquisition of the physical assets of the Bass Lake Spur and the Kenilworth Corridor.⁴

I. UNLIKE PREVIOUS STATE OF MAINE CASES, THE EXISTING COMMON CARRIER OBLIGATION ON THE BASS LAKE SPUR WILL RESULT IN A DE FACTO ABANDONMENT OF THAT OBLIGATION

Today, CP and TCW both hold active common carrier obligations on the Bass Lake Spur that cannot be extinguished without further Board authority. TCW also holds a similar common carrier obligation on the Kenilworth Corridor. The proposed Project results in the transfer of CP's full and unfettered common carrier obligation to HCRRA. Met Council asserts that there is nothing unique about this proceeding because HCRRA already holds an underlying common carrier obligation on the Kenilworth Corridor and will simply now assume one on the Bass Lake Spur. Met Council Reply at 5. It also claims that the structure is no different from numerous other cases where municipal entities hold the underlying common carrier obligation even though those entities do not actually provide the common carrier service. Id at 6.

Met Council completely ignores that unlike CP, HCRRA, once it assumes CP's obligation, is under no obligation to abide by that obligation and provide the required common carrier obligation because HCRRA holds a Subtitle IV exemption from the requirement to comply with any provision of ICCTA. Met Council doesn't even mention or address the effect of this Subtitle IV exemption. The transfer of CP's common carrier obligation to another entity who has no common carrier obligation because it possesses a Subtitle IV exemption is a

⁴ TCW is limiting this Rebuttal to the application of the State of Maine precedent to the proposed agreements. Nonetheless, there are significant factual statements asserted by Met Council and HCRRA in their respective replies that are not correct. If the Board does not find on the existing record that the proposed structure violates the State of Maine precedent, and as discussed in TCW's Initial Comments, the Board should, at a minimum, establish a procedural schedule to allow for full development of the factual record and public input.

fundamental transfiguration of CP's common carrier obligation inconsistent with prior State of Maine precedents.

Given the Subtitle IV exemption, the notion that HCRRA is no different than CP and is "a rail carrier providing transportation subject to the jurisdiction of the Board," in FD 36177, HCRRA's Reply at 4, 5 (Filed May 2, 2018) ("HCRRA's Reply"), and will "ensure the continued provision of freight rail service," Met Council Reply at 4, is false. It is undisputed that HCRRA:

- has never provided common carrier railroad transportation for compensation;
- has no economic incentive or interest in freight rail;
- is not presently providing common carrier transportation;
- has no intent or plan to ever provide such transportation service in the future; and
- is exempt from any and all Subtitle IV obligations to provide common carrier service.

These factors alone remove this transaction from all of the post-ICCTA State of Maine precedents. In every one of those cases, the entity that had the common carrier obligation was an active rail carrier subject to the full rights and remedies afforded carriers and shippers alike under Subtitle IV. Such is not the case here.

Due to its Subtitle IV exemption, HCRRA has no common carrier obligation – residual or active. At best, one could argue that it remains subject to the Board's jurisdiction because it obtained authority twice to acquire rail lines, which normally would have come with the corresponding common carrier obligation. But simply being subject to the Board's jurisdiction does not equate to having a common carrier obligation – whether active or residual. Having granted HCRRA a complete Subtitle IV exemption, the Board has determined that, even if it acquires a rail line through STB authority, in operating that rail line in the future HCRRA does not have to comply with any of the requirements applicable to carriers subject to the Board's jurisdiction. HCRRA has no obligation to quote a rate and provide service (either directly or

through a contractor) and no obligation to obtain prior Board approval to seek abandonment or discontinuance authority.⁵

Met Council's claim that HCRRA has a "residual common carrier obligation" no different than numerous other government agencies who own rail lines and this will protect TCW and its shippers is preposterous. HCRRA is not in the same legal position as those other public agencies. None of those other public entities possessing residual common carrier obligations and so relied upon by Met Council had a Subtitle IV exemption. Likewise, none of the physical rail assets owned by those public entities in the cases cited by Met Council were acquired as part of a State of Maine transaction. Rather, those public bodies acquired the rail assets with STB authority. Furthermore, in those cases, the railroad operating on the publicly owned rail assets was an active carrier in its own right. If Met Council wants to claim that it will have a residual common carrier obligation, like in those other previous cases, Met Council should seek and obtain the requisite STB authority to own the physical assets of the Bass Lake Spur and Kenilworth Corridor.

