

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB Docket No. AB-6 (Sub-No. 465X)**

**BNSF RAILWAY COMPANY – ABANDONMENT EXEMPTION – IN KING COUNTY,  
WASHINGTON (Woodinville Subdivision)**

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**STB Finance Docket No. 35731**

**BALLARD TERMINAL RAILROAD COMPANY, LLC. – ACQUISITION AND  
OPERATION EXEMPTION – WOODINVILLE SUBDIVISION – VERIFIED PETITION  
FOR EXEMPTION PURSUANT TO 49 U.S.C. § 10502**

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**REPLY OF KING COUNTY, WASHINGTON AND CENTRAL PUGET SOUND  
REGIONAL TRANSIT AUTHORITY TO BALLARD TERMINAL RAILROAD  
COMPANY, LLC.'S MOTION FOR PRELIMINARY INJUNCTION**

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King County, Washington, a political subdivision of the State of Washington (the “County”) and Central Puget Sound Regional Transit Authority (“Sound Transit”) file this joint Reply to oppose the Ballard Terminal Railroad Company, L.L.C.’s (“BTR”) Motion for Preliminary Injunction filed in these dockets on May 8, 2013. BTR seeks to enjoin the City of Kirkland from salvaging railroad track and ties on the 5.75-mile portion of the Woodinville Subdivision (the “Line”) that crosses the City of Kirkland, despite the fact that the Board’s decision approving a Notice of Interim Trail Use (“NITU”) for the Line specifically permits removal of the track. *BNSF Ry. C. – Abandonment Exemption – In King County, WA*, STB Docket No. AB-6 (Sub-No. 465X), slip op. at 6 (Service Date Nov. 28, 2008) (“NITU Order”). As detailed below, BTR has failed to meet any of the criteria for granting a preliminary injunction and its Motion must be denied.

## **I. INTRODUCTION**

The County holds a valid NITU allowing for the use of the Line as a railbanked recreational trail. A consortium of local public entities, including Sound Transit and the County, is developing a comprehensive plan for the use of the Line as a recreational trail and for other public recreational, transportation, and utility uses. The City of Kirkland owns a 5.75-mile portion of the Line in Kirkland, including the rails and other rail assets on the right-of-way. Through its issuance of the NITU, the Board has previously authorized the salvage of track on the Line. Consistent with that order, and with 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29, Kirkland plans to salvage the track on the Kirkland portion of the Line as a prelude to developing that portion of the Line as a recreational trail.

BTR seeks to enjoin Kirkland's salvage operation while the Board considers BTR's petitions to vacate the NITU and to obtain Board authority to acquire the rail assets and the County's reactivation right on the Line. BTR asserts that the injunction is necessary because BTR would not be able to afford to acquire new rails if Kirkland were to remove the existing rails, thereby making BTR's business plan unworkable and making it impossible for BTR to exercise the authority BTR seeks in its Petitions. The central premises of BTR's motion are that it will obtain the Board authority it seeks and that, having obtained that authority, it will be able to exercise it.

Those assumptions rest on a false premise, however. BTR cannot succeed on its request to vacate the NITU because it has no property, contractual, or statutory right or claim to the Line or the rail assets on the Line. Discovery regarding BTR's putative shippers confirms that no shipper has requested service on the Line and that there is no actual demand for such service. Without property rights in the Line, and without demand for service on the Line, BTR cannot

meet the Board's long-standing standards for vacating a NITU. BTR lacks the capital and financing necessary to acquire the property rights and rail assets it needs to start such service, and thus could not exercise any permissive authority even if the Board were to grant it. BTR has no likelihood of success on the merits, granting the injunction will not prevent the harm BTR fears, and BTR faces no irreparable injury because removal of the rails will not harm BTR's existing property or contract rights.

Moreover, the Board has authorized salvage of the rails and BTR has no right to expect that the rails would be in place even if it were able to obtain operating authority and acquire the Line. BTR rests its case on the notion that it can enjoin the lawful and permitted conduct of Kirkland to salvage rails and develop a trail, and collaterally obstruct other lawful and permitted conduct of the County and Sound Transit, all to protect BTR's bare desire to establish a business using rails and land it does not own, has no contractual right to acquire, and apparently cannot afford to buy. That notion turns injunction law on its head by destroying existing legal rights in order to preserve a party's unilateral hopes for a future advantage. BTR's request goes far beyond the recognized bounds of the Board's discretionary authority to provide the extraordinary remedy of a preliminary injunction. As detailed below, BTR cannot meet any of the required elements for obtaining a preliminary injunction, and its motion must be denied.

## **II. FACTUAL BACKGROUND**

### **A. Background and Recent History of the Line**

The Line is part of the Woodinville Subdivision (the "Subdivision"), a line of railroad previously owned and operated by the BNSF Railway Company and its predecessors. The Subdivision consists of (1) a 33.25-mile-long corridor extending from Subdivision milepost 5.00 in Renton through the cities of Bellevue, Kirkland, Woodinville, and portions of unincorporated

King County, to milepost 38.25 in Snohomish County; and (2) a separate, 7.30-mile-long spur, which intersects the Woodinville Subdivision at a “wye” junction in Woodinville just north of Subdivision milepost 23.80, and continues south to the Sammamish River near downtown Redmond (the “Spur”). *See BNSF Woodinville Subdivision, Existing Rail Lines and Regional Trails (May 1, 2005)*, Exhibit 1 attached hereto.

In 2008, BNSF sought authority from the Board to abandon the Subdivision, including the segment comprising the Line. *See* NITU Order at 1.<sup>1</sup> In support of its petition, BNSF declared that there was no longer any demand for rail freight service on the Line. *See id.* at 2. BNSF explained that freight traffic on the Line had “been declining steadily in recent years,” and that there was insufficient freight demand to justify continued operation of the Line. *See* BNSF Petition for Exemption at 4, 10 (Filed Aug. 11, 2008) (“BNSF Petition”). At the time, there were only two shippers on the Line, both of which supported the proposed abandonment, NITU Order at 2 n.2, and due to changes in land use patterns and increased property values along the Subdivision there was “limited, if any, freight rail growth opportunities, even for a short line operator.” BNSF Petition at 13. BNSF estimated the net liquidation value of the Line at \$243,660,000. *Id.* at 5. The STB found that “[t]here are *no* other prospects for future rail traffic [on the Subdivision].” NITU Order at 3 (emphasis, bracketed material added).

In response to BNSF’s petition, King County filed a request for a NITU in order to establish a trail and other public uses on the Subdivision. *See id.* at 4-5. With BNSF indicating support, the Board authorized BNSF abandon or to railbank the Line. *Id.* at 6. To ensure that no potential opportunity to preserve rail service was overlooked, the Board invited any interested

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<sup>1</sup> *See also BNSF Ry. Co. – Abandonment Exemption – In King County, Washington*, STB Docket No. AB-6 (Sub-No. 464X) (Service Date Nov. 3, 2009, regarding the Woodinville Subdivision from milepost 5.00 in Kenndale north to milepost 10.60 in Wilburton and *BNSF Ry. Co. – Abandonment Exemption – In King County, Washington*, STB Docket No. AB-6 (Sub-No. 463X) (Service Date Nov. 3, 2009), regarding the Redmond Spur from milepost 0.00 in Woodinville to approximately milepost 7.30 in Redmond.

party to submit an Offer of Financial Assistance (“OFA”) and conditioned the NITU Order on completion of the OFA process. *See* 73 Fed. Reg. 51,047 (Aug. 29, 2008); NITU Order at 4, 5, 7. Although BTR and its then-partner, GNP Rly, Inc. (“GNP”), considered submitting an OFA for GNP to pay \$81 million for the Subdivision, they opted not to make an offer. *See* Transcript of Deposition Upon Oral Examination of Douglas Engle, attached hereto as Exhibit 2 at pp. 174-175 (“Engle Dep.”). In fact, no OFA was filed. *See* NITU Order at 7.

Subsequently, BNSF entered into a trail use agreement with King County for the Renton-Woodinville segment of the Subdivision, including the Line, as well as the Redmond Spur.<sup>2</sup> NITU Order at 2; *see also* Notice of Consummation, *BNSF Ry. Corp. – Abandonment Exemption – In King County, WA*, STB Docket No. AB-6 (Sub-No. 465X) (Filed Feb. 5, 2010) (“Subdivision Notice of Consummation”). King County also acquired BNSF’s reactivation right with respect to the railbanked portions of the Subdivision. *BNSF Ry. Co. – Acquisition Exemption – In King County, WA*, STB Finance Docket No. 35148 (Service Date Sept. 18, 2009).

In 2009, BNSF conveyed its property interests in the Subdivision to the Port for a purchase price of \$81.4 million and other consideration. *See* Subdivision Notice of Consummation at Exhibit A p. 1 (Seventh Amendment to Donation Agreement).<sup>3</sup> BNSF retained an exclusive freight easement over the northernmost portion of the Subdivision, from Milepost 23.8 in Woodinville to Milepost 38.25 in Snohomish (the “Freight Segment”), and BNSF conveyed that freight easement to GNP. *See* Verified Petition for Exemption Pursuant to

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<sup>2</sup> The segment of the Woodinville Subdivision from Milepost 10.6 to Milepost 11.25 was previously fully abandoned. Notice of Consummation, *BNSF Ry. Co. – Abandonment Exemption – In King County, WA* – STB Docket No. AB-6 (Sub-No. 453X) (Filed March 10, 2008). BNSF sold that segment to the Port along with the rest of the Renton-Woodinville portion of the Line, and the Port subsequently sold that segment to King County as described herein.

<sup>3</sup> *See also* King County recording no. 20091218001537 (deed from BNSF to Port of Seattle, dated December 18, 2009). All conveyance instruments identified by a King County recording number in this Response may be retrieved online at <http://www.kingcounty.gov/business/Recorders/RecordsSearch.aspx> (visited May 31, 2013).

49 U.S.C. 10502, STB Finance Docket No. 35731 (filed April 3, 2013), at Exhibit B p. 2 (verified statement of Byron Cole). By contract with GNP, in January 2010 BTR began providing rail service to the few remaining shippers on the Freight Segment. *Id.* at pp. 1-2. GNP subsequently went bankrupt and Eastside Community Rail, LLC (“ECR”) acquired GNP’s assets from the bankruptcy trustee.<sup>4</sup> BTR continues to provide rail service on the Freight Segment by agreement with ECR.<sup>5</sup> Doug Engle, formerly an officer of GNP, is the sole member and also the sole employee of ECR.<sup>6</sup>

Since 2009, the Port has conveyed various property interests in the railbanked portions of the Subdivision to other regional stakeholders as follows:

- King County acquired an easement over all of the railbanked portions of the Subdivision to permit King County to fulfill its trail use responsibilities. *See* Subdivision Notice of Consummation at Exhibit A.<sup>7</sup>
- The City of Kirkland purchased the 5.75 mile segment of the Line that traverses Kirkland, subject to the County’s trail easement, for approximately \$5 million.<sup>8</sup>
- The City of Redmond purchased the portion of the Spur from milepost 3.4 to milepost 7.3, subject to the County’s trail easement, for approximately \$10 million.<sup>9</sup>
- Puget Sound Energy purchased a utility easement over the entire Subdivision (except for within the City of Redmond), subject to the County’s trail easement, for approximately \$13.5 million.<sup>10</sup>
- Sound Transit purchased a 1.1-mile segment of the Subdivision in downtown Bellevue and a high capacity transportation easement over the remainder of the

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<sup>4</sup> *See* Ballard’s Verified Petition in this matter at Exhibit B (Verified Statement of Byron Cole, dated March 28, 2013) at p. 2.

<sup>5</sup> *Id.*

<sup>6</sup> *See* Engle Dep., Exhibit 2, at p. 54 lines 1-2 (no employees) p. 117 lines 11-17 (Engle only member).

<sup>7</sup> *See also* King County recording no. 20091218001538 (grant of easement from Port of Seattle to King County).

<sup>8</sup> *See* King County recording no. 20120413001315 (“Quit Claim Deed” dated April 12, 2012).

<sup>9</sup> *See* King County recording no. 20100630000559 (“Quit Claim Deed” dated June 30 2010). Consistent with the Board’s Decision and Notice of Interim Trail Use or Abandonment in *BNSF Ry. Co. – Abandonment Exemption – In King County, Washington*, STB Docket No. AB-6 (Sub-No. 463X) (decided May 2, 2013), the City will shortly become the Interim Trail Sponsor for the in-City portion of the Spur, and the County will relinquish its trail easement there. The County will remain the Interim Trail Sponsor for its segment of the Spur from Milepost 0.0 to Milepost 3.4

<sup>10</sup> *See* King County recording nos. 20101221000997 (“North Line Rail Easement” dated December 21, 2010) and 20101221000998 (“South Line Rail Easement” dated December 21, 2010).

Subdivision, as well as the Spur from milepost 0.0 to 3.4, all subject to King County's existing trail easement, for approximately \$15.75 million.<sup>11</sup>

- King County purchased the Port's remaining interest in the Subdivision from approximately MP 5.0 – MP 12.4 (between Renton and Bellevue) and MP 13.5 – MP 14.6 (between Bellevue and Kirkland), and from approximately MP 20.3 in Kirkland to MP 23.8 in Woodinville, as well as its remaining interest in the Spur from MP 0.0 to MP 3.4 and a trail easement over the Freight Segment from Milepost 23.8 to the Brightwater Treatment Plant in Snohomish County, for approximately \$15.8 million in cash, property, or a combination thereof.<sup>12</sup> King County's original trail easement remains in force on the Sound Transit-owned segment within the City of Bellevue, as well as within the City of Kirkland's 5.75-mile segment.

**B. Regional Planning Efforts to Develop Recreational and Other Public Uses of the Railbanked Portions of the Subdivision**

In 2013, in order to coordinate and promote the development of multiple public uses on the railbanked portions of the Subdivision, King County designated those portions as a “corridor of regional significance” and established a Regional Advisory Council to carry out a regional planning process for it. See Exhibit 3 at p. 5 recitals A, C (King County Motion 13801, dated December 11, 2012). The Regional Advisory Council is composed of representatives from the City of Kirkland, the City of Redmond, King County, Sound Transit, Puget Sound Energy, and is further charged to reach out to other stakeholders as well. See *id.* at p. 6 recital D, p. 7 recital J. The Regional Advisory Council and its technical support team meet regularly to carry out its mission.<sup>13</sup> In addition to the regional efforts coordinated by the County, the City of Kirkland, Sound Transit, and the City of Redmond all have begun projects to improve their respective portions of the Subdivision for use by the public.

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<sup>11</sup> See King County recording no. 20120411001174 (“High Capacity Transportation Easement Agreement” dated April 11, 2012); see also 201204011001173 (“Quit Claim Deed” dated April 10, 2011). Sound Transit separately acquired transit-related easements over the portion of the Spur owned by the City of Redmond. See King County recording nos. 20120411001175 and 20120411001176.

<sup>12</sup> See King County recording no. 20130213001645 (“Quit Claim Deed” dated February 11, 2013).

<sup>13</sup> See generally <http://www.kingcounty.gov/operations/erc-advisory-council.aspx> (visited May 31, 2013).

## **1. Sound Transit<sup>14</sup>**

Sound Transit is working towards construction of its 14-mile East Link light rail extension on portions of the Subdivision to provide a fast, frequent and reliable connection from the Eastside's biggest population and employment centers to downtown Seattle, Sea-Tac Airport and the University of Washington. Sound Transit has budgeted \$2.8 billion for the East Link project. A major East Link station, track segment and related improvements will be located on the Subdivision just north of NE 8<sup>th</sup> Street in Bellevue.<sup>15</sup> This elevated station will include a passenger drop-off, pedestrian access and bus connections, and provide important access to adjoining medical facilities and the Wilburton re-development area.<sup>16</sup> The station is also being designed with sufficient right-of-way to allow for the future reactivation of freight rail.

East Link is presently in the final design stage, during which Sound Transit will complete the design of the trackway, stations and art installations as well as determining construction methods, including sequencing and mitigation. Sound Transit is working to start construction in 2015. The project is estimated to create more than 20,000 direct, construction-related jobs over the duration of the work and 34,000 to 42,000 indirect jobs as the stimulus spreads throughout the economy.

## **2. The Cross-Kirkland Corridor<sup>17</sup>**

The City of Kirkland has initiated a master planning process to develop a regional paved trail and a regional transit pathway on the Line within the City, which the City calls the Cross-

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<sup>14</sup> Except as otherwise noted, all information contained in this section is taken from Sound Transit's East Link project web page, available online at <http://www.SoundTransit.org/Projects-and-Plans/East-Link-Extension> (visited May 31, 2013).

<sup>15</sup> See <http://www.SoundTransit.org/Projects-and-Plans/East-Link-Extension/Location-and-stations> (visited May 31, 2013).

<sup>16</sup> See [http://www.SoundTransit.org/Documents/pdf/projects/eastlink/Openhouse201305/Hospital\\_part%201\\_2.pdf](http://www.SoundTransit.org/Documents/pdf/projects/eastlink/Openhouse201305/Hospital_part%201_2.pdf) (visited May 31, 2013).

<sup>17</sup> Except as otherwise noted, all information contained in the first paragraph of this section is taken from the City of Kirkland's Cross-Kirkland Corridor web page, available online at [http://www.kirklandwa.gov/Community/Cross\\_Kirkland\\_Corridor.htm](http://www.kirklandwa.gov/Community/Cross_Kirkland_Corridor.htm) (visited May 31, 2013).

Kirkland Corridor. While that planning process continues, Kirkland intends to use the Cross-Kirkland Corridor as a gravel recreational trail. Earlier in 2013, the City of Kirkland issued a contract to remove the rails and other railroad facilities in the Cross-Kirkland Corridor in order to develop the gravel trail. See Exhibit B to BTR’s Motion for Preliminary Injunction (“BTR Motion”) (excerpts of Declaration of City Manager Kurt Triplett).

As the Interim Trail Sponsor for the railbanked portions of the Subdivision outside the City of Redmond, King County is aware of and respects Kirkland’s plans as the owner of this segment of the Line to salvage the rail facilities that it acquired and then construct a gravel trail along the Cross-Kirkland Corridor consistent with the NITU Order. Through the Regional Advisory Council, King County is coordinating planning for development of the Subdivision along with the City of Kirkland, Sound Transit, the City of Redmond, and Puget Sound Energy, all of which own significant property interests in the Subdivision and Spur, and with other public entities.

