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ATTORNEYS AT LAW
THE FOUNDRY BUILDING ♦ 1055 THOMAS JEFFERSON STREET, NW ♦ SUITE 500 ♦ WASHINGTON, D.C. 20007
TELEPHONE: 202-342-5200 ♦ FACSIMILE: 202-342-5299

RICHARD BAR
BRENDAN COLLINS
STEVEN JOHN FELLMAN
EDWARD D. GREENBERG
MATTHEW T. JOURNY
KATHARINE FOSTER MEYER
DAVID K. MONROE
TROY A. ROLF
DAVID P. STREET
KEITH G. SWIRSKY
THOMAS W. WILCOX
CHRISTOPHER B. YOUNGER

OLIVER M. KRISCHIK
KRISTINE O. LITTLE

MINNESOTA OFFICE:
114 FIRST STREET SOUTH
BUFFALO, MN 55313
(T) 763-682-6620 (F) 763-682-6261

WRITER'S DIRECT E-MAIL ADDRESS
EGREENBERG@GKGLAW.COM

WRITER'S DIRECT DIAL NUMBER
202-342-5277

May 21, 2018

VIA E-FILING

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

Re: Docket No. FD 36178, Metropolitan Council - Petition for Declaratory Order

Dear Ms. Brown:

In an apparent attempt to delay the Board's consideration of the Metropolitan Council's Petition for Declaratory Order, on May 17, 2018 the Twin Cities & Western Railroad Company ("TCWR") filed "Rebuttal Comments" in this proceeding in response to the Reply submitted by the Council to TCWR's "Initial Comments" it filed on April 24, 2018. As noted in the Council's Reply (page 1, footnote 2), TCWR's invention of an "initial comment" phase of this declaratory order proceeding had no basis in any Board procedural regulation, and TCWR had no procedural right to supplement its initial filing. Because TCWR's "Rebuttal Comments" merely rehash and embellish arguments TCWR either already made or could have made in its "Initial Comments" for the sole purpose of trying to rebut arguments the Council made in its Reply, TCWR's filing should be rejected as an impermissible "reply to reply" pursuant to 49 CFR §1104.13(c).

While the Board has not strictly enforced its prohibition on "replies to replies" in all proceedings, parties seeking a waiver of this rule must still demonstrate good cause for it to be granted. Also, while the Board has frequently allowed replies to replies in the interest of compiling a full record, a prerequisite to this determination is that the proffered material is



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needed to complete the record of the proceeding.¹ The Board has also established other limits on such filings that have direct application here. For example, good cause to file a reply to reply is not present when the submission entirely consists of “rebuttals to the arguments made by [the petitioner] and none of which are necessary to develop a more complete record.”² The Board has also rejected proffered replies to replies when they merely repeat the parties’ prior arguments.³ Also, in considering whether to waive its prohibition, the Board considers whether allowing the reply to reply will result in further delays to a proceeding.⁴

TCWR’s proffered “Rebuttal Comments” fall into all of these categories. There is nothing in its filing that is needed by the Board to ensure it has a complete record in this proceeding, and TCWR doesn’t bother to demonstrate otherwise. Rather, its filing consists entirely of arguments that repeat and embellish on arguments TCWR made in its initial filing for the purpose of rebutting the arguments the Council included in its Reply. See Rebuttal Comments at footnote 4 (“TCW is limiting this Rebuttal to the application of the *State of Maine* precedent to the proposed agreements,” which TCWR already addressed extensively in its initial filing). See also, *id* at 14 (“TCW has limited these Rebuttal Comments to the application of the law to the agreements submitted in the record,” thereby admitting that all TCWR seeks to do in its filing is rehash and expand on arguments it already made in response to the Petition for Declaratory Order).

In the process of embellishing the arguments it has made in its “Initial Comments,” TCWR selectively miscites provisions of a separate Joint Powers Agreement (the “JPA”) between the Council and HCRRA to argue that HCRRA will not fulfill its common carrier obligations. TCWR *omits* the critical provision of that agreement that *directly and definitively disposes* of TCWR’s incorrect argument:

If the Council breaches or otherwise does not perform its obligations under this Agreement, (1) HCRRA is still ultimately responsible to fulfill its Common Carrier Obligation in the Corridors or HCRRA's commitment to fulfill that responsibility as described in the pleadings submitted to the Surface Transportation Board in Docket Numbers FD 36177 and FD 36178 as part of any

¹ STB Docket FD 35960, *Petition of Union Pacific RR Co. for a Declaratory Order* (STB Served September 30, 2016) slip op. at 5.

² STB Docket FD 36148, *Adrian Blissfield RR Co. – Petition for Declaratory Order* (STB Served January 31, 2018), slip op. at 3.

³ STB Docket EP 664 (Sub- No. 2) *Petition of Western Coal Traffic League to Institute a Rulemaking Proceeding to Abolish the Use of the Multi-Stage Discounted Cash Flow Model in Determining the Railroad Industry’s Cost of Equity Capital*, (STB Served August 10, 2017) slip op. at 1, fn 2.

⁴ STB Docket AB 167 (Sub – No. 1189X) *et al, Consolidated Rail Corp. – Abandonment Exemption – In Hudson County, N.J.* (STB Served July 1, 2016) slip op. at 4, note 7.

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proceedings that may be required to implement the property transactions referenced in this Agreement; and (2) HCRRA is still ultimately responsible to fulfill its retained or assumed rights and obligations under the Trackage Rights Agreements as described in the pleadings and documents in the proceedings described in clause (1). In the event that the Council breaches or otherwise does not perform its obligations under this Agreement, HCRRA's and the County's remedies are solely their available remedies at law or in equity or as provided herein against the Council, and HCRRA will continue to hold the Common Carrier Obligation.⁵

Similarly, although TCWR does cite the entirety of Section 5 of the JPA, it misstates its import. Rather than indicating that all obligations associated with being a common carrier fall on the Council rather than HCRRA, as TCWR contends, the plain words of the provision establishes that the opposite is the case. In several places, the language of this section makes it clear the Council's obligations in this respect would be, *on behalf of HCRRA*, to obtain third parties to provide any needed rail freight service, maintenance or capital repair.⁶ In other words, HCRRA would retain the common carrier obligation on the Kenilworth Corridor and obtain that on the Bass Lake Spur.

Finally, the Board's acceptance of TCWR's filing would further TCWR's apparent goal of delaying the Board's processing of the Council's Petition, and the SWLRT Project generally. For all of the reasons set forth in this letter, TCWR's proffered "Rebuttal Comments" should be rejected.

Do not hesitate to contact the undersigned with any questions or if you need additional information.

Very truly yours,



Edward D. Greenberg
Attorney for Metropolitan Council

cc: Parties of Record

⁵ See PDO, Attachment 2, Exhibit D to Exhibit 4A, section 1(a).

⁶ *Id.*, section 5.