Unlike HCRRA, those public bodies that did acquire their assets through STB authority do have a residual common carrier obligation because they have Board authority to own rail assets, are a common carrier in their own right, and are fully subject to Subtitle IV. Plus, they have retained operators to operate their lines and those operators are also common carriers in

⁵ L.A. Cnty. Metro. Transp. Auth.--Aban. Exemption--in L.A. Cnty., Cal., AB-409 (Sub-No. 5X) (STB served July 17, 2008) (dismissing a verified notice of exemption for abandonment because the owner of the line had been granted a Subtitle IV exemption and thus could abandon the line without STB authority); Cf. Caldwell Cnty. Econ. Dev. Comm'n --Exemption from 49 U.S.C. Subtitle IV, FD 32659, 1995 ICC LEXIS 198 (ICC served Aug. 3, 1995) (while no abandonment or discontinuance authority required, public body should notify ICC and shippers of any proposed abandonment and discontinuance so that appropriate environmental review can occur).

their own right.⁶ In those cases, there is the functional equivalent of a landlord/tenant relationship with both entities holding unextinguished common carrier rights but the tenant is the active common carrier.⁷ In that situation, the landlord (the public body) has a residual common carrier obligation. If the tenant is incapable of meeting its common carrier obligation or obtains authority to discontinue its common carrier obligation, the landlord, holding an unextinguished common carrier obligation and not being exempt from Subtitle IV, must “step up to the plate” and provide the common carrier obligations set forth in Subtitle IV.

That is not the situation here. If Met Council does not have STB authority, it will not have any residual common carrier obligation and neither will HCRRA. HCRRA has no obligation “to step up to the plate.” It has no “residual” obligation to do so. If a shipper demands service, due to the Subtitle V exemption, HCRRA does not legally have to provide it. If a connecting carrier requests an interchange, HCRRA does not have to provide it. HCRRA does not have to do anything a normal carrier would be required to do. In fact, it can legally abandon/discontinue its alleged “residual common carrier obligation” at any time and without Board authority. The only remedy a shipper or a connecting carrier will have against HCRRA in the future is to seek to have the Subtitle IV exemption revoked so that the Board could then

⁶ See e.g., Lackawanna County Railroad Authority, Inc. – Exemption from Regulation, FD 30628, 1985 ICC LEXIS 529 (ICC served March 15, 1985); Pennsylvania Northeast Regional Railroad Authority – Acquisition Exemption – Lackawanna County Railroad Authority, FD 34846 (STB served June 5, 2006); Staten Island Rapid Transit Operating Auth. v. ICC, 718 F.2d 533 (2d Cir. 1983); Washington State Department of Transportation – Acquisition Exemption – Palouse River and Coulee City Railroad, Inc., FD 35024 (STB served May 30, 2007).

⁷ Here, the only “tenant” railroad is TCW. TCW only has overhead rights and has no right to serve local shippers on the Bass Lake Spur or the Kenilworth Corridor. CP is the carrier with the residual common carrier obligation and if requested would have to provide local service. Under the proposed structure and upon request, there will be no entity with the legal requirement or ability to provide local service.

exercise its jurisdiction. Such revocation proceedings can take forever, and even then, once the proceeding to revoke the exemption has been completed, there is another proceeding to adjudicate the underlying complaint.⁸ This is a difficult process and does not provide shippers, or TCW, with any assurances that there are adequate remedies to obtain relief against HCRRA.⁹ This is in sharp contrast to every single other post-ICCTA State of Maine proceeding whereby the entity possessing the common carrier authority was subject to the full and immediate application of the ICCTA.