### **3. City of Redmond<sup>18</sup>**

The City of Redmond has begun to redevelop the Redmond portion of the Spur, renamed as the “Redmond Central Connector,” which runs through downtown Redmond. This redevelopment has been a long-standing goal of the City. The Redmond Central Connector includes a 1.1 mile regional trail and 12-acre linear park that integrates landscape art and historical effects, connects a previously fractured transportation network of streets, sidewalks, urban bicycle facilities, and a trail connecting to a 60-mile plus regional trail system. It also accommodates light rail transit and local and regional utilities. Redmond removed virtually all track and other rail facilities from the Central Connector in 2012. Phase I construction (from

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<sup>18</sup> All information contained in this section is taken from the City’s Central Connection project web page, available online at <http://www.redmond.gov/cms/One.aspx?portalId=169&pageId=83186> (visited May 31, 2013).

Downtown west to the Sammamish River) is scheduled to be completed in Summer 2013. Phase II construction (consisting of a paved trail from the Sammamish River westward to the 9900 block of Willows Road) is scheduled to occur in 2013-14, with Phase III construction (trail construction north from the 9900 block of Willows Road to NE 124<sup>th</sup> Street), to follow subsequently. Redmond recently executed a Statement of Willingness to Accept Financial Responsibility to become the Interim Trail Sponsor for the Central Connector pursuant to 49 C.F.R. 1152.29.<sup>19</sup> Redmond is thus obligated to make the Central Connector available for the reactivation of freight rail service by a bona fide petitioner under appropriate circumstances.<sup>20</sup>

### **C. BTR's Current Operations on the Freight Segment**

In December 2012, ECR acquired GNP's assets, including GNP's freight rail easement over the Freight Segment from Woodinville to Snohomish.<sup>21</sup> BTR continues to provide rail service over the Freight Segment by permission of the Board and by agreement with ECR.<sup>22</sup> Freight operations are minimal. BTR serves just three customers on the Freight Segment: Spectrum Glass, a Boise Cascade distribution center, and Matheus Lumber. A fourth shipper went bankrupt a few years ago. Since BTR began serving the line, freight volumes have declined by roughly ten percent each year, from 270 total cars in 2010 to 235 cars in 2011 and just 213 total cars in 2012. See Exhibit 4 (Excerpts from Transcript of Deposition Upon Oral

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<sup>19</sup> See Decision and Notice of Interim Trail Use or Abandonment in *BNSF Ry. Co. – Abandonment Exemption – In King County, Washington*, STB Docket No. AB-6 (Sub-No. 463X) (Service Date May 3, 2013).

<sup>20</sup> See *BNSF Ry. Co. – Abandonment Exemption – In King County, WA*, STB Docket No. AB-6 (Sub-No. 465X), slip op. at 6 (Service Date Nov. 28, 2008).

<sup>21</sup> See 77 Fed. Reg. 70206-07 (November 23, 2012) (notice of exemption that would authorize ECR, a non-carrier, to acquire GNP Rly Inc.'s assets).

<sup>22</sup> There is some uncertainty as to BTR's authority to use the Freight Segment pursuant to a 5-year lease executed by BTR and ECR in April 2013. BTR needs the Port's approval to operate on the Freight Segment. See Decision in *Ballard Terminal R.R. Company LLC—Lease Exemption—Line of Eastside Community Rail, LLC*, STB Finance Docket No. 35750 (Service Date May 1, 2013). BTR and ECR are operating as though the lease is in effect, but on information and belief it is King County's and Sound Transit's understanding that the Port of Seattle has not yet approved the lease due to an ongoing insurance dispute with ECR. See, e.g., Engle Dep., Exhibit 2, p. 150 at lines 21-22 ("The Port of Seattle has issues with this agreement. Or with the O&M agreement"); see also *id.* at p. 158-159, p. 164.

Examination of Byron Cole) (“Cole Dep.”) at p. 46 lines 11-25, p. 47 lines 1-9. ECR and the Port each earn \$10 per car. *Id.* at p. 174 lines 4-11.

BTR has put little or no money into upkeep of the track and has no firm plans for any significant maintenance, despite several outstanding signal or crossing issues at a couple of intersections. *See generally* Cole Dep., Exhibit 4, at pp. 80-86 (maintenance), pp. 205-11 (signal and crossing issues). BTR’s three existing lines (the Ballard line, the Meeker Southern, and the Freight Segment) collectively produce only around a half-million dollars of gross revenue each year and overall BTR typically operates at a loss. Cole Dep., Exhibit 4, at p. 32 lines 21-25, p. 33 lines 1-6 (revenue); p. 56 at line 9. Indeed, until recently the Ballard and Meeker lines have been underwriting the Freight Segment to one degree or another. *See, e.g., Id.* at p. 33 lines 15-25 p. 34 lines 1-2; p. 84 lines 1-8; p. 169 lines 19-25, p. 170 lines 1-6; p. 226 lines 5-12.

Beyond its contract and lease interests in the Freight Segment, BTR has no property interests in the Subdivision south of MP 23.8, including specifically the Line and the Cross-Kirkland Corridor. *Id.* at p. 216 lines 2-4 (“Q. [D]oes Ballard own any property on the Woodinville Subdivision south of Woodinville? A. No.”). BTR does not lease any portion of the Line, nor does it have any contract or other rights to make any use of the Line. *Id.* at p. 95 lines 17-22 (“Q. Does Ballard own any real property interest in the line? . . . A. No.”); *see also* pp. 100-103 (testifying that Ballard has not sought to acquire a freight rail easement from Kirkland, King County, or Sound Transit).

#### **D. BTR’s Petitions and the Claimed Need for Rail Service on the Line**

On April 3, 2013, BTR submitted its Petitions in these Dockets seeking, *inter alia*, to vacate the NITU, acquire the tracks and rail facilities, acquire the County’s reactivation authority, and obtain operating authority, all with respect to the Line. BTR alleges that its

Petitions are based on newly-identified shipper demand, which justifies reactivation of the Line and preservation of the rails and ties on the Cross-Kirkland Corridor. BTR Motion at 4-5. Accordingly, BTR seeks to enjoin Kirkland from removing the rails while it prosecutes its Petitions. The facts as presented by BTR in support of its Motion, and as developed in discovery, show that there is no shipper demand for service on the Line and no need to preserve the rails.

**1. There is No Present Freight Demand on the Line**

BTR asserts that “[t]wo customers, CalPortland and Wolford Demolition Company [(“Wolford”)], have come forward and asked BTR to provide them rail services” because “they are ready, willing, and able to utilize the line once rail service is reinstated.” BTR Motion at pp. 4-5. These assertions are not supported by the facts.

First, the Wolford and CalPortland letters are general letters of support, not requests for service. The words “ready, willing, and able” do not appear in either of them, neither do they constitute a request for service. At most, the letters identify potential future highway and construction projects that might be able to use rail service, but neither letter indicates that there is any current demand or need for rail service. Mr. Michael Skrivan, the author of the CalPortland letter, testified that he did not understand his letter to be a request for rail service. Excerpts from Deposition Upon Oral Examination of Michael Skrivan, Sr. attached hereto as Exhibit 5 (“Skrivan Dep.”) p. 27 line 13-16, p. 34 lines 16-25. Mr. Skrivan also testified that when he wrote the letter, CalPortland had no current or foreseeable need for freight rail service on the Line. *Id.* at p. 34 lines 23-25, p. 35 lines 1-2. For its part, Wolford Trucking and Demolition has operated directly adjacent to the Freight Segment without rail service for over 40 years. Excerpts from Transcript of Deposition Upon Oral Examination of Bobby Wolford (“Wolford Dep.”), attached hereto as Exhibit 6, at p. 7 lines 4-8, p. 130 lines 9-18. Further, a company with whom

Wolford subcontracts currently is undertaking a major highway project in the Bellevue-Kirkland area — apparently without any need for rail service on the Line. *Id.* at pp. 94 lines 17-25, p. 95 lines 5-10. In any case, both Wolford and CalPortland have made clear that they have no current contracts with Ballard or ECR for rail service. *See, e.g., Id.* at p. 44 lines 1-4 (“Q. Does your company have any business dealings with Ballard Terminal Railway currently? A. Not now. We were going to put some ecology blocks and do some work for them but we never did.”); Skrivan Dep., Exhibit 5, p. 37 lines 11-15 (“Q. My question was whether you had any contract with Eastside Community Rail. A. No. Q. Or with Ballard? A. No.”). Byron Cole, the owner of BTR, confirmed the absence of any agreements for service between BTR and either Wolford or CalPortland, or any other shippers regarding the Line.<sup>23</sup> *See* Cole Dep., Exhibit 4, at p. 126 lines 10-13; p. 127 lines 1, 22-25; p. 128 lines 3-16 (shippers generally); *see also id.* at p. 141 at lines 15-19 (CalPortland); p. 146 at 14-19 (Wolford).

Second, neither Wolford nor CalPortland are located on the Line.<sup>24</sup> Skrivan Dep., Exhibit 5, p. 52-53, p. 54 lines 1-7; Wolford Dep., Exhibit 6, p. 66 lines 10-18; Engle Dep., Exhibit 2, p. 173 lines 13-18. Nor do they own, or have a current plan to obtain, any property rights in or on the Line. Skrivan Dep., Exhibit 5, pp. 53-56; *see also* Wolford Dep., Exhibit 6, p. 103 lines 12-25, p. 112 lines 13-16. Their potential use of the Line depends on obtaining contracts from customers that might require the use of rail service, but neither Wolford nor CalPortland have such customers. Skrivan Dep., Exhibit 6, p. 62 lines 7-11; *see also* Wolford Dep., Exhibit 6, p. 103 lines 22-25.

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<sup>23</sup> Mr. Cole also could not identify any *potential* shippers who had inquired about service on the Line. *See* Cole Dep., Exhibit 4, at pp. 108-110.

<sup>24</sup> Wolford’s facility is adjacent to the Freight Segment in Maltby, but there is no spur to give Wolford access the Freight Segment and Wolford has no immediate plans to build one. Wolford Dep., Exhibit 6, at p. 130 lines 9-17, p. 140 lines 23-25, p. 141 lines 1-24. In his personal capacity Mr. Wolford owns one commercial lot in Kirkland that is located adjacent to the Line, but that lot is leased to a brand-new storage facility for five years and is too small for excavation spoils transload. *Id.* at p. 63 lines 5-9, pp. 114-118.

Wolford's potential use of the Line would be to transport dirt and spoils from construction sites in Bellevue and deliver them to sites adjacent to the Freight Segment for construction of a trail. *See, e.g.*, Wolford Dep., Exhibit 6, p. 99 lines 7-25, p. 100 lines 1-5. But, Mr. Wolford testified that contracts to haul dirt from construction sites in Bellevue have not been let and invitations to bid have not yet been sent. *See, e.g., Id.* at p. 32 lines 2-12; p. 34 lines 8-23; p. 92 lines 20-25, p. 93 lines 1-9. ECR confirms that there are no contracts to move construction spoils out of Bellevue by rail. *See* Exhibit 7 at p. 7 (ECR Business Plan, dated February 19, 2013) ("There are no written plans, agreements or otherwise to move spoils from Bellevue to Snohomish County, although there have been many conversations and some analysis."). Mr. Wolford also testified that Wolford has no contracts to *dispose* of construction spoils from Bellevue or Kirkland along the Freight Segment. *See* Wolford Dep., Exhibit 6, p. 99 at lines 22-25, p. 100 at lines 1-17. Mr. Engle confirmed that ECR has no contracts with Snohomish County or any other public agency to build a trail or maintenance of way road along the Freight Segment. *See* Engle Dep., Exhibit 2, at p. 76 lines 19-25, p. 77 line 1.

CalPortland's use of the Line would be to deliver aggregate to customers. Skrivan Dep., Exhibit 5, p. 54 lines 15-24. Mr. Skrivan testified that CalPortland does not presently have any contracts requiring aggregate to be moved by rail on the Line. *See, e.g., Id.* at p. 54 lines 7-11. Mr. Skrivan testified that his primary interest is in selling aggregate to BTR or ECR for use as railroad ballast, but that he has no contract for even that work. *Id.* at p. 15 at lines 21-25, p. 16 lines 1-3; p. 26 lines 21-25, p. 27 lines 1-2. Mr. Skrivan confirmed, moreover, that there is no need for CalPortland to use rail service for the potential projects that CalPortland is targeting. *Id.* at p. 38 lines 7-17.

## 2. BTR Lacks the Financial Resources to Establish Freight Service on the Line

As discussed above, BTR's revenue from the existing freight on the Woodinville-Snohomish segment of the Woodinville Subdivision is small and shrinking as freight volumes continue to decline. BTR appears to be underwriting that freight service with revenue from its other, separate lines. BTR has not identified any additional source of revenue or capital with which to acquire the property interests in the Line it would need to operate, to acquire the track it seeks to acquire, to acquire the reactivation right from King County, to repair and maintain the track, or to acquire any necessary rolling stock and cover other operating expenses. *See, e.g.,* Cole Dep., Exhibit 4, p. 105 lines 8-10 ("Q. So has Ballard reserved any money that you could use to acquire a property interest in the line? A. "I haven't[.]").

BTR's landlord, and apparent partner, ECR (Mr. Cole described himself and Doug Engle as having been "joined at the hip" for three years; *see* Cole Dep., Exhibit 4, p. 157 lines 10-12), has described a conceptual plan to allocate rail maintenance costs between BTR and a future excursion train. *See* Engle Dep., Exhibit 2, pp. 59-61 and Exhibit 8 (Eastside Community Rail, Corridor Alignment – Cost Sharing Example). But that concept does not address the *initial* costs of acquiring the necessary interests in the Line. Moreover, ECR's concept is contingent upon ECR first obtaining a \$6.4-million dollar direct appropriation from the Washington State Legislature to upgrade the tracks on the Freight Segment. Engle Dep., Exhibit 2, p. 133 lines 13-25, p. 134 lines 1-6; p. 189 lines 2-5 ("Q. So y[ea]r one begins only upon receipt of funding to rehabilitate the line to move from excepted class to either class 1 or class 2? A. Yes.").<sup>25</sup> ECR

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<sup>25</sup> There is a fundamental question whether such an appropriation is expressly forbidden by the Washington State Constitution. *See* Wash. Const. Art. VIII §5 ("The credit of the state shall not, in any manner be given or loaned to, or in aid of, any individual, association, company, or corporation."). *See also* Exhibit 10 (excerpt from Robert F. Utter and Hugh D. Spitzer, THE WASHINGTON STATE CONSTITUTION: A REFERENCE GUIDE (2002) at p. 147

cannot begin to hope for such an appropriation until the 2015-17 budget biennium, having missed the window for the 2013-2015 budget. *Id.* at pp. 90-91, p. 189 lines 24-25, p. 190 lines 1-2. Moreover, a \$6.4 million-dollar direct legislative appropriation for a private excursion train is obviously a huge “ask” that would nearly match the *state-wide* budget for the Washington State Department of Transportation’s freight rail grant and loan program for the *entire* 2013-2015 biennium. BTR has provided no evidence indicating that it has a reasonable likelihood of securing this substantial funding from the Legislature.<sup>26</sup>

ECR further appears to rely on revenue from a future excursion train service, from which ECR expects to generate up to ninety percent of its income. Engle Dep., Exhibit 2, p. 185; Exhibit 7 at p. 2 (p. 1 of ECR business plan dated February 19, 2013). ECR has even proposed—in writing—that the freight reactivation petition could be dropped if the City of Kirkland and King County would allow an excursion train to run to Bellevue. Engle Dep., Exhibit 2, p. 197 lines 19-25, p. 198 lines 1-12; Exhibit 9 (Email from Doug Engle to Kurt Triplett (Nov. 16, 2012). Mr. Cole did not seem to know of Mr. Engle’s proposal (*see* Cole Dep., Exhibit 4, pp. 159-161), and for its part BTR has forsworn any interest in operating an excursion train service, dismissing such ventures as too expensive. *See* Cole Dep., Exhibit 4, at p. 171 lines 20-22 (“We’re [Ballard] not going to fund, finance, build, acquire an excursion train and the pieces of power to run it[,] ever. It’s way too expensive for us.”) (bracketed material added). BTR thus cannot expect to underwrite its speculative freight service with excursion-train

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(“Sections 5 and 7 are seen as anti-railroad provisions . . . the discussions always focused on the railroads . . . The vote for a provision prohibiting subsidies passed by a 2-to-1 margin.”)).

<sup>26</sup> The Legislature provided WSDOT \$5 million for freight rail loans and \$2.75 million for freight rail grants in 2013-2015. *See* <http://www.wsdot.wa.gov/Freight/Rail/GrantandLoanPrograms.htm> (visited May 30, 2013). BTR has applied for grants for its other lines, Cole Dep., Exhibit 4, at p. 70 lines 11-13, but not for the Freight Segment, *Id.* at 74 lines 17-22, p. 75 lines 13-21, p. 76 lines 14-18.

revenue, even if an excursion train were to begin service on the Freight Segment in the foreseeable future.

### III. ARGUMENT

#### A. Standard for Granting a Preliminary Injunction

“An injunction is an extraordinary remedy and will generally not be granted unless the requesting party can show that it faces unredressable actual and imminent harm that would be prevented by an injunction.” *American Chemistry Council v. Alabama Gulf Coast Ry.*, slip op. at 4, STB Docket No. NOR 42129 (Service Date May 4, 2012). *See also* 49 U.S.C. § 721(b)(4). In considering whether to grant such extraordinary relief, the Board requires a movant to meet a four-part test:

- (1) there is a likelihood that it will prevail on the merits of any challenge to the action sought to be enjoined;
- (2) it will suffer irreparable harm in the absence of an injunction;
- (3) other interested parties will not be substantially harmed by an injunction; and
- (4) the public interest supports the granting of the injunction.

*Id.* (citing *Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Va. Petroleum Jobbers Ass’n v. Fed. Power Comm’n*, 259 F.2d 921, 925 (D.C. Cir. 1958)).

As a general matter, the Board has been unwilling to issue preliminary relief to a would-be operator when its ultimate success depends on uncertain shipper demand materializing in the future<sup>27</sup> or on the need to obtain property rights that the Board cannot grant.<sup>28</sup> As detailed above,

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<sup>27</sup> *Norfolk Southern Ry. Co. – Petition for Exemption – In Baltimore City and Baltimore County, MD*, STB Docket No. AB 290 (Sub-No. 311x), Slip Op at 5 (Service Date May 4, 2010) (denying request to stay petition for abandonment pending consideration of petition to reopen based on vague assertions of possible shipper demand).

<sup>28</sup> *Eighteen Thirty Group, LLC – Acquisition Exemption – In Allegany County, MD*, STB Finance Docket No. 35436, slip op. at 3 (Service Date Nov. 17, 2010) (declining to stay notice of exemption when relief required acquisition of property rights the Board could not grant).

there is no evidence of shipper demand and BTR does not have, and professes an inability to obtain, the property rights it needs to make any use of the Line. At the most basic level, BTR's motion fails. BTR also fails to meet any of *Holiday Tours* factors.