As a result of the Subtitle IV exemption, the Board cannot make the requisite finding required in a State of Maine proceeding that CP's common carrier obligation that currently exists on the Bass Lake Spur is being retained in a manner that preserves both TCW's and shippers' common carrier rights. HCRRA will not have "both the intent and the unconditional ability to continue to assume and exercise [CP's] common carrier rights and obligations." Id at *5. CP's

⁸ See e.g., Caldwell Railroad Commissions – Exemption from 49 U.S.C. Subtitle IV, FD 32659 (Sub-No. 2) (STB served Sept. 8, 2015) (taking three different proceedings and 18 months to revoke an exemption from Subtitle IV); The Durango & Silverton Narrow Gauge Railroad Company – Petition for Declaratory Order or Exemption, FD 31024, 1988 ICC LEXIS 345 (ICC served Nov. 21, 1988) (taking 18 months to revoke Subtitle IV exemption); Central of Tennessee Railway & Navigation Company Incorporated DBA The Longhorn Railway Company – Petition for Declaratory Order, FD 33820 (STB served Apr. 3, 2000) (six months of litigation between the shortline with an active common carrier on assets owned by a public body possessing a Subtitle IV exemption and the public body over the public bodies interference with the shortline's common carrier obligation); Rail Gen. Exemption Auth. – Misc. Agric. Commodities – Pet. of G. & T. Terminal Packaging Co., Inc., et al. to Revoke Conrail Exemption, 8 I.C.C. 2d 674, 686 (1992) aff'd Mr. Sprout, Inc. v. ICC, 8 F.3d 118, 126 (2d Cir. 1993) (proceeding to revoke commodities exemption and bring complaint took nine years).

⁹ The above cases certainly belie any notion that TCW can obtain "immediate" relief in the event HCRRA interferes with TCW's common carrier rights or that the Board can "immediately reinstate" HCRRA's common carrier obligation. See HCRRA's Reply at 11. Interestingly enough, despite the numerous assertions by Met Council and HCRRA that HCRRA is prepared to fulfill its residual common carrier obligation and act accordingly, the paragraph at Page 11 of HCRRA's Reply is the only place where HCRRA admits that the Subtitle IV exemption would first have to be revoked before it would be required to provide any sort of common carrier service. Met Council never addresses the Subtitle IV exemption.

common carrier obligation is being fundamentally transformed from one that is unconditional and fully enforceable to an entity that has no common carrier obligation. There will be no common carrier protections for shippers or connecting carriers if the Bass Lake Spur is transferred. This is at odds with the State of Maine precedents.

II. TO THE EXTENT HCRRA WILL HAVE ANY FORM OF COMMON CARRIER OBLIGATION, THAT OBLIGATION WILL BE FULFILLED BY MET COUNCIL CONTRARY TO THE STATE OF MAINE PRECEDENTS

In a State of Maine transaction, not only must the common carrier obligation be preserved and not impaired as a result of the transfer of the physical rail assets, but the transaction should not give the owner of the underlying physical assets, usually a public body, as is the case here, the ability to manage, interfere with, or control the common carrier obligations on the line. In prior cases, if the owning public entity had some ability to manage or control the common carrier, the Board has denied the State of Maine finding and either required the public body to obtain common carrier authority in its own right or restructure the transaction. See City of Austin, TX -- Acquisition -- Southern Pacific Transportation Company, FD 30861(A), 1986 ICC LEXIS 95 (ICC served Oct. 23, 1986) (city required to assume a common carrier obligation (even though it did not intend to operate the line itself) because it acquired ownership of the line and assumed responsibility for contracting with and ensuring continued common carrier service); Wisconsin Department of Transportation – Petition for Declaratory Order – Rail Lines in Almena, Cameron, and Rice Lake, Barron County, WI, FD 35366, slip op at 4 (STB served Sept. 23, 2010) (agreements appeared to give public body too many rights related to the common carrier obligation so the Board was unable to make the requisite State of Maine finding); Atlanta Development Authority D/B/A Invest Atlanta and Atlanta Beltline, Inc. – Verified Petition for a Declaratory Order, FD 35991, slip op. at 8 (STB served Dec. 15, 2016) (public body was given

too much control over common carrier and could have prevented the common carrier from communicating with shippers directly, or entering into track use, grade crossing, or other operating agreements).¹⁰

Here, a review of the agreements and Met Council's own reply comments establishes that that Met Council will have the ability to interfere with the common carrier obligation. Under those agreements, Met Council will be required to act on HCRRA's behalf in all matters involving HCRRA's common carrier obligations. Not only will Met Council be the sole manager of HCRRA's obligations, but those same agreements provide that Met Council will indemnify HCRRA for any violations of the common carrier obligation or any other contractual breaches.

The resolution of March 14, 2018 (Attachment 1 to HCRRA's Reply) ("Resolution") and Section 5 of the Joint and Cooperative Exercise of Powers Agreement ("JCEPA") demonstrate that it is Met Council, and not HCRRA, that is the de facto "carrier" responsible for ensuring compliance with whatever common carrier obligations are imposed on HCRRA. The "background" section of the resolution says HCRRA will be responsible for the federal common carrier obligation "in the event that a shipper requests service on those lines. . . However, under the Joint and Cooperative Exercise of Powers Agreement, the Metropolitan Council will assume

¹⁰ Cf. City of Woodinville Wash. – Petition for Declaratory Order, FD 35905 (STB served Oct. 7, 2016) ("City of Woodinville") (Not finding public body a carrier, but nonetheless noting that the public body could transfer property needed by the common carrier without notice to the common carrier and requiring that no such actions should take place without consulting with and notifying the common carrier in advance). Here, HCRRA and Met Council admit that they will be using part of TCW's exclusive rail easement (granted as part of its trackage rights agreement) for purposes of installing a light rail system and without any required notice to TCW. Combined with Met Council's ability to manage HCRRA's alleged residual common carrier obligation and to indemnify HCRRA, Met Council's ability to control and interfere with TCW's rights goes far beyond those authorized (subject to the notice requirement) in the City of Woodinville case.

on HCRRA's behalf the responsibility for securing a freight carrier if needed; the Metropolitan Council will also assume on HCRRA's behalf the responsibility for assuring the associated operations, maintenance and capital repair obligations."

Section 5 of the JCEPA says:

5. Council's Obligation for Certain Duties and Financial Obligations.

(a) The Council will, if and when requested by HCRRA, at the Council's cost and expense: (i) secure on behalf of HCRRA appropriate third parties to provide any needed rail freight service on the Kenilworth Corridor and/or the Bass Lake Spur Corridor as a designated rail carrier; and (ii) undertake, or secure appropriate third parties to undertake, all other duties, responsibilities, liabilities and obligations of HCRRA that may arise in the Corridors, under the Trackage Rights Agreements or on account of the Associated Freight Easements, or this Agreement, including but not limited to operations (other than the operation of trains referenced in clause (i) above), maintenance and capital repair and replacement. The Council may fulfill its responsibilities on behalf of HCRRA under clause (ii) above by contracting with third parties, but the Council is not relieved of any of its responsibilities or obligations hereunder in the event that the Council cannot secure the services of a third party to fulfill those obligations or if a third party fails to perform.

(b) The Council's and third-party obligations herein will be funded first from fees paid to HCRRA under the Trackage Rights Agreements, which fees HCRRA shall timely pass through to the Council which will be responsible for paying HCRRA or any third parties. If the fees passed through to the Council are insufficient, the Council will be responsible for paying or securing funding for any excess costs, obligations, liabilities and expenses and shall do so from non-County and non-HCRRA sources except to the extent that the County or HCRRA has explicitly agreed to bear such cost, obligation, liability or expense in a separate agreement.

Petition at 342.

Taken together, the Resolution and the JCEPA establish that all obligations normally associated with being a common carrier fall not on HCRRA, but on Met Council. Yet, Met Council claims it will not be a carrier, even though it is the entity controlling and managing the nominal common carrier. Such an arrangement has never before been approved in any State of Maine transaction.