**B. Issuing A Preliminary Injunction Will Not Prevent The Harm BTR Seeks To Avoid**

Preliminary injunctive relief is only available when the injunction will prevent the harm alleged. See *BNSF Ry. Co. – Discontinuance of Trackage Rights Exemption – In Peoria and Tazewell Counties, ILL.* STB Docket No. AB 6 (Sub-No. 470X) slip op. at 3 (Service Date July 2, 2010) (refusing to issue a stay under *Holiday Tours* test because petitioner failed to show that its plan would succeed even if the stay were granted). “A plaintiff may be irreparably harmed by all sorts of things, but the irreparable harm considered by the court must be caused by the conduct in dispute and remedied by the relief sought.” *Sierra Club v. U.S. Dep't of Energy*, 825 F. Supp. 2d 142, 152-53 (D.D.C. 2011) (refusing to grant preliminary injunction because the injury may occur even if the injunction is issued). The key question, therefore, is “whether the plaintiff has shown that the relief sought will actually prevent irreparable harm.” *Id.* “It would make little sense for a court to conclude that a plaintiff has shown irreparable harm when the relief sought would not actually remedy that harm.” *Id.* In other words, BTR must show that the harm will not occur if the injunction issues.

BTR cannot meet this threshold test because BTR's claimed injury – being unable to afford to start rail service on the Line – will not be avoided by enjoining the salvage of the rails. As shown above, BTR has not demonstrated that it can acquire the property rights necessary to use the Line (including the rails), has not demonstrated that there is demand for rail service on the Line, and has not demonstrated that it can afford to implement its own plan. Board authority is only permissive, not mandatory, and obtaining such authority in no way assures that BTR can

exercise that authority. *See In re Chicago, Milwaukee, St. Paul and Pacific R.R. Co.*, 882 F.2d 1188, 1191 (7th Cir. 1989) (affirming Board’s determination that its grant of authority to acquire and operate a line is “merely permissive,” does not require the transfer of the line, and does not affect the rights and remedies of the parties to the transaction in the event of a dispute). Thus, even if the Board grants BTR all the relief BTR seeks, including preservation of the rails, BTR will remain unable to establish the rail service necessary to avoid the harm it fears.

**C. BTR Cannot Demonstrate Any Likelihood Of Success On The Merits**

BTR’s argument that it has a “strong likelihood of success on the merits” rests on the assertion that it meets the standard for vacating the NITU because it is “a bona fide, financially sound, existing Class III rail carrier that has stated shipper and public support for its proposal to resume rail service on this extant and railbanked line.” BTR Motion at 12. This is not the correct standard, however, and BTR’s formulation conveniently omits those parts of the test that it knows it cannot meet.<sup>29</sup>

The Board will only entertain requests to vacate a NITU from a bona fide railroad under appropriate circumstances. *BNSF Ry. Co. – Abandonment Exemption – In King County, WA*, STB Docket No. AB-6 (Sub-No. 465X), slip op. at 6 (Service Date Nov. 28, 2008); *GNP Rly, Inc. – Acquisition and Operation Exemption – Redmond Spur and Woodinville Subdivision*, STB Finance Docket No. 35407, slip op. at 5 (Service Date June 15, 2011). Moreover, Board decisions make clear that it will not vacate a NITU for the purpose of allowing reactivation of

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<sup>29</sup> BTR suggests further that likelihood of success on the merits is easy to demonstrate because the Board has invited Ballard’s Petitions by acknowledging that a bone fide carrier in the appropriate circumstances could seek to reinstate rail service on the Line. BRT Motion at 12 (citing *King County, WA – Acquisition Exemption – BNSF Ry. Co.*, STB Finance Docket No. 35148 (Service Date Sept. 18, 2009). That mischaracterizes the Board’s decision in *King County*. The Board did not encourage or “invite” entities to file such applications, nor did the Board indicate that a lower standard would apply for such applicants. Indeed, the Board made clear in *GNP Rly, Inc. – Acquisition and Operation Exemption – Redmond Spur and Woodinville Subdivision*, STB Finance Docket No. 35407, slip op. at 5 (Service Date June 15, 2011) that it would apply the *BNSF* test with rigor. Moreover, nothing in *BNSF* purported to change the Board’s general precedent regarding vacating NITUs.

rail service unless and until the petitioner (1) has received all Board authority, (2) is in a position to provide active rail service, including possessing the necessary legal rights to use the right-of-way for the proposed service, and (3) has obtained the consent of the abandoning railroad or the successor holder of the reactivation right. *Iowa Power, Inc. – Constr. Exemption – Council Bluffs, IA*, 8 I.C.C.2d 858 (1990). For example, in the only NITU decision cited by BTR, the petitioner had already entered into a lease agreement giving it the right to use the railbanked line for rail service. *Norfolk and Western Ry. Co. – Abandonment Between St. Mary’s and Minster in Auglaize County, OH*, STB Docket No. AB-290 (Sub-No. 68) (Service Date Oct. 15, 1993). See also *Georgia Great Southern Div., South Carolina Cent. R.R. Co. – Abandonment and Discontinuance Exemption – Between Albany and Dawson, in Terrell, Lee, and Dougherty Counties, GA.*, STB Docket No. AB-389 (Sub-No. 1X) (Service Date May 16, 2003) (vacating NITU on request of successor in interest to abandoning railroad that had acquired all property and railroad rights in the line and that had demonstrated demand for use of the line); *R.J. Corman R.R. Co. /Pennsylvania Lines, Inc. – Constr. and Operation Exemption – In Clearfield County, PA*, STB Finance Docket No. 35116, slip op. at 7 (Service Date July 27, 2009) (a Class III carrier may reactivate a railbanked line by obtaining authority to acquire the line pursuant to Section 10902 (or an exemption), by acquiring the line from its owner and then terminating the trail use agreement); *BG & CM R.R., Inc. – Exemption from 49 U.S.C. Subtitle IV*, STB Finance Docket No. 34398, slip op. at 2-3 (Service Date Oct. 17, 2003) (CITU vacated and operating authority granted when petitioner demonstrated it had already acquired the right of way and track assets and had actual shippers requesting service); *Missouri Pacific R.R. Co. – Abandonment Exemption – In St. Louis County, MO. (Carondelet Branch)*, STB Docket No. AB-3 (Sub-No. 98X) (Service Date April 25, 1997) (vacating NITU when railroad had executed a contract to

acquire right-of-way and trackage and demonstrated demand from an active shipper). Applying these standards, it is clear that BTR cannot show any likelihood of prevailing on the merits.

### **1. BTR is Not Financially Sound**

Even under BTR's incomplete statement of the standard for vacating a NITU, BTR fails. BTR is not financially sound. BTR is not making money on the Freight Segment and does not appear to be able to afford to make any significant capital investments in new service. *Supra*, 15 - 17. BTR admits it could not afford to acquire new rails, and presents no evidence that it can pay to acquire the existing rails and real property interests it needs to initiate service. Indeed, BTR and its landlord, ECR, appear dependent on the hope of an outright gift from the Washington Legislature to afford upgrades on the Freight Segment. While BTR may not be in bankruptcy, as GNP was, and while BTR may be able to sustain its existing once- or twice-weekly service on the Freight Segment for an extended period, BTR has not met its burden of showing that it is financially sound or able to meet the obligations of owning and operating an additional 11.2 miles of track.

### **2. There Is No Actual Demand For Rail Service On The Line**

The linchpin of BTR's Petitions, and its request for injunction, is its claim that demand for service has recently arisen on the Line. BTR claims that two shippers have submitted letters stating "they are ready, willing, and able to utilize the line once rail service is reinstated." BTR Motion at 5.<sup>30</sup> These assertions fail to survive scrutiny.

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<sup>30</sup> BTR also points to letters of support from several public entities and officials. But, those are inadequate to demonstrate *shipper* demand for rail service because host jurisdictions are not shippers. *Norfolk Southern Ry. Co. – Petition for Exemption – In Baltimore City and Baltimore County, MD*, STB Docket No. AB 290 (Sub-No. 311X), slip op at 5 (Service Date May 4, 2010) (denying request to stay petition for abandonment because of insufficient evidence of shipper demand). The letters offered by BTR indicate "support" based on a general hope that restored service will spur economic development in Snohomish, not on any demand for service.

Contrary to BTR's assertion, the letters from CalPortland and Wolford Trucking and Demolition do not state, or even suggest, that they are "ready, willing, and able" to use the Line. At most, the letters indicate a general level of support for potential rail service without making any commitment to use it. Letters from private entities, even entities that could be a shipper on the line, expressing only general interest in, or support for, rail service are insufficient to show actual demand for rail service. *Norfolk Southern Ry. Co. – Petition for Exemption – In Baltimore City and Baltimore County, MD*, STB Docket No. AB 290 (Sub-No. 311X), slip op at 5 (Service Date May 4, 2010).

Moreover, the sworn testimony from the authors of those letters make clear that neither CalPortland nor Wolford has requested rail service on the Line and that neither entity has any current need for rail service on the Line. *Supra*, 12 - 13. Both Wolford and CalPortland indicated that future projects in the Bellevue area had the potential to support rail service, but they also admitted that they had no contracts to work on those projects, no customers who needed to be served by the Line, and no current need to use the Line. *Supra*, 13 - 14. As with the businesses in *Norfolk Southern* and *GNP Rly*, CalPortland and Wolford appear to be interested in having the option to use rail service, but neither has an actual or foreseeable need for it.

### **3. BTR Lacks The Property Rights It Needs To Use The Line**

BTR does not own or hold any right to use any portion of the Line for any purpose. From Milepost 23.8 south to Milepost 12.6 the fee interest in the Line is owned by King County, the City of Kirkland, and Sound Transit. BTR owns nothing, leases nothing, and has no permission to use any part of the Line. Fundamentally, without the property rights to use the Line, BTR lacks the ability to hold itself out as a rail carrier on the Line and cannot provide rail service on

the Line. *See Saratoga and North Creek Ry., LLC – Operation Exemption – Tahawus Line*, STB Finance Docket No. 35631, slip op. at 4 (Service Date Oct. 11, 2012) (noting that a carrier must have property rights to use a line, in addition to Board authority, to begin operations); *James Riffin – Petition for Declaratory Order*, STB Finance Docket No. 35245, slip op. at 6 (Service Date Sept. 15, 2009), *petition for review docketed*, No. 09-1277 (D.C. Cir. Nov. 12, 2009) (failure to obtain a cognizable possessory interest in a line of railroad rendered him incapable of exercising the authority granted to him to acquire and operate the line). BTR is thus unable to show that the appropriate circumstances exist to vacate the NITU or that it satisfies the *Iowa Power* test for vacating the NITU. *See also James Riffin d/b/a The Northern Cent. R.R. – Acquisition and Operation Exemption – In Baltimore City, MD*, STB Finance Docket No. 34982, slip op. at 3 (Service Date Oct. 9, 2007) (Board prevented use of, and revoked, a class exemption to operate on a dormant rail line when there were substantial doubts about an entity’s ability to obtain property rights).<sup>31</sup>

#### **4. BTR Cannot Succeed On Its Request For An Exemption Because Of Public Controversy And Uncertain Funding**

In addition to being unlikely to succeed on the merits of its request to vacate the NITU, BTR is also unlikely to succeed on its request for an exemption. Specifically, because BTR lacks the property rights to use the Line, customers to serve on the Line, and the money to develop the Line, it is highly unlikely that BTR can bring its plan to fruition. Because a proposed rail operation that is not likely to succeed does not advance the national rail policy, the case is not appropriate for the individual exemption. *See Ozark Mountain R.R. – Cost Exemption*, STB Finance Docket No. 32204, slip op. at 4-5 (Service Date Dec. 15, 1994).

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<sup>31</sup> *Iowa Power* also makes clear that BTR must obtain the consent of the entity holding the reactivation right, in this case King County. King County has not consented to BTR’s use of the Line because BTR has failed to present a bone fide, credible plan for restoring rail service on the Line.

#### **D. BTR Will Not Suffer Irreparable Harm In The Absence Of An Injunction**

BTR argues that it will suffer irreparable harm if the rails are removed from the Line because it would be cost prohibitive for it to replace the rails at a later date. Accordingly, BTR asks the Board to enjoin the removal of the rails. But the irreparable injury BTR seeks to avoid is not the removal of the rails *per se* – rails are commodity items that can always be replaced. Rather, the injury BTR seeks to avoid is the “significant loss of a business opportunity” (BTR Motion at 10) because its business plan assumes that it would not have to buy new rails. No legal authority supports the notion that Kirkland should be enjoined from exercising its valid legal right to salvage the rails because BTR’s internal plans will be frustrated.

In order to obtain an injunction, the moving party must “show that it faces unredressable actual and imminent harm.” *American Chemistry Council, supra*, slip op. at 4. The federal courts have explained further what “actual and imminent harm” means:

“The irreparable injury requirement erects a very high bar for a movant.” . . . “To demonstrate irreparable injury, a plaintiff must show that it will suffer harm that is ‘more than simply irretrievable; it must also be serious in terms of its effect on the plaintiff.’ ” . . . The “alleged injury must be certain, great, actual, and imminent.” . . . Courts will need not grant injunctive relief “against something merely feared as liable to occur at some indefinite time.” . . . The “movant must demonstrate that the injury is of such ‘imminence’ that there is a clear and present need for equitable relief to prevent irreparable harm.” . . .

*Air Transport Ass’n of America, Inc. v. Export-Import Bank of the United States*, 840 F. Supp. 2d 327, 334 (D.D.C. 2012) (internal citations omitted). BTR cannot meet this “very high bar.”

First, BTR faces no imminent, or even likely, harm. The alleged harm – loss of future business opportunities – depends on so many future contingencies, in addition to preserving the rails, so as to make the harm remote, speculative, and uncertain. BTR would need to (1) obtain all the Board authority it seeks, which could not occur until January 2014 under the Board’s

schedule, (2) secure the financing to acquire the necessary property rights, (3) successfully negotiate with the property owners for those property rights, (4) complete necessary track work and obtain rolling stock, and (5) secure customers. Each one of those steps is itself uncertain and distant in time. The unlikely possibility that all of those events will occur in some foreseeable timeframe, if ever, makes the likelihood of BTR's feared harm so far from "imminent" that there is no "clear and present need" for an injunction to preserve the rails.

Furthermore, the harm BTR claims is economic in nature and economic harms are not generally considered irreparable. *Id.* at 335 (citing and quoting cases finding that loss of business opportunities, market share, and profits, and even closure of businesses are economic harms not protectable by injunction). In order to overcome that bar, BTR must show that the harm would threaten the existence of its business or cause an extreme hardship to its business. *Id.* at 336 (citing cases).

BTR cannot meet that burden for the simple reason that BTR's inability to extend its operations onto the Line does not affect, much less harm, its current operations on the Freight Segment or elsewhere in Washington. Mr. Cole has made it clear that he can continue the current operation without the need to expand onto the Line.<sup>32</sup> *See, e.g.,* Cole Dep., Exhibit 4, p. 126 lines 16-19 ("[F]rom the standpoint of looking for a trans-loading [facility], *they* [shippers] *don't see a lot of difference between unloading in downtown Bellevue or unloading in downtown Woodinville.* The few minutes of trucking.") (Bracketed material, italics added).

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<sup>32</sup> *See also* Cole Dep., Exhibit 4, p. 49 lines 24-25 ("Boise [Cascade] is upbeat and Spectrum is upbeat. Matheus is soldiering on."); p. 79 lines 5-8 ("But if we're going to be in a position to be able to do this long-term, *and just setting aside Kirkland to Bellevue at the moment*, there's things that can be done at Maltby ... and there's things that can be done at Woodinville to boost the freight up[.]") (italics, ellipsis, bracketed material added); *see also id.* at p. 86 lines 1-8 (describing potential to earn additional income from storing empty rail cars on the existing Freight Segment).

Moreover, Kirkland’s salvage of the rails does not deprive BTR of anything it has any right to expect. As a matter of law, BTR has no current legal right or expectation that the rails will be available for its use even if the NITU is vacated. The Board expressly authorized the removal and salvage of these rails. *BNSF Ry. Co. – Abandonment Exemption – In King County, WA*, STB Docket No. AB-6 (Sub-No. 465X), slip op. at 6 (Service Date Nov. 28, 2008) (authorizing rail salvage upon satisfaction of certain environmental conditions).<sup>33</sup> See also 49 C.F.R. § 1152.29(d)(1) (authorizing removal of rails following issuance of the NITU).<sup>34</sup> “The Trails Act does not prohibit a trail sponsor from removing track or making changes to the [right-of-way] . . . , so long as the property remains available for reactivation of rail service.” *GNP Rly, Inc. – Acquisition and Operation Exemption – Redmond Spur and Woodinville Subdivision*, STB Finance Docket No. 35407, slip op. at 5 (Service Date June 15, 2011). The Trails Act imposes no bar to a trail user making changes to the right-of-way “even if those structural changes were to make it difficult to return the line to freight operation. . . .” *The Baltimore and Ohio R.R.R. Co., Metro. Southern R.R. Co. and Washington and Western Maryland Ry. Co. – Abandonment and Discontinuance of Service – In Montgomery County, MD and the District of Columbia*, STB Docket No. AB 119 (Sub. No. 112) at 2 (Service Date Feb. 22, 1990). Conversely, the reactivating railroad must expect to bear the expense of reconstruction to allow for the reactivation of rail service. See 16 U.S.C. § 1247(d) (providing for restoration and or reconstruction of railbanked line by a railroad); *Georgia Great Southern Div., South Carolina Cent. R.R. Co. – Abandonment and Discontinuance Exemption – Between Albany and Dawson*,

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<sup>33</sup> Those environmental conditions have been satisfied. *BNSF Ry. Co. – Abandonment Exemption – In King County, WA*, STB Docket No. AB-6 (Sub-No. 465X), slip op. at 2 (Service Date March 26, 2009).

<sup>34</sup> More generally, the Trails Act requires only that a railbanked corridor be preserved in a legal condition to allow for the reactivation of rail service, and the Board has limited authority to regulate activity on the right-of-way otherwise. See *National Trails System Act and R.R. Rights-of-Way*, STB Docket No. EP 702 at 5, Service Date Feb. 16, 2011 (“Board does not ‘regulate activities over the actual trail, and [has] no involvement in the type, level, or condition of the trail. . . .’”) (quoting *Ga. Great Southern Div. – Aban. & Discontinuance Exemption – Between Albany & Dawson, in Terrell, Lee, & Dougherty Counties, Ga.*, 6 STB 902, 907 (2003)).

*in Terrell, Lee, and Dougherty Counties, GA.*, STB Docket No. AB-389 (Sub-No. 1X) (Service Date May 16, 2003) (matters relating to the use of a railbanked corridor are beyond Board's authority; issues of obligations between railroads and trail users is purely contractual). Because BTR has no contractual or legal right to expect Kirkland to make the rails available to BTR, it cannot suffer any legal injury or harm if Kirkland were to remove them.

BTR attempts to side-step these fundamental precepts by citing cases in which courts have issued injunctions to protect the loss of future business opportunities. BTR Motion 9-11. But the plaintiffs in each of those cases had one thing that BTR lacks here: a contract or other legal right that arguably prevented the defendant from taking the action to be enjoined *and* that created a legal expectation to that future business opportunity. The irreparable injury arose from the breach of a contract or other legal obligation owed to the plaintiff, thus giving the plaintiff a legal right to expect future benefits that were denied by the defendants' alleged breach.<sup>35</sup>

That is not the case here at all. BTR has no contracts with anyone to establish freight service on the Line. BTR has no statutory or other legal claim to the Line or the rails under any law. The salvage of the rails does not violate any law or breach any contract. BTR's ability to establish future freight service on the Line does not depend on enforcing extant legal rights or by remedying an alleged legal wrong. BTR's unilateral expectation--that it would not have to buy

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<sup>35</sup> *Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373 (6th Cir. 1995) (injunction to pay royalties allegedly due under contract while parties arbitrated breach of contract claim); *Roland Machinery Co. v. Dresser Indus., Inc.*, 749 F.2d 380 (7th Cir. 1984) (injunction to stop termination of contract that allegedly violated state and federal antitrust laws); *Gateway Eastern Ry. Co. v. Terminal R.R. Ass'n*, 35 F.3d 1134 (7th Cir. 1994) (injunction to allow access to tracks under trackage rights agreement while parties arbitrated breach of contract claim); *Garth v. Statek Corp.*, 876 S.W.2d 545 (Tex. Ct. App. 1994) (injunction to prevent use of trade secrets allegedly in violation of a nondisclosure agreement); *Sambo's of Ohio, Inc. v. City Council of City of Toledo*, 466 F. Supp. 177 (N.D. Ohio 1979) (temporary restraining order to prevent revocation of sign permits in alleged violation of First Amendment and Lanham Act); *Tom Doherty Assoc., Inc. v. Saban Entertainment, Inc.*, 60 F.3d 27 (2d Cir. 1995) (injunction to provide publishing rights to Mighty Morphin Power Rangers pending litigation of breach of contract claim).

new rails to operate on the Line someday in the future--cannot be protected by an injunction.<sup>36</sup> If BTR's theory were law, any business entity could enjoin a competitor simply by alleging that the competitor's action threatens to harm some future business goal. Injunction law would be converted from an extraordinary shield into a legal broadsword. There is no support for that theory, and it should be rejected out of hand.

In an effort to obscure the revolutionary impact of its request, BTR attempts to frame the purpose of a preliminary injunction simply as preserving the status quo to assure that it can obtain the relief it seeks and that the status quo here is the presence of the rails and the pendency of its Petitions. BTR Motion at 10-11. But preservation of the status quo does not trump the need to show irreparable injury or likelihood of success on the merits. As detailed above, BTR cannot show either likelihood of success on the merits or irreparable harm, so preservation of the status quo is irrelevant.

Moreover, BTR's argument misconstrues the nature of the "status quo." BTR has no present legal right or interest in the rails, and no claim to preserve them. Kirkland owns the rails and has the unquestioned right to salvage the rails. Kirkland owns the land and has an unquestioned right to develop a trail on the Line. The County and Sound Transit have the unquestioned rights to develop a trail and other public uses on the Line. *Supra*, 5 - 8. Moreover, BTR has no legal right to expect that the rails will be there if the Board were to grant the

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<sup>36</sup> The only case cited by BTR that comes close to addressing the facts of this case is *Gulf Coast Rural Rail Transp. Dist v. Southern Pac. Transp. Co., Order Granting Temporary Injunction and Findings of Fact and Conclusions of Law* No. H-94-2749 (S.D. Tex. 1994) (BTR Motion at 15). But that case is distinguishable and of little persuasive force for several reasons. First, the case is an unreported trial court order that did not explain its decision or provide any insight into its reasoning. Second, although not apparent from the order provided by BTR, the injunction was issued *after* the line had been abandoned and *before* the abandonment was reopened to allow for railbanking. *Baros v. Texas Mexican Ry. Co.*, 400 F.3d 228, 230-31 (5th Cir. 2005) (reciting history of the matter). Third, there did not appear to be any adverse effects on Southern Pacific or the public interest, unlike here where the injunction would impose substantial harm on Kirkland and the public interest. Fourth, as the history of the matter in *Baros* makes clear, enjoining the removal of the rails does not assure the establishment of rail service. Over ten years after the injunction was issued, it did not appear that rail service had been initiated. *Id.*

Petitions. *Supra*, 3 - 5. BTR's proposed injunction would profoundly change the status quo by destroying Kirkland's existing right to salvage the rails, the County's existing right to develop a trail and other uses, and Sound Transit's right to develop East Link. Conversely, the injunction would confer on BTR legal rights in the future existence of the rails that it does not currently have. Plainly, BTR is seeking to alter the status quo, not preserve it.

**E. Issuing the Injunction Would Harm King County and Sound Transit, as Well as Kirkland**

BTR argues that issuing an injunction will not harm others because Kirkland will not be harmed by any delay in salvaging the rails. BTR Motion at 12-15. As Kirkland will explain in its Opposition, that argument is incorrect and an injunction would impose substantial harm on Kirkland. In addition, an injunction would impose substantial harm on the County and Sound Transit in several ways.

First, although directed at removal of the rails, the underlying principle of BTR's request – that no activity on the Line can substantially increase the ultimate cost for BTR to acquire and operate the Line – means that the development of any trail, transportation, or other permitted use of the Line is subject to being enjoined simply because some putative rail operator has the idea that someday the possibility of rail service may arise. As a practical matter, this means that Sound Transit cannot proceed with ongoing plans to implement its East Link service, particularly at the NE 8<sup>th</sup> station, because Sound Transit would have to reconsider its current design for accommodating transit, trail, and potential reactivated rail uses on the right-of-way. Sound Transit should not be required to halt its ongoing transit development work based only on a feared impact to a hypothetical reinstatement of rail service. Similarly, the efforts of the County and other regional stakeholders to develop the Line will be frozen until BTR's plans become focused enough to determine how to exercise those property rights without interfering with

BTR's putative plan. This adverse impact on the development of alternative public uses of rail corridors is directly contrary to the objectives of the Trails Act, as interpreted by the Board, until a bone fide rail operator demonstrates an actual and present need to reinstate rail service. *See* discussion *infra*, at 31 - 32.

Second, the impacts of the injunction extend beyond the Line itself. The Line is only a portion of the Subdivision and the connected Spur. The County and regional stakeholders are developing the entire Subdivision and Spur in a comprehensive and coordinated manner. Limitations on existing rights to use any portion to the Subdivision or Spur affect plans for the rest of the corridor. As a practical matter, an injunction against Kirkland will effectively enjoin all regional stakeholders from further development of the corridor, placing at risk the value of the tens of millions of dollars public stakeholders have spent to acquire and develop the corridor. *See Norfolk Southern Ry. Co. – Petition for Exemption – In Baltimore City and Baltimore County, MD*, STB Docket No. AB 290 (Sub-No. 311X), slip op at 9 (Service Date May 4, 2010) (recognizing that imposing uncertainty over the use of a line based on uncertain proposals for future service is contrary to the public interest). Because of the substantial public investment in the coordinated development of the Subdivision, including the Line, the Board should acknowledge that BTR's requested injunction would introduce substantial uncertainty into the planning and development effort and impose great harm on the County, Sound Transit, and other stakeholders.

**F. Issuing the Injunction Is Contrary to the Public Interest**

The public interest would not be served by issuing the injunction. The public benefits BTR claims – future employment and economic development (BTR Motion at 16) – are all speculative, distant in time, and not likely to occur even if the Petitions are granted. The Board

has recognized that any public interest in uncertain future rail service, particularly when not supported by strong evidence of shipper demand, can be outweighed by non-rail public projects, particularly when there is an immediate need for those projects. *See Norfolk Southern Ry. Co. – Petition for Exemption – In Baltimore City and Baltimore County, MD*, STB Docket No. AB 290 (Sub-No. 311X, Slip Op at 9 (Service Date May 4, 2010) (use of track for transit purposes outweighed potential freight service when there was no evidence of shipper demand); *Union Pac. R.R. Co. – Abandonment and Discontinuance of Trackage Rights Exemption – In Los Angeles Co., CA – In the Matter of An Offer of Financial Assistance*, STB Docket No. AB-33 (Sub-No. 265X) (Service Date May 7, 2008) (denying notice of intent to file an OFA where there was insufficient evidence of shipper demand and an important public purpose to use the line for transit purposes); *Norfolk and Western Ry. Co.--Abandonment Exemption-- In Cincinnati, Hamilton County, OH*, STB Docket No. AB-290 (Sub-No. 184X), slip op. at 8 (Service Date May 13, 1998) (“we must consider arguments that there exist overriding public purposes sufficient to justify our withdrawing our jurisdiction where that jurisdiction would operate to defeat a paramount public purpose.”).

In this case, that balance weighs heavily against BTR. First, the Board has recognized that the national rail policy is not advanced by supporting rail proposals that are speculative or uncertain for the simple reason that the national rail policy is not advanced by rail service that is not likely to occur. *Ozark Mountain R.R.*, STB Finance Docket No. 32204, slip op. at 4-5 (Service Date Dec. 15, 1994). As detailed above, BTR has not provided any evidence that it will be able to succeed.

Second, there is a strong public interest in recreational trails and the rights of trail sponsors and property owners. 16 U.S.C. § 1247(d). Among those rights is the ability to remove

existing rail assets to develop a trail and other public uses. 49 C.F.R. § 1152.29(d)(1). As described above, the Board protects those interests by setting high standards for vacating a NITU by requiring a petitioner to demonstrate that it is in a position to provide rail service before vacating a NITU.

BTR's injunction would undermine both those public interests without advancing any public interest. Granting the injunction will not promote the national rail policy, or likely lead to the creation of more jobs, because there is no evidence that BTR has, or will be able to, secure the property rights, customers, and financing it would need to realize those benefits. Conversely, the important public purpose of developing recreational trails will be stymied. The public interest does not favor the destruction of existing public purposes based on such weak evidence of future rail service.

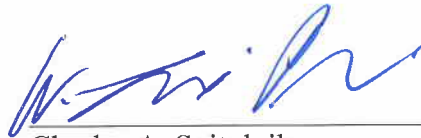
Moreover, issuing an injunction under these circumstances would establish a dangerous precedent. The decision would embolden potential rail operators to pursue the same strategy as BTR. Trail sponsors across the country would be at constant risk of being enjoined from exercising valid trail rights any time a would-be operator felt it had a potential plan to restore rail service and that further trail development would impair that effort. The result would hamstring the Trails Act by introducing so much uncertainty into trail sponsorship rights that trail sponsors would be loath to invest in and develop trails. It would further disrupt the orderly, and entirely lawful, development of trails as contemplated in the Trails Act. While trail sponsors recognize that recreational trails must give way to restored rail service under the appropriate circumstances, trail sponsors are entitled to a measure of certainty that they can continue to develop and improve trails until a bona fide carrier is able to introduce genuine rail service and the Board approves such activity. Because BTR's request for an injunction would undermine the important

objectives of the Trails Act without advancing the national rail policy, BTR's request for injunction should be denied.

#### **IV. CONCLUSION**

Because BTR cannot satisfy any of the required elements to obtain a preliminary injunction, its Motion for Preliminary Injunction should be denied.

Respectfully submitted,



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Dated: June 4, 2013

**CERTIFICATE OF SERVICE**

I hereby certify that I am providing a copy of REPLY OF KING COUNTY, WASHINGTON AND CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY TO BALLARD TERMINAL RAILROAD COMPANY, LLC.'S MOTION FOR PRELIMINARY INJUNCTION upon the following parties of record by email and by first class mail with postage prepaid and properly addressed:

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Puget Sound Regional Transit Authority

Dated this 4th day of June, 2013

## INDEX OF EXHIBITS

| <b>Exhibit Description</b>                                                                                | <b>Exhibit No.</b> |
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# **EXHIBIT 1**

# BNSF Woodinville Subdivision (N. Renton to Snohomish)

## Existing Rail Lines and Regional Trails

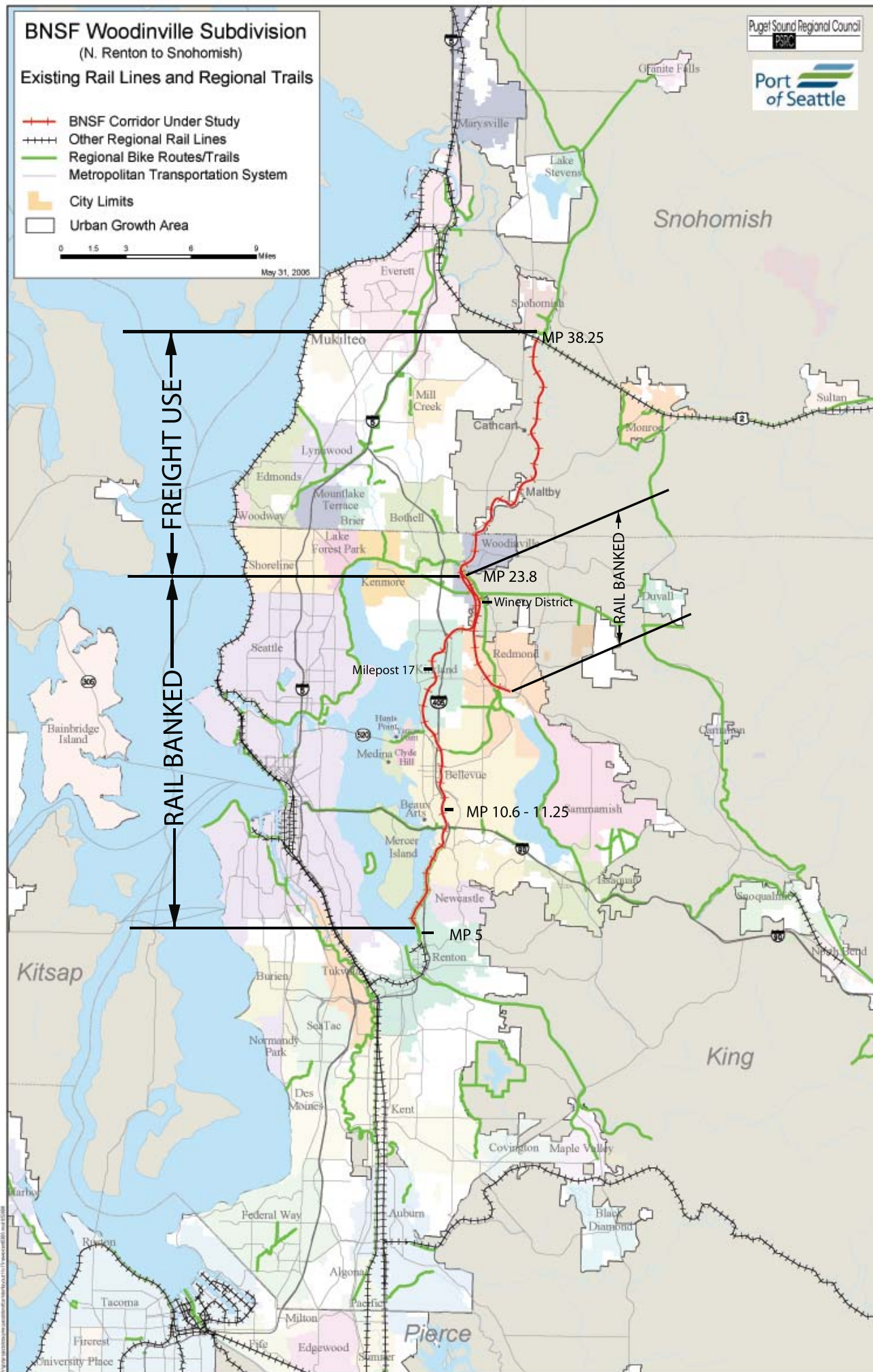
- +—+ BNSF Corridor Under Study
- + -+ -+ -+ Other Regional Rail Lines
- Regional Bike Routes/Trails
- Metropolitan Transportation System
- City Limits
- Urban Growth Area

0 1.5 3 6 9 Miles

May 31, 2005

Puget Sound Regional Council  
PSRC

Port  
of Seattle



## **EXHIBIT 2**

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BEFORE THE SURFACE TRANSPORTATION BOARD

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STB FINANCE DOCKET NO. 35731                   )  
BALLARD TERMINAL                                   )  
RAILROAD COMPANY, L.L.C.                        )  
-ACQUISITION AND EXEMPTION-                   )  
WOODINVILLE SUBDIVISION                        )  
STB DOCKET NO. AB-6 (SUB. NO. 465X)           )  
BNSF RAILWAY COMPANY                            )  
-ABANDONMENT EXEMPTION-                        )  
IN KING COUNTY, WA                                )  
)

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DEPOSITION UPON ORAL EXAMINATION

---

OF

DOUGLAS ENGLE

---

Taken at 600 University Street, Suite 3600

Seattle, Washington

DATE:                   Wednesday, May 22, 2013

REPORTED BY:Katie J. Nelson, RPR, CCR  
CCR NO.: 2971

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tom@montgomeryscarp.com

1 THE WITNESS: Eastside Community Rail has no  
2 employees.

3 Q. (By Mr. Ferguson) Okay. Is she an agent of  
4 Eastside Community Rail?

5 MR. MONTGOMERY: Object to the extent it  
6 calls for a legal conclusion.

7 THE WITNESS: There are no agreements  
8 between Ms. Cox and Eastside Community Rail or Marketing  
9 Philharmonic and Eastside Community Rail.

10 Q. (By Mr. Ferguson) Is she a shareholder of ECR?

11 A. No.

12 Q. Does she have a title connection with her  
13 involvement with ECR?

14 A. She, as we represent ourselves as in charge of  
15 the excursion train. And it might be helpful, sorry, but I  
16 brought it, might be helpful if we --

17 Q. We're going to come to the honeycomb, don't  
18 worry.

19 A. Well, if you would like to get your questions  
20 answered, this might be a faster, more expedient way to get  
21 that done.

22 Q. Okay. Let's do it.

23 MR. MONTGOMERY: Where's your set? Are you  
24 going to mark a set?

25 THE WITNESS: I just want to do the

1 A. Yes.

2 Q. Busboys, expeditors, people that run a  
3 restaurant?

4 A. Yes.

5 Q. Okay.

6 A. And I believe that all the scheduling will be  
7 managed and maintained by Ballard Terminal.

8 Q. Coming back to Ms. Cox, does she have any  
9 financial interest in Eastside Community Rail?

10 A. No.

11 Q. She doesn't have a debt position in the company?

12 A. Only a moral obligation from GNP bankruptcy.

13 Q. Ms. Cox owes your company a moral obligation?

14 A. No, I owe her. I brought friends and family into  
15 GNP and I personally would like to pay those people back in  
16 the future. I consider that my moral obligation to those  
17 individuals that were good enough to give me some of their  
18 time in exchange for debt.