Not only will Met Council be the manager of HCRRA's common carrier obligations, but it will also make sure that HCRRA is held harmless for any breaches of law or of contract. The Resolution notes that "Metropolitan Council will make HCRRA whole for any financial responsibility or exposure, without Metropolitan Council recourse to Hennepin County to pay for these expenses." These indemnity provisions are contractually contained in Section 7 of the JCEPA between Met Council and HCRRA, which gives HCRRA sweeping indemnity rights:

7. Indemnification and Defense. Without limiting the Council's obligations under Sections 5 and 6, the Council will also defend, indemnify, and hold harmless HCRRA and the County and their commissioners, employees, consultants and agents from and against all costs, liabilities and exposures of any kind or character, including, without limitation, fines, penalties, losses, damages, actions, suits, demands, judgments, settlements, fines, fees, costs of investigation, expenses at arbitration, trial or appeal and without institution of arbitration or suit, cleanup, repair and replacement, and attorneys' fees, arising from, in connection with or incidental or related to (i) the Common Carrier Obligation rights, obligations or liabilities of HCRRA; (ii) the rights, obligations or liabilities of HCRRA under the Trackage Rights Agreements, or (iii) the rights, obligations or liabilities of HCRRA under the Associated Freight Easements. As between the Council, HCRRA, and the County, the Parties intend that this defense, indemnification and hold harmless obligation be interpreted and applied without limitation and in the broadest possible manner.

See Petition at 343.

The clear result of the Resolution and the JCEPA is to delegate all management duties and obligations and all expenses and liabilities normally associated with owning and operating a rail line as a common carrier to Met Council. HCRRA is to be relieved from any and all such obligations and will have no obligation to pay Met Council for being so relieved. These provisions ensure that HCRRA has no obligation, liability or risk whatsoever with respect to either the Bass Lake Spur or the Kenilworth Corridor. Naming HCRRA as the common carrier is a sham and a perversion of the State of Maine precedent.

Amazingly, Met Council argues that "the party acquiring the railroad assets [Met Council] will not have undue control over the transferring party's [HCRRA] exercise of the

common carrier obligation.” Met Council Reply at 9. Well, technically, this statement is true in the sense that Met Council will not have “undue” control of the common carrier obligation. Instead, Met Council will simply have “all” control and full contractual responsibility to ensure compliance (or non-compliance) with any required implementation of the common carrier obligation, including the right to select and hire a third party carrier to carry out that obligation. In such a situation, the Board, as it has done in the past in similar factual circumstances, should treat Met Council as a non-carrier that will be acquiring both the physical assets of a carrier and the de facto common carrier obligation. As such, simply based on the agreements as presented, the Board should deny or dismiss Met Council’s State of Maine request and instead find that Met Council should either obtain STB authority or restructure the transaction agreements.

III. IF THE BOARD DOES NOT DISMISS OR DENY MET COUNCIL’S STATE OF MAINE REQUEST, TCW RENEWS ITS REQUEST FOR THE BOARD TO ESTABLISH A PROCEDURAL SCHEDULE AND ALLOW PUBLIC COMMENT

TCW believes that the documents already present in the record are sufficient for the Board to find (1) that CP’s existing common carrier obligation on the Bass Lake Spur will be fundamentally impaired and altered to the detriment of TCW and the existing shippers using the Bass Lake Spur when it is transferred to HCRRA because, in effect, it will result in a de facto abandonment of CP’s existing common carrier rights inconsistent with the State of Maine principles; and (2) that the agreement gives Met Council too much management control and supervision over whatever common carrier rights will exist on both the Bass Lake Spur and Kenilworth Corridor in a post-transaction environment so that Met Council will be a de facto carrier; requiring Met Council to obtain STB authority. Under those conditions, the proposed transaction does not qualify for a State of Maine finding. However, if the Board does not agree,

TCW renews its request that the Board establish a procedural schedule to allow for fact finding and additional public comment.

TCW has limited these Rebuttal Comments to the application of the law to the agreements submitted in the record. In its Reply, Met Council has also made numerous factual assertions on which TCW disagrees and for which, if the Petition is not denied, should be tested, examined, and commented on before the Board makes any additional findings. For example, Met Council has made numerous statements about why the construction of the light rail project will not interfere with TCW's existing operations.¹¹ It flat out states that it has gone to "enormous and costly efforts" to "ensure that TCWR's legitimate exercise of its overhead trackage and related rights on the Kenilworth Corridor and Bass Lake Spur will not be unreasonably interfered with during the construction and subsequent operation of the SWLRT Project." Met Council Reply at 3. It claims that "intends to follow the construction specifications and protocols TC&W and the Project Office have discussed and collaboratively developed in great detail." Met Council Reply at 18 and Exhibit B. All of these statements are untested and unproven and disputed by TCW. Furthermore, given that there are no agreements with TCW,¹² it is certainly unclear to TCW as to how Met Council can make these statements or

¹¹ Met Council Reply at 4 (will construct and operate so as to not unreasonable interfere with TCW freight operations); Met Council Reply at 18 ("the Council has committed to preserve the freight design, construction and operating protocols to which it and TCWR had agreed"); and Met Council Reply at 23 ("the construction and operation of the SWLRT Project will not interfere with TCWR's use of the remaining Bass Lake Spur sidings and main line tracks.").