19 Q. How does ECR generate revenue?

20 A. Let me point it out so he can get it.

21 MR. MONTGOMERY: Sure.

22 MR. FERGUSON: Which page are you looking  
23 for?

24 THE WITNESS: Please find that page  
25 (indicating).

1 Q. (By Mr. Ferguson) With the pie chart?

2 A. Yes.

3 Q. Is that a stand-alone document or is that  
4 attached to something else?

5 A. It should be stand alone, but...

6 Q. Okay.

7 (Exhibit Number 23 marked.)

8 MR. WAGNER: Is that Bates stamped?

9 MR. MONTGOMERY: It's not. It was brought  
10 today.

11 MR. WAGNER: It was --

12 THE WITNESS: It was previously submitted.

13 MR. WAGNER: I've seen that in here  
14 (indicating).

15 THE WITNESS: I added --

16 MR. FERGUSON: Let's go off the record for a  
17 second.

18 (Discussion held off the record.)

19 MR. FERGUSON: Back on.

20 Q. (By Mr. Ferguson) Mr. Engle, the court reporter  
21 just handed you what's been marked as Exhibit 23. This is  
22 a document that you brought to the deposition this morning  
23 entitled "Eastside Community Rail Corridor Alignment Cost  
24 Sharing Example as of 2013 May 3."

25 Would you explain what this document is, please?

1           A.     In answer -- response to your question as to how  
2     does ECR make its money, ECR makes its money based on a  
3     share of the revenue stream of the various activities  
4     inside the rail corridor. We have previously, in your  
5     package, in the documents I submitted, is a document that  
6     relates to the Surface Transportation Board's revenue  
7     adequacy rate of return, which over the last several years  
8     is about 11 percent.

9           So it is my intention to be able to offer more  
10    cost effective service to those entities using the right of  
11    way and make 11 percent margin on that business. For  
12    example, if this corridor is a hundred feet wide, for the  
13    purposes of this document, with freight only operating  
14    inside the corridor, all of the maintenance of way cost are  
15    the burden of Ballard Terminal Railroad.

16           If, for example, we were to add a trail to that,  
17    we believe that excluding the rail structure, which is why  
18    I resubmitted this, there is a sentence there that says  
19    "Trail expenses do not include rail structure costs," that  
20    the trail -- if the trail had 37 feet of the right of way,  
21    that for those general purposes of maintaining the right of  
22    way, keeping the weeds down, keeping the ditches clean,  
23    water flow, et cetera, that the trail would pay for its  
24    37 feet of the right of way.

25           Now, then, if it was a trail only use, that the

1 user would be responsible also for 100 percent of the right  
2 of way cost and maintenance. So in the simple scenario,  
3 where there's freight and trail for the maintenance of way  
4 costs excluding railroad structure, the rails is only going  
5 to pay 63 percent and the trail is only going to pay  
6 37 percent. The rail is always responsible for the rail  
7 structure costs.

8 So taking this to the next, which is the little  
9 table over here in the center to the right, after talking  
10 to KPNG, whatever allocation method you choose to pursue,  
11 you need to stick with it. So whether you use gross ton  
12 miles, gross vehicle miles, percent of revenue, percent of  
13 cost, whatever that is, you do it and you stick with it.

14 We decided, from an administrative standpoint,  
15 the easiest way to calculate, and the most consistent way  
16 to do this is gross vehicle miles. So for example, if  
17 freight constituted 50,000 vehicle miles in a year, and  
18 excursion constituted 150,000, and let's say some day in  
19 the future commuter was added into the mix, they would be  
20 the busiest at 300,000 miles, then that rail portion would  
21 get divvied up 10 percent to freight, 30 percent to  
22 excursion, 60 percent to commuter. What that would mean  
23 overall in the red numbers underneath net is that the  
24 freight would be paying 6 percent; excursion, 19; commuter,  
25 38; trail, 37.

1 response to the discovery requests?

2 A. Yes, I did.

3 Q. And did you find anything?

4 A. I believe this is another one that my attorneys  
5 in Chicago objected to providing. I provided the  
6 documents. I would say that 80 percent of the conversation  
7 has been around a trail between Brightwater and Maltby.

8 Q. So you found documents, communications with  
9 representatives of Snohomish County, but some of those you  
10 haven't produced?

11 A. I believe there are some e-mails that exist, I  
12 haven't searched for them. But I believe there are some  
13 e-mails that exist between, it would be primarily Steve  
14 Thompson, Steve Dickson, would be my two primary contacts.  
15 And again, those have been primarily related to the trail.

16 MR. MONTGOMERY: Again, Eastside has made it  
17 clear, and I know you know this, that it objected to and  
18 didn't produce documents related to the freight segment.

19 Q. (By Mr. Ferguson) Do you have a contract with  
20 Snohomish County to construct a trail or maintenance of way  
21 road alongside the freight segment?

22 A. No.

23 Q. Do you have a contract with any other public  
24 agency to construct a maintenance of way road or a trail  
25 alongside the freight segment?

1 A. No.

2 Q. Number 16 asks for all communications related to  
3 the line or the freight segment with reps of the city of  
4 Snohomish. Have you had any written communications with  
5 Snohomish city reps since June 2011?

6 A. Given that you've already subpoenaed all of their  
7 e-mail, you would have that. Any other records have  
8 already been provided.

9 Q. That's not my question, though. Have you had  
10 communications with Snohomish County, excuse me, City of  
11 Snohomish representatives since June 2011?

12 A. Yes.

13 Q. Okay. When you searched for documents in  
14 response to Kirkland's discovery requests, did you search  
15 for communications with City of Snohomish reps?

16 A. No.

17 Q. Do you believe that you have in your possession,  
18 either hard copies, stored in a computer or an e-mail,  
19 communications with the City of Snohomish reps?

20 A. Not as it relates to e-mail.

21 Q. So do you believe you have hard copies of  
22 communications with City of Snohomish reps?

23 A. I don't understand your question.

24 Q. Okay. I'll rephrase it.

25 Maybe I misunderstood your answer, so I'm going

1           A.     Yeah.   Yes.

2                     MR. MONTGOMERY:   Sorry, again, object to the  
3     extent it relates to north of the segment at issue here.

4                     Go ahead.

5                     THE WITNESS:   Yes, the difference between  
6     this and the 6.26 million that's floated around is the fact  
7     that there is 9 percent use tax in here.   So if you took  
8     that out, it would be 6.26.

9           Q.     (By Mr. Ferguson)   Okay.   Who is that funding  
10    going to?   Who is this request going to be made to?

11          A.     Well, the request was made to the state  
12    legislature, and --

13          Q.     How was that request made?

14          A.     Well, we were trying to figure that out when the  
15    Snohomish County Executive's office blew up.

16          Q.     Do you know who made the request?

17          A.     The guy who was supposed to make the request was  
18    involved in a research scandal.

19          Q.     Do you know his name?

20          A.     Kevin.

21          Q.     Okay.   And he was an official with Snohomish  
22    County?

23          A.     He was on staff, yes.

24          Q.     All right.   Do you know if he or anyone else made  
25    a request for this funding?

1           A.     We were never able to get it in to the proper  
2     form in the time frame required by the legislature.   We  
3     missed the window.

4           Q.     And this is a request you had made to the  
5     Washington Department of Transportation or did you make it  
6     to --

7           A.     Under -- we made this directly with the  
8     legislature to get into the transportation budget, which it  
9     didn't get even as a line item zero.   Okay, so it didn't  
10    even make any of the hurdles.

11           So, the department of -- after a phone call --  
12    after a conversations with WSDOT, there were no -- we had  
13    missed the window for them and there was no opportunity to  
14    get funding in this legislative session through them  
15    either.   So until 2015, there will be no state or WSDOT  
16    improvements made to the line.

17           Q.     Okay.   Mr. Engle, if we understood your testimony  
18    correctly, you said that some amount of maintenance needed  
19    to be done to keep freight moving; is that correct?

20           A.     When I hear that back, that doesn't sound exactly  
21    right.   There's always maintenance that needs to be done.

22                   MR. FERGUSON:   Can you find that in the  
23    answers and read that back, please.

24                   Conscious of the time here, folks.

25                               (Answer on Page 89, Lines 6 through 22

1 Rail's organization. If you look at Page 4 of Exhibit 19,  
2 the subpoena. We asked you for all versions of Eastside  
3 Community Rail's articles of incorporation, formation  
4 documents, corporate bylaws, annual reports and tax  
5 returns. And you produced to us a certificate of formation  
6 and an initial annual report.

7 Are there any other documents that reflect the  
8 corporate organization of ECR, other than those that you  
9 produced to us?

10 A. Nope.

11 Q. Eastside Community Rail a limited liability  
12 company, correct?

13 A. Yes.

14 Q. Is it a single member LLC?

15 A. Yes.

16 Q. Are you the only member?

17 A. Yes.

18 Q. Is there any other individual who has an interest  
19 in ECR?

20 MR. MONTGOMERY: Object to the form.

21 THE WITNESS: I would say there's a lot of  
22 people that have interest. But I would say --

23 Q. (By Mr. Ferguson) Financial statement in the  
24 company?

25 A. Nobody, other than the people that I owe money

1           A.     None other than compensation for their scheduling  
2     and crews.

3           Q.     Okay. Did you have to provide any assurances to  
4     EB5 about the percentage of revenue ECR would take from the  
5     excursion train?

6           A.     There were no assurances, no.

7           Q.     Is there a barrier to running excursion service  
8     right now?

9           A.     The track --

10                   MR. MONTGOMERY: Sorry, object to the form  
11     and foundation.

12                   Go ahead. Thank you.

13                   THE WITNESS: The track, as classified by  
14     Ballard Terminal, is in excepted condition. Excepted  
15     condition does not allow you to run passenger operations,  
16     per Exhibit 25.

17           Q.     (By Mr. Ferguson) So that's what -- there needs  
18     to be at least a \$6.4 million investment, capital  
19     investment in the segment to bring it up to standard to run  
20     passenger service. If the number is wrong, correct me on  
21     the number.

22           A.     I believe the number is less than that, like  
23     \$5 million instead of 6, roughly to get it up to a Class 1  
24     condition and you can operate passenger rail in a Class 1  
25     condition.

1 Q. That's a slower rate of speed than a Class 2,  
2 correct?

3 A. Yes, it is.

4 Q. And there currently is no funding for that  
5 upgrade --

6 A. Correct.

7 Q. -- correct?

8 Okay. If I understood you correctly when we  
9 first discussed the EB5 agreement, I believe there's an  
10 option that EB5 holds; is that right?

11 A. Yes.

12 Q. Can you explain what that is?

13 A. Exhibit 21, Page 2, Section 4.

14 MR. MONTGOMERY: Object to the extent it  
15 calls for a legal conclusion. The document speaks for  
16 itself.

17 Go ahead.

18 THE WITNESS: "Consideration."

19 An equity interest ownership equal to 15 percent  
20 of ECR, including equivalent ownership and any newly formed  
21 joint venture related to the assets acquired from GNP. Et  
22 cetera, et cetera.

23 Q. (By Mr. Ferguson) Okay. Has EB5 exercised that  
24 option?

25 A. No.

1       between Woodinville and Snohomish?

2           A.     Any portion of the Eastside rail corridor.

3           Q.     Is your relationship with Ballard defined by any  
4       written agreement?

5           A.     Just the lease agreement.

6           Q.     Okay. Is there any, are there any other oral  
7       agreements that you have with Ballard that --

8           A.     As I previously mentioned, I have a couple of  
9       debts with him. I have a scheduling and crew understanding  
10      with him, as it relates to the excursion train. That's, I  
11      think, the extent of it.

12          Q.     Okay. So is the only written agreement that  
13      defines your business relationship with Ballard, then, the  
14      lease agreement, and this is the lease agreement that you  
15      and Mr. Cole signed last month?

16          A.     Yes, it is.

17          Q.     Okay. The court reporter has marked as  
18      Exhibit 30 a copy of the lease agreement. Mr. Engle, do  
19      you know if the Port of Seattle has given its approval as  
20      to the terms of this lease agreement?

21          A.     The Port of Seattle has issues with this  
22      agreement. Or with the O&M agreement.

23          Q.     Which O&M agreement, is this the O&M agreement  
24      between GNP and the Port that ECR assumed?

25          A.     Yes.

1 Q. Are any payments being made to Eastside Community  
2 Rail?

3 A. Nope.

4 Q. Have any been made to Eastside Community Rail?

5 A. Yes, I believe that I received a payment from the  
6 trustee, which I immediately signed over to Ballard  
7 Terminal for deposit only.

8 Q. Okay. Turning to Page 4 under Section 4 titled  
9 "Lease Compensation," this, again, is in the lease  
10 agreement Exhibit 30. Subpart B states that "Ballard shall  
11 pay to ECRR a lease payment of \$10 per loaded car."

12 Is that the term providing for the \$10 per car  
13 payment that you referenced earlier in which you hope will  
14 be reconciled at the end of the year?

15 A. Yes.

16 Q. Okay. Subpart C provides Ballard shall pay the  
17 Port fees required to be paid by ECRR to the Port as set  
18 forth in sections of the O&M agreement, that's the \$10  
19 payment that you referenced that Ballard is supposed to pay  
20 to the Port?

21 A. Yes.

22 Q. Do you know if there are any other payments,  
23 other than that \$10 per car payment owing to the Port under  
24 the O&M agreement?

25 A. Any other payments? These are the only two

1 MR. MONTGOMERY: Object to the form.

2 Q. (By Mr. Ferguson) 2008?

3 MR. MONTGOMERY: Same objection.

4 THE WITNESS: Yes.

5 Q. Okay. Well, why wasn't there an effort to try to  
6 run freight on the line in those years?

7 A. In 2008, Burlington Northern was still operating  
8 the line and was in the process of selling it to Seattle,  
9 Port of Seattle, King County, and the same time driving  
10 shippers offline. So it wanted, as a demand of King  
11 County, wanted all the shippers off the line from Bellevue  
12 to Woodinville. And Redmond to Woodinville.

13 Q. Okay. But the shippers you're talking about,  
14 CalPortland and Bobby Wolford, they're not on the line,  
15 right?

16 A. The line is defined?

17 Q. As from Woodinville to Bellevue.

18 A. Correct. They are not on the line.

19 Q. Okay. And their business is concerned with  
20 moving in aggregate materials and moving out dirt and other  
21 materials?

22 A. Yes.

23 Q. So then, and construction had been ongoing, you  
24 agreed earlier, correct?

25 A. Yes.

1 Q. So then why wasn't, say, an offer of financial  
2 assistance made to step in and continue to provide freight  
3 rail service in 2008?

4 A. Because we believed the Port of Seattle, and we  
5 believed King County that they really wanted rails and  
6 trails, which turned out to be a bad assumption.

7 Q. Were you in a position to make a payment, I mean  
8 had you considered making an OFA to BNSF in 2008?

9 A. In 2009, yes. To purchase the entire corridor.

10 Q. When you say the entire corridor, you mean the  
11 entire Woodinville subdivision, all 40 plus miles of it?

12 A. Yes.

13 Q. How much were you willing to pay at that point?

14 MR. MONTGOMERY: Can we define who "we" is?  
15 Object to the form. It might be helpful.

16 Q. (By Mr. Ferguson) I guess ECR didn't exist then?

17 A. Correct.

18 Q. It would have been GNP Railway, Inc.?

19 A. Yes.

20 Q. How much was GNP Railway, Inc. prepared to pay at  
21 that point?

22 A. 81 million.

23 Q. And was that to be financed in a partnership with  
24 Ballard Terminal Railroad?

25 A. Ballard Terminal would have still been the

1 freight operator. I'm not sure, you're asking me to  
2 speculate on the terms of that. We had --

3 Q. No, I'm not asking you to speculate. I didn't  
4 ask you directly, so I'll ask it now. What was the source  
5 of the \$81 million that you just referenced?

6 A. The Federal Railroad Administration.

7 Q. In the form of a grant?

8 A. In the form of a loan, low interest loan.

9 Q. So the FRA, you thought, was going to make a loan  
10 of \$81 million to GNP to buy the asset from BNSF?

11 A. Yes, using the dirt, the fee as collateral.

12 Q. Okay. And did you ever step forward with -- did  
13 you ever make that offer to BNSF?

14 A. Yes, we did. And I believe that's the only  
15 reason the Port of Seattle eventually stepped up and closed  
16 the deal.

17 Q. Did you explore getting any moneys above and  
18 beyond 81 million?

19 A. Our loan package, I believe, at that time, was  
20 140 million, or something like that. I don't recall  
21 exactly.

22 Q. Okay. Do you have any estimate as to what the  
23 value of the real estate constituting the line is between  
24 Woodinville and Bellevue?

25 A. 7 million be my guess, maybe eight.

1       their situations have changed. And I haven't gone to them  
2       and asked them for their continued interest. And I, quite  
3       frankly, would feel really bad if somebody picked up the  
4       phone and called them and they're like, yeah, we talked  
5       about it, but I'm sure as hell not doing that right now.  
6       Kind of blah, blah, I'm not asking them to do it right now,  
7       so I'm just...

8           Q.    You don't need to say any more about it.

9           A.    Thank you.

10          Q.    Moving back to the business plan, the last  
11       paragraph in this first page.

12          A.    Mm-hm (answers affirmatively).

13          Q.    States that, "Given the track's publicly  
14       rehabilitated, Bounty of Washington tasting train will  
15       represent more than 90 percent of ESCR's income."

16                Is that an accurate projection of the proportion  
17       of revenue you expect to be generated from the excursion  
18       train?

19          A.    Versus the freight on the existing operating  
20       line, yes.

21          Q.    So is this business plan, this projection limited  
22       to the freight segment running between Woodinville and  
23       Snohomish?

24          A.    Yes, it is.

25          Q.    That amount does not account for any revenues,

1 almost entirely excursion.

2 Q. So your one begins only upon the receipt of  
3 funding to rehabilitate the line to move from excepted  
4 class to either Class 1 or Class 2?

5 A. Yes.

6 Q. Okay. Does this contemplate the running of an  
7 excursion train on the line from Woodinville to Bellevue?

8 A. No.

9 Q. Do you have plans, though, to run an excursion  
10 train, if you receive funding and if Ballard accesses the  
11 line from Woodinville to Bellevue, to run an excursion  
12 train south of Woodinville?

13 A. It's my understanding that Kathy and the wineries  
14 would love to get to Bellevue.

15 Q. Do you know if any track upgrades will be  
16 necessary on that 12-mile segment from Woodinville to  
17 Bellevue to run a passenger excursion train?

18 A. Yes, they would be.

19 Q. And what would the funding source for that be?

20 A. Given we're presently waiting until the 2015  
21 legislative session, I would suspect that it will be a  
22 combination of sources significantly dependent upon the  
23 state and local interest.

24 Q. So the earliest that an excursion train can run  
25 from Woodinville to Bellevue would be at least after the

1       2015 legislative session?

2           A.     Correct.

3           Q.     Will, if Ballard accesses the line between  
4       Woodinville and Bellevue, do you expect ECR to have any  
5       responsibilities for maintaining the right of way on that  
6       line?

7           A.     Not until there's additional services required on  
8       the line, or inside the right of way.

9           Q.     Do you have any understanding of how Ballard will  
10      be able to maintain the operating costs for that line in  
11      addition to its obligations to maintain the freight  
12      segment?

13                   MR. MONTGOMERY:   Foundation; calls for  
14      speculation; incomplete hypothetical.

15                   THE WITNESS:   And as pointed out by Chuck  
16      Bromley from Boise Cascade, it's all about line density.  
17      It's all about the number of cars on the line.  And any  
18      increases in traffic make your fixed costs go down  
19      proportional to each car.  So the more cars we get on the  
20      line, the easier it is for -- to maintain the line and make  
21      a buck.

22           Q.     (By Mr. Ferguson)  Okay.  Looking at the graph  
23      titled "Daily" -- or staying with "Revenue" for a second.  
24      This freight revenue line, is that a flat line?

25           A.     It pretty much -- it's taking the existing

1 A. Yes.

2 Q. Okay. Do you know whether you had any  
3 conversations with Mr. Cole that you would approach the  
4 City of Kirkland about running freight before this e-mail  
5 went out?

6 A. Try that again.

7 Q. Sure. Do you recall having any conversations  
8 with Mr. Cole about running, about his company running  
9 freight on the Woodinville-Bellevue line before you  
10 e-mailed Kurt Triplett on November 7th?

11 A. Yes.

12 Q. Okay. And was he aware that you would be  
13 contacting the City of Kirkland and other public agencies  
14 and private businesses?

15 MR. MONTGOMERY: Objection; foundation.

16 THE WITNESS: Yes, that we both would be.

17 Q. (By Mr. Ferguson) Okay. Thank you.

18 (Exhibit Number 32 marked.)

19 Q. (By Mr. Ferguson) Mr. Engle, what's been marked  
20 as Exhibit 32 has just been handed to you. This is an  
21 e-mail thread starting with a message from Kurt Triplett to  
22 you dated November 16th. Below that is an e-mail from you  
23 to Kurt Triplett and Sung Yang of King County of the same  
24 date.

25 In the e-mail that reads from your Comcast

1 account to Kurt Triplett and Mr. Yang, did you write this  
2 message?

3 A. Yes.

4 Q. Under bullet point number 1, it reads, "The  
5 railroad drops its freight plans and therefore reactivation  
6 to pursue this process."

7 Would you please explain what this sentence  
8 means?

9 A. That if Kirkland was willing to allow the  
10 excursion train to the south Kirkland Park & Ride, that we  
11 would drop freight plans, which was a huge give on our  
12 part.

13 Q. Why would it be a huge give, as you put it?

14 A. Because I believe there's 50,000 carloads that  
15 could be moved out of Kirkland or out of Bellevue.

16 Q. Why would you give that up, then?

17 A. Trying to come to a mutually satisfactory  
18 agreement.

19 Q. To just then allow the excursion train to run on  
20 the line between Woodinville and Bellevue?

21 A. Yes.

22 Q. Who is Ernie Wilson?

23 A. Ernie Wilson is a rail fan.

24 Q. How do you know Mr. Wilson?

25 A. We were looking at redeveloping our condominium

C E R T I F I C A T E

STATE OF WASHINGTON       )  
                                  ) ss  
COUNTY OF KING           )  
                                  )

I, the undersigned Washington Certified Court Reporter, pursuant to RCW 5.28.010, authorized to administer oaths and affirmations in and for the State of Washington, do hereby certify: That the foregoing deposition of the witness named herein was taken stenographically before me and reduced to a typed format under my direction;

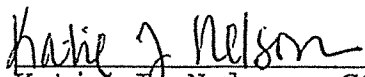
That, according to CR 30(e), the witness was given the opportunity to examine, read and sign the deposition after same was transcribed, unless indicated in the record that the review was waived;

That all objections made at the time of said examination have been noted by me;

That I am not a relative or employee of any attorney or counsel or participant and that I am not financially or otherwise interested in the action or the outcome herein;

That the witness coming before me was duly sworn or did affirm to tell the truth;

That the deposition, as transcribed, is a full, true and correct transcript of the testimony, including questions and answers and all objections, motions and exceptions of counsel made at the time of the foregoing examination and said transcript was prepared pursuant to the Washington Administrative Code 308-14-124 preparation guidelines;

  
Katie J. Nelson, CCR, RPR,  
Certified Court Reporter 2971 for  
the State of Washington residing at  
Redmond, Washington. My CCR  
certification expires on 10/22/13.

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2 P.O. BOX 22884  
3 SEATTLE, WASHINGTON 98122  
4 (206) 323-0919  
5 FAX (206) 328-0632  
6 info@starkovichreporting.com

7 Wednesday, May 22, 2013

8 To: Emily Finnegan  
9 Fletcher & Sippel  
10 29 North Wacker Drive, Suite 920  
11 Chicago, IL 60606

12 Re: Surface Transportation Board  
13 Deposition of: DOUGLAS ENGLE  
14 Date Taken: Wednesday, May 22, 2013

15 PLEASE TAKE NOTICE THAT:

16 Enclosed are two forms: "Affidavit" and a "Correction  
17 Sheet." Instruct the deponent to review the deposition,  
18 record any corrections on the Correction Sheet, and sign  
19 the Affidavit before a Notary Public. Return both forms to  
20 this office for their inclusion in the original transcript  
21 and distribution to other parties. The transcript will be  
22 forwarded to the appropriate party: June 24, 2013.

23 Thank you for your assistance in obtaining signature.

24 By: Katie J. Nelson, RPR, CCR, CCR No. 2971

25 cc: HUNTER FERGUSON, ANDREW MARCUSE, JORDAN WAGNER, TOM  
MONTGOMERY

## A F F I D A V I T

STATE OF WASHINGTON )  
 ) ss.  
COUNTY OF KING )

I have read my within deposition, and the same is true and correct, save and except for changes and/or corrections, if any, as indicated by me on the "CORRECTIONS" flyleaf page hereof.

\_\_\_\_\_  
DOUGLAS ENGLE

SUBSCRIBED AND SWORN to before me  
this \_\_\_\_\_ day of \_\_\_\_\_, 2013.

\_\_\_\_\_  
NOTARY PUBLIC in and for  
the State of \_\_\_\_\_,  
residing at \_\_\_\_\_.  
My commission expires \_\_\_\_\_.

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7 C O R R E C T I O N S H E E T

8 PLEASE NOTE ALL CHANGES OR CORRECTIONS ON THIS SHEET BY  
9 PAGE AND LINE NUMBER, AND THE REASON THEREFOR.

| 10 PAGE | 11 LINE | 12 CORRECTION AND REASON |
|---------|---------|--------------------------|
|---------|---------|--------------------------|

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# **EXHIBIT 3**



# KING COUNTY

## Signature Report

December 11, 2012

### Motion 13801

1200 King County Courthouse  
516 Third Avenue  
Seattle, WA 98104

Proposed No. 2012-0452.2

Sponsors Hague, Phillips, Ferguson,  
Patterson, Dunn and von Reichbauer

1 A MOTION establishing the Eastside Rail Corridor as a  
2 corridor of regional significance and declaring the  
3 criticality of the regional ownership partnership by  
4 establishing the Eastside Rail Corridor regional advisory  
5 council to immediately initiate a regional planning process.

6 WHEREAS, the Eastside Rail Corridor ("the ERC") is a forty-two-mile corridor  
7 that extends from Renton to Snohomish and from Woodinville to Redmond, and

8 WHEREAS, the ERC creates a direct contiguous land use and transportation  
9 connection through the communities of Renton, Bellevue, Kirkland, Redmond,  
10 Woodinville, Snohomish county and King County, and

11 WHEREAS, the first time acquisition of the ERC was studied was by the Puget  
12 Sound Regional Council, leading to the original vision of potential uses. In May 2007,  
13 the Puget Sound Regional Council completed a technical study of the ERC identifying  
14 desirable potential uses and examining their general impacts, the comparative costs of  
15 such potential uses and the legal or institutional issues associated with preserving or  
16 acquiring the ERC. Based on this study, the BNSF corridor advisory committee  
17 recommended, for the ERC portion south of Woodinville, that, among other uses, an  
18 interim regional multipurpose trail be developed, and

19 WHEREAS, the region, through the Puget Sound Regional Council has  
20 established land use and transportation plans to guide the integrated and managed growth  
21 of the Puget Sound region, and

22 WHEREAS, the ERC is centrally located within the Puget Sound planning area,  
23 and

24 WHEREAS, these regional planning efforts have established, through Vision  
25 2040, regional goals for the economy, housing, transportation, public services,  
26 development patterns and the environment, and

27 WHEREAS, the ERC provides an opportunity to connect jobs, housing and  
28 transportation across multiple communities, and

29 WHEREAS, King County has established policy emphasizing the critical  
30 importance of transportation dual-usage, transit and nonmotorized trail usage, to link the  
31 centers and cities of the Puget Sound region, and

32 WHEREAS, development of the ERC has the potential to meet future public  
33 transportation needs by providing regional livability connections to South, East and North  
34 King County through a series of biking, walking and hiking trails, and

35 WHEREAS, the ERC could also provide for a regional trail system that could  
36 extend into Snohomish and Skagit counties to the north, and Pierce county to the south,  
37 and

38 WHEREAS, the ERC is a regional utility corridor for the transmission of natural  
39 gas, electricity (and related facilities), water and wastewater, and

40 WHEREAS, King County has experience with other joint use corridors such as  
41 the Interurban Trail and the Tolt Corridor, and

42 WHEREAS, the ERC provides a trans-generational opportunity to support  
43 walkable, compact and connected communities through publically owned lands, and

44 WHEREAS, through dual-usage and trail sponsorship, King County has an  
45 opportunity to enhance and protect the environment through reduced greenhouse gas  
46 emissions and to improve public health through increased opportunities to bike and walk,  
47 and

48 WHEREAS, the ERC provides a regional opportunity to connect historically  
49 disadvantaged and geographically disparate communities and centers, and

50 WHEREAS, the ERC is now under public ownership, and

51 WHEREAS, King County is the interim trail sponsor, and

52 WHEREAS, King County is entering into a Purchase and Sale Agreement with  
53 the Port of Seattle for 15.6 miles of fee ownership in the southern portion of the ERC  
54 south of Woodinville and 3.6 miles of trail easement within the northern portion of the  
55 ERC north of Woodinville, contingent upon future financing, a Reciprocal Coordination  
56 and Cooperation Covenant Agreement with Puget Sound Energy, an Intergovernmental  
57 Land Transfer Agreement with the city of Redmond and a prospective Intergovernmental  
58 Land Transfer Agreement with the city of Kirkland, and

59 WHEREAS, Puget Sound Energy has purchased a utilities easement the length of  
60 the ERC, and

61 WHEREAS, Sound Transit has purchased 1.1 miles of fee ownership in Bellevue  
62 and a transit easement over the southern portion of the ERC, and

63 WHEREAS, the cities of Redmond and Kirkland have purchased in fee those  
64 portions of the ERC within their respective municipal boundaries, and

65 WHEREAS, Puget Sound Energy, Sound Transit, Redmond and King County  
66 were all a party to the November 5, 2009, Memorandum of Understanding, wherein dual  
67 usage was a guiding principle, and

68 WHEREAS, the city of Kirkland is in agreement with that guiding principle for  
69 the use of its property rights, and

70 WHEREAS, King County's dual usage policy identifies the critical importance of  
71 a comprehensive regional planning process, and

72 WHEREAS, this motion advances the goals of the county's Strategic Plan by  
73 encouraging vibrant, prosperous and sustainable communities and safeguarding and  
74 enhancing King County's natural resources environment, and

75 WHEREAS this motion further advances the goals of the county's Equity and  
76 Social Justice Initiative by supporting ongoing public access for all people to the ERC as  
77 a safe, clean and quality outdoor space and facility that will serve the interests of the  
78 citizens of the region, and

79 WHEREAS this legislation advances the adopted King County Comprehensive  
80 Plan by furthering economic development, housing, natural resources, utilities and  
81 transportation modalities, and

82 WHEREAS, the eastside of King County is the second largest economic engine in  
83 the state, and

84 WHEREAS, the most affordable housing is located in southern King County, and

85 WHEREAS, the economic recession has caused all levels of government to look  
86 toward creative financial partnerships, and

87 WHEREAS, the taxpayers of King County are the same taxpayers who support  
88 Sound Transit, and

89 WHEREAS, interim use of the ERC is subject to freight reactivation, and

90 WHEREAS, the high capacity transportation, regional trail and county  
91 wastewater facilities that are to be located in the ERC will be of significant public benefit  
92 and constitute essential public facilities. As essential public facilities, these  
93 transportation, trail and wastewater uses are subject to the requirements of the Growth  
94 Management Act, and

95 WHEREAS, the ERC will be a dual use transportation corridor, which is a  
96 corridor that will provide for the co-location of motorized public transportation facilities  
97 and regional trail facilities;

98 NOW, THEREFORE, BE IT MOVED by the Council of King County:

99 A. Due to its regional role in connecting and supporting vibrant, livable and  
100 healthy communities for all, the ERC is hereby designated a corridor of regional  
101 significance.

102 B. The high capacity transportation, regional trail and county wastewater  
103 facilities that are to be located in the ERC will be of significant public benefit and  
104 constitute essential public facilities. As essential public facilities, these transportation,  
105 trail and wastewater uses are subject to the requirements of the Growth Management Act.

106 C. The Eastside Rail Corridor regional advisory council ("ERCRAC") is hereby  
107 established as a collaborative group to carry out a regional planning process to  
108 "coordinate planning and development activities to the extent possible to ensure effective  
109 use of the southern portion of the ERC and the Redmond Spur" as previously discussed in

110 that certain November 5, 2009, memorandum of understanding. The ERCRAC's regional  
111 planning process and guiding principles shall work to implement the regional dual use  
112 objectives consistent with any existing easements, covenants and other property interests  
113 of record that are applicable to the ERC.

114 D. The executive shall transmit by January 16, 2013, for council confirmation by  
115 motion, advisory council membership with the following executive-level representation:

- 116 1. Three King County councilmembers;
- 117 2. King County executive or the executive's designee;
- 118 3. One representative from the city of Redmond;
- 119 4. One representative from the city of Kirkland;
- 120 5. One representative from Puget Sound Energy; and
- 121 6. One representative from Sound Transit.

122 E. The King County executive and county councilmember representing the  
123 majority of the cities directly impacted by ERC development shall serve as co-chairs and  
124 shall convene the first meeting of the advisory council in February 2013.

125 F. A technical staff team shall be established by the advisory council to support  
126 the work of the advisory council.

127 G. A third-party facilitator who is not an employee of King County shall be hired  
128 by the county to lead the work of the advisory council based on the guidance of the co-  
129 chairs of the advisory council and the support of the interagency, technical-staff working  
130 group.

131 H. The goal of the advisory council is to oversee the partner planning process  
132 including implementing and coordinating the rail, trail and utility uses in the ERC,

133 coordinating with affected cities around local planning and development with the  
134 regional uses and overseeing the work of a technical staff work group.

135 I. Consistent with that goal, the advisory council will develop a charter and work  
136 plan with policy options identified for discussion by March 29, 2013. As part of their due  
137 diligence, the advisory council should review and consider previous studies of the ERC.  
138 The advisory council shall address both near-term and long-term recommendations  
139 including any needed changes to the county's countywide planning policies and present  
140 them to the King County executive by July 31, 2013.

141 J. The advisory council shall reach out to a broad-spectrum of stakeholders,  
142 including but not limited to representatives of regional partners, local governments in the  
143 ERC, community organizations, business owners, adjacent landowners, rail/trail  
144 advocates, public health agencies and citizens who are interested in the ERC's  
145 development.

146 K. The King County executive shall transmit these recommendations by motion  
147 to the council by August 30, 2013.

148

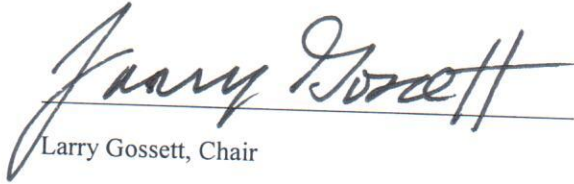
Motion 13801 was introduced on 11/26/2012 and passed by the Metropolitan King County Council on 12/10/2012, by the following vote:

Yes: 8 - Mr. Phillips, Mr. von Reichbauer, Mr. Gossett, Ms. Hague,  
Ms. Patterson, Ms. Lambert, Mr. Dunn and Mr. McDermott

No: 0

Excused: 1 - Mr. Ferguson

KING COUNTY COUNCIL  
KING COUNTY, WASHINGTON

  
Larry Gossett, Chair

ATTEST:

  
\_\_\_\_\_  
Anne Noris, Clerk of the Council

Attachments: None

## **EXHIBIT 4**

---

BEFORE THE SURFACE TRANSPORTATION BOARD

---

STB FINANCE DOCKET NO. 35731           )  
BALLARD TERMINAL                        )  
RAILROAD COMPANY, L.L.C.                )  
-ACQUISITION AND EXEMPTION-            )  
WOODINVILLE SUBDIVISION                )  
STB DOCKET NO. AB-6 (SUB. NO. 465X)    )  
BNSF RAILWAY COMPANY                    )  
-ABANDONMENT EXEMPTION-                )  
IN KING COUNTY, WA                       )

---

DEPOSITION UPON ORAL EXAMINATION  
OF  
BYRON COLE

---

Taken at 600 University Street, Suite 3600  
Seattle, Washington

DATE:           Friday, May 24, 2013

REPORTED BY:Katie J. Nelson, RPR, CCR  
CCR NO.: 2971

## A P P E A R A N C E S

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(206) 625-1801  
tom@montgomeryscarp.com

1 MR. COHEN: I'd like to mark another  
2 exhibit.

3 (Exhibit Number 37 marked.)  
4

5 E X A M I N A T I O N - (Continuing)

6 BY MR. COHEN:

7 Q. Mr. Cole, showing you what's been marked as  
8 Exhibit 37, is that your signature at the end of it?

9 A. It is.

10 Q. Did you review this document before you signed  
11 it?

12 A. I looked at it.

13 Q. And you signed it on May 2nd or 23rd? 23rd would  
14 be yesterday. Did you sign this yesterday?

15 A. Yeah.

16 Q. We'll come back to it.

17 Did I ask you for an estimate of aggregate  
18 revenues at Ballard Terminal Railroad, say, to make it  
19 precise, 2012, Ballard Terminal Railroad revenues?