¹² Met Council says that TCW's claim that "there are no agreements between TCWR and the Council or HCRRA for accommodating TCWR's overhead rights and freight rail operations" is "preposterous." Met Council Reply at 15. Because there are no proposed or existing agreements between TCW and Met Council or HCRRA dealing with the sharing of the corridor with light rail or dealing with the impacts of the construction of the light rail project, TCW is at a loss to understand why its statement is "preposterous." Perhaps Met Council is referring to the existing trackage rights agreements. Of course none of those agreements contemplated or deal with the light rail project.

how it intends to fulfill these intentions. If this proceeding moves forward, further development of the record will show that these intentions are illusory and unenforceable.

Met Council also makes numerous other factual statements regarding the negotiations between the parties, the understandings and draft agreements, and the extent and scope of the environmental analysis. It claims that TCW added new demands and terms “unrelated to the construction and operating terms” that would have “significantly increased the Council’s cost, liability, and risk of damages.” Met Council Reply at 18. According to Met Council and notwithstanding the removal of thousands of feet of siding and spur tracks, the light rail project will nonetheless “result in substantial infrastructure improvements.” Met Council Reply at 19. TCW’s claims about the critical role the sidings play are “grossly overstated” according to Met Council, Met Council Reply at 22, and it questions TCW’s statements regarding TCW’s use of the sidings and TCW’s claim that there will be a degradation of service without those tracks. Met Council Reply at 23.

The point of the above is that there are substantial disagreements between Met Council and TCW regarding the factual assertions by both parties. TCW believes that on their face the agreements, as structured, do not meet the State of Maine precedent; however, if the Board does not agree, the development of the factual record and submission of additional comments could significantly facilitate the Board’s analysis.¹³

CONCLUSION

TCW respectfully renews its requests that the Board dismiss the Petition for failure to structure the Project agreements in a manner to meet even the most minimum requirements for a

¹³ For example, if TCW’s statements regarding the adverse impacts on shippers are true, then the Project does not fit within the STB’s precedent exempting relocation projects from STB authority and any requisite environmental analysis.

successful State of Maine transaction. In no other State of Maine transaction has the common carrier obligation been effectively eliminated because the entity acquiring the common carrier obligation (HCRRA) has been granted a complete exemption from Subtitle IV. In no other State of Maine proceeding has the entity owning and controlling the physical rail assets (Met Council) been granted the authority to manage the common carrier and agreed to indemnify the common carrier from any violations of the common carrier obligation. As such, the Board should either dismiss the Petition until such time as the transaction can be properly restructured under the standard State of Maine precedent, or it should require Met Council to submit itself to STB authority and seek approval for its acquisition of the physical assets of the Bass Lake Spur and the Kenilworth Corridor. Alternatively, the Board should, at a minimum, set a procedural schedule to allow for public comment, discovery, development of a complete record, and a deeper analysis of the Project.¹⁴

Respectfully submitted,



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May 17, 2018

Counsel for Twin Cities & Western Railroad
Company

¹⁴ The Board also has the option of holding the proceeding in abeyance pending a decision by the District Court on TCW's breach of contract claims and preemption claims.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of these Rebuttal Comments of Twin Cities & Western Railroad Company ("TCW") in support of TCW's request to dismiss The Metropolitan Council's Petition for Declaratory Order by mailing copies of the Rebuttal Comments via prepaid first class mail to all parties of record in this proceeding or by more expeditious means of delivery.

Dated at Washington, D.C. on this 17th day of May, 2018.



William A. Mullins
Counsel for Twin Cities & Western Railroad
Company