20 A. I don't know if you asked me that or not.

21 Q. Well, if I did, I forgot, could you give me your  
22 best estimate of the 2012 revenues of Ballard Terminal  
23 Railroad?

24 A. Okay. So it isn't aggregate, it's earnings from  
25 the three railroads compiled together. And I think for

1       2012, it was around \$500,000.

2           Q.     That would be revenues, not net income?

3           A.     No, it's not net by any means.

4           Q.     Okay.

5                   MR. MONTGOMERY:  Unfortunately.

6                   THE WITNESS:  Yeah.

7           Q.     (By Mr. Cohen)  And how, what proportion of that  
8     revenue came from the Eastside?

9           A.     Eastside.

10          Q.     What did you call it?

11          A.     Eastside Freight and Railroad.

12          Q.     Yes, Eastside Freight and Railroad?

13                   MR. FERGUSON:  It's 26.

14                   MR. COHEN:  Thank you.

15                   THE WITNESS:  To get a clue here from this,  
16     the per car costs, and I can give you the per car revenue  
17     providing we were able to collect it all.

18          Q.     (By Mr. Cohen)  Well, you're turning the  
19     telescope backwards on me.  Let's start, if you can tell  
20     me, of that roughly \$500,000, how much of that revenue came  
21     from Eastside Freight Railroad operations?

22          A.     We only began getting paid for our Eastside  
23     Freight operations -- we only began to get paid, got one  
24     payment from the bankruptcy trustee, and we find -- so we  
25     were not doing the billing, the bankruptcy trustee was

1        billing for the work that we did. So we got paid one  
2        payment.

3                And when we actually, when Doug Engle completed  
4        the buyout of the -- of the GNP position, then we signed an  
5        agreement with Doug that we would essentially continue what  
6        we had been doing without getting paid, operating the  
7        common carrier freight business, but using the nationwide  
8        system for collecting, it's all based on, paid so much a  
9        car that you handle, a loaded car. And the system, it  
10       takes about three or -- three months before you get paid  
11       for something. If you did something in August, you don't  
12       get paid until Halloween.

13               So we got almost nothing from the, sort of,  
14       regular system, but we did get that one payment that came  
15       from Perry Stacks. Perry Stacks was the bankruptcy  
16       trustee.

17               So, you know, it's an unusual year. The year  
18       we're in now, we're doing all the billing and we're getting  
19       paid.

20               Q.     Ballard Terminal Railroad is doing all the  
21       billing?

22               A.     Yeah, so we'll get paid the right amount.

23               Q.     So what were your -- well, I'll ask that, do you  
24       know the per car revenues in 2013, average?

25               A.     Yeah, the amount we --

1           A.     Okay.

2           Q.     I have you moving 270 carloads in 2010, does that  
3     sound --

4           A.     That's -- well, I don't know. I guess I'd like  
5     to see the document.

6           Q.     Sure, let's do that.

7           A.     It's probably my work on the document.

8           Q.     Yep.

9                     MR. MONTGOMERY: Thank you, Counselor.

10                    (Exhibit Number 38 marked.)

11           Q.     (By Mr. Cohen) So, Mr. Cole, showing you what's  
12     been marked as Exhibit 38. Do you recognize this document?

13           A.     Well, it's got my name on the back of it, so...

14           Q.     Your signature too?

15           A.     That's what I mean.

16           Q.     Yes.

17           A.     Yes, I composed it.

18           Q.     All right.

19           A.     And so here's the list of the three years.

20           Q.     Yes.

21           A.     And so, I think it's accurate.

22           Q.     Okay. So check me on this, it shows 270 carloads  
23     in 2010; 235 in 2011; 177 through September of 2012?

24           A.     That's what it says, yes.

25           Q.     Does that sound right to you?

1           A.    Yes, I think it's -- I think those are the  
2           numbers.

3           Q.    Okay.  And if you would look at Exhibit 26, which  
4           I handed you a minute ago, you'll see a total 2012 number  
5           there of 213 cars, you see that?

6           A.    I see that.

7           Q.    Does that sound accurate to you?

8           A.    Let's see here, yeah.  Yeah, I think that's  
9           probably a correct...

10          Q.    And do you have an estimate for 2013 year to  
11          date?

12          A.    Well, these first three show a declining trend in  
13          traffic, and so I certainly hope it's reversed this year  
14          and we start to climb up a little bit out of the recession.  
15          So we have excellent year on our Meeker line this year.  
16          Record breaking.

17          Q.    Really, I'm asking you, since I have no records  
18          for 2013, do you know what the traffic volume is, we'll  
19          say, through the end of April on the Eastside line?

20          A.    Yeah, we -- we know, but I don't have it in my  
21          head here what it is.

22          Q.    Okay.

23          A.    But I can provide that for you.

24          Q.    So you're showing something in the ballpark of a  
25          10 percent decline in traffic each year since you began

1 operations. To what do you attribute that decline?

2 A. Well, the housing market has been in a gigantic  
3 slump and it's sort of coming out of it now. But I still  
4 get -- from my forest products industry years, the one  
5 trade journal that's still being published every month, and  
6 it's not over yet. And so that's the single biggest thing,  
7 because Boise Cascade is in building products. And our  
8 third shipper, that is Matheus Lumber, I couldn't remember  
9 it a while ago. And they're in the same boat.

10 And there was a cedar lumber wholesale outlet as  
11 well, and they folded up completely in the beginning of the  
12 first year when we started in 2010. They went bankrupt,  
13 so...

14 Q. I was going to ask you, are you down to three  
15 shippers on the Eastside line right now?

16 A. At the moment, but --

17 Q. Go ahead.

18 A. -- there's opportunities there to get some more  
19 industries.

20 Q. Have any of your current three shippers advised  
21 you of plans to increase or reduce traffic in 2013?

22 A. Well, I think -- I think the forest products, the  
23 building materials people, they're always hopeful that  
24 better times are coming. And so, you know, that's what  
25 they would say, it's a little better here.

1 Q. I'm really asking, have there been any, has  
2 anybody advised you, we are planning to increase traffic,  
3 reduce traffic, go out of business, amongst your three big  
4 shippers?

5 A. Well, Spectrum Glass apparently is doing quite  
6 well. And they bought a huge warehouse in Maltby.

7 Q. In Maltby?

8 A. Maltby.

9 Q. I'm sorry, Maltby?

10 A. Yes, top of the hill. Just to hold their finish  
11 product before it's shipped out to wherever all it goes.  
12 So they're enjoying good times, but they're not hooked to  
13 the building trades. Boise Cascade is firmly hooked to the  
14 housing and --

15 Q. Right.

16 A. -- and light commercial construction markets.

17 Q. But I'm not asking what you see coming based on  
18 changes in the economy. I'm asking, have any customers  
19 communicated to you that we're going to be having an  
20 increase in freight traffic or a decrease in freight  
21 traffic in the near future here?

22 A. No.

23 Q. Okay.

24 A. No. Boise is upbeat and Spectrum is upbeat.  
25 Matheus is soldiering on.

1           A.    What they say is -- is basically, you know,  
2           somewhere in the middle of what five track inspectors might  
3           come up with each working individually.

4           Q.    Doug Engle testified on Wednesday that it would  
5           not be possible to run an excursion train on this track  
6           until some significant investment is made to rehabilitate  
7           it, do you agree with that statement?

8           A.    Well --

9                   MR. MONTGOMERY:  Objection; foundation.

10                  Go ahead.

11                 THE WITNESS:  Okay.  It would -- the dinner  
12           train or any of those excursion trains are big investments.  
13           It would be better to not have the track system hanging on  
14           by its fingernails to Class 1.  And then an inspector comes  
15           by, which they periodically do, and say, Well, we just took  
16           a look at something, half a mile track in this area and we  
17           don't think it actually meets Class 1, so now you can't run  
18           the train until you go out there and change a bunch of  
19           ties.  Rather have it clearly centered in Class 1.  So I  
20           think the whole thing needs to be carefully looked at.  And  
21           I'm not for wasting money, so get enough money to change  
22           enough ties.

23                 But since he did that, I have walked that whole  
24           line.  We're hosting a group of people who were very  
25           interested in the culverts.  They had a contract with the

1 Port of Seattle who, for whatever reason, commissioned  
2 these people to go look at the culverts and drainage issues  
3 all along the line. So I spent about three full days, not  
4 in a row, but over a period, walking the line with those  
5 people. And they were digging out the ends of the culverts  
6 and checking for flow and collapses and one thing and  
7 another.

8 That gave me plenty of time to look at the ties  
9 and rail and so forth over while we all moved along the  
10 line together. There's a lot of good ties in that line,  
11 from Woodinville wye where we keep the engine to the  
12 interchange with Burlington Northern. And so, I would say  
13 that the easy method I use is the rail is in 39-foot  
14 lengths, and so I discount the number of ties that need to  
15 be removed in a 39-foot length, and write it down in my  
16 pocketbook. And move on all the way and take a look at  
17 another one. And pretty soon you find out the center of --  
18 the average one needs four ties. Then you can figure out  
19 the distance and see how many ties you need.

20 So I think, I think that most of the track is  
21 okay, freight train 10 miles an hour and excepted track,  
22 but I think it does need some ties to get to the Class 1.  
23 Freight trains are still at 10 miles an hour, but a  
24 passenger train could run at 15. I think that's fast  
25 enough for the train. I don't think it's necessary to

1 spend money up front right away to get to Class 2.

2 Q. So would still be necessary to spend some money  
3 to get to Class 1?

4 A. Some, yes. Because there's some stretches where  
5 there's not enough good ties in a row. Like a cluster --

6 Q. Right.

7 A. -- four or five in a row that are not good.

8 Q. Is Ballard Terminal Railroad planning to make  
9 that investment?

10 A. I don't think so. I think we need to find some  
11 investor to or a grant or loans. Over the years we've been  
12 in the business, we've had two interest free loans from the  
13 state of Washington and one small grant. A lot of people  
14 have been more successful and have had several large  
15 grants. So the word is down there at Olympia to look  
16 around and see if you can help out these guys.

17 Q. Are you planning any additional investment in  
18 2013 in maintenance of the freight segment, other than the  
19 spraying for weeds that you've already done?

20 A. Well, I didn't see anything starting out at the  
21 Woodinville wye and going around all three legs and then  
22 walking, not in the same day, but walking the whole line  
23 all the way to the Snohomish bridge, I didn't see anything  
24 that would say we can't run another train until we've fixed  
25 this cluster of bad ties, I didn't see anything that bad.

1 I was quite surprised at how much pretty good darn rail  
2 there is that's probably a Class 2. There's a lot of  
3 welded rail.

4 And so, I'd say it's probably good for another  
5 year without maybe replacing any ties.

6 Q. So Ballard has no plans to do additional  
7 maintenance on the track freight segment in 2013?

8 A. Yeah, I don't -- I don't think it's necessary.

9 Q. Okay.

10 A. Mind you, we've only had this obligation since  
11 Doug bought the license. I mean, only -- before that it  
12 was Tom Payne's thing to do. He didn't have the money to  
13 do much.

14 Q. Right.

15 A. He did do -- they tightened all the track bolts  
16 at all the joints, all the track bolts. And some would  
17 break, he'd tighten them and put new ones in and things  
18 like that.

19 Q. We're going to get more of this later, but I  
20 gather that under your agreement with Eastside Community  
21 Rail, the responsibility for doing maintenance falls on  
22 Ballard, correct?

23 A. Well, that's what it says, yeah. I didn't help  
24 write that.

25 Q. We'll talk about that later.

1                   One other question about Exhibit 39. Do you know  
2                   who paid for the RailWorks analysis that's reflected in  
3                   this report?

4                   MR. MONTGOMERY: Assumes facts not in  
5                   evidence.

6                   THE WITNESS: I -- I have no idea.

7                   MR. MONTGOMERY: Foundation.

8                   Go ahead. I'm sorry. Just trying to get in my  
9                   objection.

10                  THE WITNESS: I thought you were done.

11                  MR. MONTGOMERY: You took care of my second  
12                  one for me, thank you. Did you get that? Assumes facts  
13                  and foundation.

14                  THE COURT REPORTER: I did.

15                  THE WITNESS: I don't know, did they send a  
16                  bill to somebody. Didn't send it to me. I would think  
17                  they're hoping to be chosen to do the work eventually when  
18                  it happens, and it would probably happen in stages. They  
19                  never sent me a bill for inspecting jobs that I had for  
20                  them, so I -- does somebody know that there was a bill  
21                  tendered?

22                  Q.     (By Mr. Cohen) I don't, I guess I was --

23                  A.     I think they just did it and hope they get the  
24                  job.

25                  Q.     I see. Did Ballard -- I'm sorry.

1 MR. MONTGOMERY: Just take a long time.

2 MR. COHEN: It's hard to be deposed and eat  
3 a donut at the same time.

4 MR. MONTGOMERY: Take your time asking the  
5 question and we'll be okay.

6 MR. COHEN: This one will be quick, though.

7 Q. (By MR. COHEN) Did Ballard engage RailWorks to  
8 do this inspection?

9 A. I suggested to Doug that -- I think they're the  
10 best outfit out here in this part of the country. And we  
11 use them virtually exclusively and have for many years.  
12 And so he did, and so --

13 Q. "He did" means Doug did?

14 A. Doug engaged them. As a matter of fact, he and I  
15 and Ernie, one of his assistants, did a car trip one day  
16 and went to the RailWorks headquarters in Chehalis. And  
17 when we got there, holy smokes, those guys gave us a tour  
18 of their shops and all of their equipment, and very  
19 cordial. And I mean, I already knew two or three of them  
20 for years and years.

21 But, anyway, so for them that worked out to being  
22 invited to come and check out the section of rail that we  
23 operate the trains on, so they did.

24 Q. Okay. But Doug was the --

25 A. Yeah.

1 Q. -- guy?

2 A. Doug was the guy who did the invitation. And  
3 they made the report and addressed it to Doug.

4 Q. I see. Thank you. Have some of that donut.

5 Referring you back to Exhibit 38, that's your  
6 letter to Judge Lynch. On the last page of that letter,  
7 you describe the state department of transportation grant  
8 program, you see that?

9 A. Where is it?

10 Q. Last page?

11 A. Last page.

12 Q. Of Exhibit 38.

13 A. Yeah.

14 Q. Just above your signature.

15 A. Okay. What's your question? I understand the  
16 paragraph.

17 Q. Right. My understanding is that someone applied  
18 for a grant to the state department of transportation to  
19 rehabilitate the freight segment. To your knowledge, is  
20 that true?

21 A. Well, wasn't me. I think it would be Doug. And  
22 you know, I encouraged him to do it. Some people fair  
23 very, very well. There's a huge imbalance in the state and  
24 the state of Pennsylvania. The state of Pennsylvania  
25 awards to every short line at the table, every year. I

1 don't think you even have to apply. But they're really  
2 into maintaining the short lines in a high state of good  
3 repair.

4 State of Washington is all about let's buy some  
5 more Talgo trains and let's bring Burlington Northern some  
6 money so they can put in more passing tracks so we can run  
7 those more Talgo trains, things like that.

8 The state rail office for short lines has  
9 dwindled to maybe two people down there. It used to be the  
10 dominant thing. It's just a little group that's part of  
11 transportation. Just a little group. There's not much for  
12 the short lines anymore.

13 Q. Do you know if someone, do you know if Doug  
14 applied for it --

15 A. I don't know.

16 Q. -- a grant?

17 A. I don't know. Yeah, I don't know either way.

18 Q. You've not been involved in that effort?

19 A. I wasn't, no. I encouraged him to nose around,  
20 but when you go to the state rail office, it's all about  
21 Talgos all the time.

22 Q. I hear you. There's something I don't  
23 understand. Given that under the lease agreement, the  
24 responsibility of maintaining that line is all Ballard, why  
25 would you expect Doug to go apply for grants?

1 MR. MONTGOMERY: Object to the form.

2 Assumes facts.

3 THE WITNESS: Well, I got a full plate  
4 already with two other railroads. And he's -- he had the  
5 time and the inclination and the enthusiasm to go do it. I  
6 said, I got him some names of people that were still down  
7 there. And so he, you know, took the time to go do it.  
8 And I think he also talked to people in the legislature  
9 when he was down there. Had perhaps the better reception  
10 from them, because the rail office is not much about short  
11 lines anymore. It's -- sorry, it's not the way it should  
12 be. The Talgo trains should be funded from a completely  
13 different place.

14 Q. (By Mr. Cohen) Right. Do you know if a grant  
15 application was, in fact, filed?

16 A. I don't know --

17 Q. Okay.

18 A. -- either way.

19 Q. Turning to Page 4 of Exhibit 38. Am I correct  
20 that this letter was written in September 2012?

21 A. Whatever it says, yeah.

22 Q. So I'm looking --

23 MR. MONTGOMERY: Page 4. Okay, good. Yeah.

24 Q. (By Mr. Cohen) I'm looking at the last paragraph  
25 on Page 4?

1           A.     Okay.

2           Q.     The statement, "What is clear, is that the  
3           operation of just the existing carload freight side of the  
4           business does not generate enough income to put any  
5           significant amount of money into the track structure."

6           A.     Mm-hm (answers affirmatively).

7           Q.     That was your statement?

8           A.     This is my letter, absolutely.

9           Q.     And that was September 2012?

10          A.     Mm-hm (answers affirmatively).

11          Q.     Is that statement still true today?

12          A.     It is. And some other things I said in there,  
13          too, I was in good form.

14          Q.     It's a nice letter.

15                   MR. MONTGOMERY: I'll object once again to  
16          this line of questioning to the extent that it applies to  
17          the Snohomish to Woodinville rather than Woodinville to  
18          Bellevue section.

19                   MR. COHEN: Mr. Montgomery, if you want, I'm  
20          willing to note a continuing objection, if you --

21                   MR. MONTGOMERY: That would be lovely,  
22          Mr. Cohen.

23                   MR. COHEN: -- want to, inquiries about the  
24          freight segment.

25                   MR. MONTGOMERY: That would be terrific.

1 MR. COHEN: All right.

2 Q. (By Mr. Cohen) Do you agree with the statement  
3 that "It is not realistic to forecast that huge increases  
4 in the amount of freight traffic are just around the bend"?

5 A. Well, when we earlier here, we were talking  
6 about, you know, who were the customers that we have  
7 between Woodinville and Snohomish. And so, there's not  
8 very many, three active ones. And the good news is we  
9 haven't really lost any in the three years we've been  
10 running the line.

11 Q. Except the cedar company, right?

12 A. Cedar guys, yeah. I mean, those people are --  
13 made a colossal blunder, they spent a ton of money on a  
14 facility to store and display the cedar lumber, just the  
15 beginning of the crash. And an outfit back in Minnesota,  
16 anyway -- don't feel sorry for them, they got tons of  
17 money.

18 What -- where do you want me to go with this?

19 Q. I'm sorry, what I was really asking is your  
20 statement that it is not realistic to forecast that huge  
21 increases in freight traffic are just around the bend?

22 A. For the Woodinville to Snohomish line. But there  
23 are things we can do and, you know, this is written while  
24 things were still in limbo. It was Perry Stacks as the  
25 trustee, and a nice enough guy, but it wasn't clear what

1 was going to happen.

2 And there had been some bigger short line  
3 conglomerates sniffing around. I thought one of them might  
4 step forward or something. Be much better financed and  
5 able to make something happen. But if we're to be in a  
6 position to be able to do this long-term, and just setting  
7 aside Kirkland to Bellevue at the moment, there's things  
8 that can be done at Maltby. There is vacant industrial  
9 ground. And there's things that can be done at Woodinville  
10 to boost the freight up enough to, you know, the contacts  
11 with the trans-loading companies that are already on our  
12 line. We have four at Meeker --

13 Q. But Meeker is a different line?

14 A. It's a different line. It's five miles up  
15 Burlington Northern, former Transcontinental railway. It  
16 runs south and east out of Puyallup.

17 Q. I hear you.

18 A. Okay. So anyway, I think about them all every  
19 day, not just one or the other or the other. So there's  
20 opportunities on the freight branch that we're operating  
21 today to try to get some more customers there, too. But  
22 this thing to Bellevue is a completely different deal. And  
23 not going to be digging 10 million cubic yard excavation  
24 holes in the ground in downtown Woodinville any time soon.

25 Q. Save Bellevue. We'll get into that this

1       afternoon. I'm really, this is a statement you made about  
2       the freight segment?

3             A.     Yes.

4             Q.     I'm curious whether today, now it's what is it,  
5       seven, eight months later, that statement remains accurate?

6                   MR. MONTGOMERY: I think that was asked and  
7       answered.

8                   THE WITNESS: Well, I feel the same way as I  
9       did in the letter. It's -- there's, you know, the Port  
10      pretty well just wants to be done with the whole thing,  
11      they haven't been any help. If it was in Pennsylvania,  
12      we'd be awash in money. We'd have it long since by now, it  
13      would be Class 2 track. Because in Pennsylvania, they look  
14      at short lines differently than they do here. The Port is  
15      incredibly passive.

16                  MR. MONTGOMERY: Keep talking if you have  
17      more to say. Don't worry about the whispering.

18                  THE WITNESS: So this still reflects how I  
19      feel.

20             Q.     (By Mr. Cohen) All right. That's fine.

21                   Can you continue running freight indefinitely on  
22      the freight segment without putting some money into  
23      maintenance?

24             A.     No. I don't think so.

25             Q.     When will you need to start maintaining that

1 line?

2 MR. MONTGOMERY: Assumes facts not in  
3 evidence. Mischaracterizes earlier testimony to the extent  
4 it's reflective of it.

5 Go ahead.

6 THE WITNESS: Okay. This year we sprayed  
7 for weeds using a professional weed sprayer that has  
8 contracts with Burlington Northern and short lines in Idaho  
9 and Montana and so forth. And they're out here and they  
10 had two other ones and I had them do ours. And things are  
11 dying and so it looks like they were spraying more than  
12 water out the spray nozzle. I rode in the hi-rail rig with  
13 the guy and we did two rails in one day. And we did  
14 Woodinville one day, and the next day we did our other two.

15 So --

16 Q. (By Mr. Cohen) So you've explained you sprayed  
17 for weeds, but you also said, and correct me if I'm  
18 misstating your testimony, some ties need to be replaced?

19 A. There's some, yes. I wouldn't say there's zero.  
20 But the standards for excepted track, you only need about  
21 five good ties in 39 feet of track, which is a really low  
22 standard. But that's what the book says.

23 Q. Right. So --

24 MR. MONTGOMERY: Are you finished?

25 THE WITNESS: Well, no, I was going to

1 say --

2 Q. (By Mr. Cohen) Go ahead.

3 A. -- that I've never tried to just keep going on  
4 the very borderline of one more tie. You know, federal  
5 inspector comes and looks and he says I think there's  
6 six -- you know, there's only four good ties in this  
7 segment. We gotcha. And with a spray can, and you got 30  
8 days to pull that tie out and change it.

9 Pulling out individual ties is an expensive way  
10 of upgrading a track. It's better to bring in sort of a  
11 crew in to (indicating) change it out, not every tie, but  
12 changes the ones you need in a whole production line.

13 Q. My question for you is, how long can you postpone  
14 those tie replacements and still feel that you can safely  
15 run a freight railroad?

16 MR. MONTGOMERY: Objection; calls for  
17 speculation.

18 THE WITNESS: It's not an exact science.  
19 Some of it, Tom Payne did the simple thing when he took it  
20 over. He just said, Burlington Northern was calling this  
21 Class 2 track. We're calling it excepted, period. It's an  
22 administrative thing. Didn't even have to inspect it. He  
23 didn't want to. He just downgraded. So it doesn't mean  
24 that all of a sudden a bunch of ties failed, lowering it  
25 down, it was just that put it down there, not going to have

1 any beefs from the FRA when they do track inspections. It  
2 exceeds the minimum standards and so forth.

3 I'd like it if we would be replacing some ties  
4 next year.

5 Q. Do you have plans to do that?

6 A. No, kind of depends on the money. I tasked Doug  
7 to go get some money from the state. It's there. Quit  
8 spending it on Talgo trains. Get back to what you were  
9 supposed to do, to support the short line network. They  
10 had a plaque on the wall at one time that said, our job  
11 here is to preserve the existing freight rail network in  
12 the state of Washington. They've -- somebody threw out the  
13 plaque, and it's not a very big piece of what they do these  
14 days. They're all excited about the Talgos. And that's  
15 another story.

16 Q. So is Ballard Terminal Railroad currently losing  
17 money on the freight segment operation?

18 MR. MONTGOMERY: Objection; foundation.

19 THE WITNESS: We're about breaking even or  
20 maybe come out a little bit on the plus side.

21 Q. (By Mr. Cohen) That's based on the comparison  
22 between the cost you listed in Exhibit 26 and your  
23 revenues?

24 A. Yeah, I mean, it's in -- you know, a big piece of  
25 the cost picture is the diesel fuel, and things like that.

1 We don't have much control over them. But diesel fuel has  
2 been sort of stable here for a while. Employees are happy  
3 and we haven't given them a raise for a few years. So  
4 there's a lot of pieces to the whole thing. I'm not giving  
5 up on it.

6 We can -- but the other two railroads,  
7 essentially Meeker, we can afford to carry this thing a  
8 little bit. But please, let us go to Bellevue so we can  
9 make some serious money and fix the whole damn thing. We  
10 won't need any grant.

11 Q. We'll talk about Bellevue this afternoon.

12 A. I hope so.

13 Q. I just want to know your statement that your  
14 breaking even or a little better is based on the summary of  
15 costs shown on Exhibit 26?

16 MR. MONTGOMERY: Object to the form.

17 THE WITNESS: For this.

18 Q. (By Mr. Cohen) That's Exhibit 26 you're looking  
19 at?

20 A. Yeah.

21 Q. Is the answer to my question yes?

22 MR. MONTGOMERY: Same objection.

23 THE WITNESS: Well, it doesn't have any  
24 money in there for maintenance. It has maintenance on the  
25 locomotive and the caboose. It doesn't have anything for

1 the track. But saying we have responsibility for the track  
2 doesn't relieve Doug from the job of trying to find some  
3 money so that I can get the job done.

4 Q. (By Mr. Cohen) Right.

5 A. So we'll see how it works.

6 Q. All right. So there's no money in these costs  
7 for maintenance of --

8 A. No.

9 Q. -- track?

10 A. No.

11 Q. There's no money for payments to Ballard  
12 Industrial Company, right?

13 A. Well, it doesn't -- yeah, it doesn't talk about  
14 the income stream. But we are getting the full income  
15 stream, nobody is stiffening it off, not Tom Payne and not  
16 the bankruptcy trustee, so we're getting 100 percent of  
17 that. I'll say, it's a big pain in the rear to collect.  
18 It's a very obtuse -- it's made for giant railroads.

19 Q. And the income stream is, what was the number you  
20 gave me?

21 A. So we get, right now, we get 446 --

22 Q. \$446 --

23 A. -- per car.

24 Q. -- per car, times 213 cars in 2012?

25 A. Yeah.

1 Q. All right. Is there any other income?

2 A. Oh, we've had people talk to us about storing  
3 cars. We have a couple of great places to store cars. We  
4 store cars on our other two railroads. So you can make  
5 some money there.

6 Q. Is anybody paying you right now to --

7 A. Not at the moment.

8 Q. -- store cars?

9 A. I haven't had any. I've gotten a lot of calls  
10 and I've been really too busy to hound them back to make  
11 that happen. But that's an easy thing with no investment.  
12 It's just empty cars that show up on the interchange and  
13 you find a side track to park them on.

14 Q. So any other income?

15 A. Can't think of any other sources, actually,  
16 beyond that.

17 Q. All right. And that cost estimate on Exhibit 26  
18 doesn't include any payments to the Port?

19 A. Right.

20 MR. MONTGOMERY: Asked and answered.

21 Q. (By Mr. Cohen) Doesn't include any payments to  
22 Eastside Community Rail?

23 MR. MONTGOMERY: Asked and answered.

24 Q. (By Mr. Cohen) Right?

25 A. That's correct.

1 Q. Doesn't include any return on your capital  
2 investment?

3 A. Nope.

4 Q. Turning to -- we're going to take a lunch break  
5 shortly.

6 MR. MONTGOMERY: Good, I need to go to the  
7 restroom.

8 MR. COHEN: Give me a couple more questions  
9 and we'll stop.

10 Q. (By Mr. Cohen) Turning back to Exhibit 38 --

11 A. Yes.

12 Q. -- Page 4.

13 A. Of Exhibit 38?

14 Q. Yes.

15 A. Fourth full paragraph.

16 Q. Okay.

17 A. "As you can see," is that the one?

18 Q. Last sentence. Read that sentence into the  
19 record for me.

20 A. "Our financial position becomes more precarious  
21 every day."

22 We can do this forever, can't we.

23 Q. Tell me what you meant by that statement to the  
24 bankruptcy judge?

25 A. Well, he's a pretty low-key guy. And there was

1 think that -- that area would be on his list as well. But  
2 what's Sound Transit -- you guys bought the rights to a big  
3 chunk there, did you not? Most of the yards? And the old  
4 building where the box factory, cardboard box factory, I  
5 think. I don't know what the actual value is. There's  
6 also a lot of drainage water flowing through there.  
7 There's two channels in the railroad -- it was actually  
8 built on field that's been brought in there, so it's a  
9 little higher. There's some pretty big ditches, and  
10 whatever is done, that water is going to want to keep  
11 moving.

12 Q. So you don't know the value of the real property?

13 A. I have -- no, it hasn't been -- it hasn't been  
14 available. Ask Burlington Northern. They might have  
15 numbers, because they have been thinking about getting rid  
16 of this land for so many years.

17 Q. Does Ballard own any real property interest in  
18 the line?

19 MR. MONTGOMERY: Object to the extent it  
20 calls for a legal conclusion.

21 Go ahead.

22 THE WITNESS: No.

23 Q. (By Mr. Cohen) Does Ballard have any plans to  
24 acquire a property interest in the line?

25 A. I'm not sure what you mean.

1           Q.    So do you believe that in order to run freight on  
2           the line between Woodinville and Bellevue, you would need  
3           an easement or other property right to get onto the  
4           property?

5           A.    It kind of depends on what the STB does.  On  
6           being able to -- it would all be -- you know, for us all to  
7           see after the STB findings were published.

8           Q.    So Ballard has no present plan to acquire a  
9           property interest?  And by a property interest, I mean a  
10          freight easement or any other kind of property interest in  
11          the line?

12          A.    I don't think so.  I didn't mean to say that.

13          Q.    Oh, you do have a plan?

14          A.    I'm saying it wouldn't be unusual that we had a  
15          freight easement or something.  There's a number of  
16          different ways these things can go.

17                In City of Seattle, we have a franchise, a  
18          30-year franchise that's renewable.  It's the same kind of  
19          a document, virtually the same language, maybe the  
20          identical language that Union Pacific and Burlington  
21          Northern have for all parts of the industrial district in  
22          Seattle, that they don't own, never have, and never will  
23          need to.

24          Q.    Have you requested such a franchise from any of  
25          the entities that own the real property?

1           A.     No, we're trying to. I haven't gotten anything  
2     from the Kirkland people in spite of going to more meetings  
3     and community gatherings and feel-good sessions in downtown  
4     Seattle and over on the Eastside.

5                     MR. MONTGOMERY: Keep talking. Just keep  
6     answering. Go ahead, keep going.

7                     THE WITNESS: But not a good audience with  
8     anybody at Kirkland who said, you know, you guys are right,  
9     we don't actually need to rip the track up, it's 100-foot  
10    wide, you guys have made us offers that we've read where  
11    the trail can be on one side or the other side and you  
12    would help to construct the trail, we didn't see it that  
13    way a while ago, but now we're interested in talking turkey  
14    about it. That's what I want to see. That has to be the  
15    next step. I'm not worried about the contract language at  
16    all. We're so far away from that, it's the people in  
17    Kirkland who don't want to share.

18            Q.     (By Mr. Cohen) So you know that Kirkland paid  
19    \$5 million for the Kirkland section of the line?

20           A.     Mm-hm (answers affirmatively), it did. Did  
21    Kirkland know it was railbanked and how the railbanking  
22    works and how getting things out of railbanking and back to  
23    use works? All we're doing is doing that.

24           Q.     In your discussions with Kirkland, did you --

25           A.     I didn't have any discussions with Kirkland. I

1        couldn't, and hardly did Doug Engle and any of his Eastside  
2        helpers. It's, like, you go to the council meetings and  
3        you sign up to speak and you get to have three minutes,  
4        maybe. And you sit there until the very last piece of the  
5        agenda after three hours of listening to them argue about  
6        if we're going to have a new dog kennel or something. And  
7        then there's like hardly any time. And the president of  
8        the council stands up and says, Well, we wouldn't be able  
9        to give you three minutes, could you each get by on two  
10       minutes. It's insulting. You can't seem to actually talk  
11       to anybody who is willing to just sit down and be square.

12            Q.     So let's talk about King County.

13            A.     Just as bad.

14            Q.     Just wait a second. Have you made any offers to  
15       King County to buy a freight easement over their section of  
16       the line?

17            A.     No. The one that's most logical for us would be  
18       to try to get some rights to operate our trains out of  
19       Woodinville down south down the valley towards Redmond.  
20       Redmond solved their problem quickly by ripping out all the  
21       tracks and signals that was inside their city limit in  
22       spite of the fact that there's three customers, not in  
23       downtown that they are so worried about, but on the  
24       outskirts of Redmond. There's the -- used to have rail  
25       service, would like to get it back.

1 I had hoped sometime maybe we can make a deal  
2 with Redmond to put the tracks back. The tracks are all in  
3 a big pile behind a cyclone fence in downtown Redmond, so  
4 are the signals.

5 Q. So Sound Transit also owns a little more than a  
6 mile of the line. Have you approached --

7 A. I didn't know that.

8 Q. I'm sorry?

9 A. I don't know that that's the case. Where would  
10 that be, sort of?

11 Q. Just north of NE 8th. So --

12 A. Is that outside the city limits of Redmond, we're  
13 talking?

14 Q. We're talking about the line --

15 A. Okay.

16 Q. -- between Woodinville and Bellevue, right.

17 Have you approached Sound Transit about buying a  
18 freight easement on their segment of the line?

19 A. No. But if -- I mean, first thing is to see what  
20 happens here with Kirkland. And if we're successful there,  
21 then, yes, I would go and try to make some contacts and see  
22 what their plans are. I've always -- all I know is what is  
23 in the Times paper, drawings from time to time and some  
24 text, and the timeline for that is a few years down the  
25 road.

1                   So that doesn't mean we shouldn't try to see what  
2                   kind of a deal could be negotiated, by any means, but it  
3                   does mean that it's not, like, an emergency at the moment.

4                   Q.    So you have not approached King County, Sound  
5                   Transit or Kirkland in efforts to acquire a freight  
6                   easement?

7                   A.    Well, Doug Engle has tried it.  And it's not --  
8                   sometimes when Doug puts together these meetings, I attend.  
9                   And sometimes I don't.  But he's worked hard, harder than I  
10                  have, to try to make those things happen.

11                  Q.    But he's not with Ballard Terminal Railroad, is  
12                  he?

13                  A.    I'm not sure that makes that much difference.

14                  Q.    Well, it's Ballard that's seeking to reactivate  
15                  rail service, correct?

16                  A.    That's right.  We are people with the NPC and  
17                  ends.

18                  Q.    What are those?

19                  A.    Those are the rights to run short lines.

20                  Q.    Right.  And so you have made no effort to acquire  
21                  property rights on the line?

22                  A.    Is that a bad thing, from your view?

23                  Q.    I'm just asking the question.  You've made --

24                  A.    I haven't, but today while we've been sitting  
25                  here, I've probably spent 10,000 bucks on gravel that I

1 don't know where it went because I wasn't down there at  
2 Meeker, so I got lots of things to do. I can't put all my  
3 effort into this Eastside project. But I'm here and doing  
4 this because this is one of the most key steps right now.  
5 The track would be gone if we hadn't done this. I'd be  
6 looking at in a pile at NK down by Puyallup and buying it  
7 back to use on our other railroads.

8 Q. So has Ballard reserved any money that you could  
9 use to acquire property interest in the line?

10 A. I haven't, but if I could make a deal to get  
11 property interest in the line, I think that the  
12 fund-raising would not be that hard.

13 Q. Okay.

14 A. But it's no sense worrying about funds. The  
15 first thing we have to do is to stop Kirkland from ripping  
16 the tracks up. We were like -- we only got it stopped  
17 about one day before it would have been tearing into. We  
18 do business with NK, I know those guys. They're good guys,  
19 they have good quality used track. This didn't allow them  
20 to stockpile anymore in Tacoma.

21 Q. Okay. Let me refer you to Exhibit 40, that's  
22 your verified statement.

23 A. Yeah.

24 Q. And on Page 2 of Exhibit 40 --

25 A. Okay.

1           Q.    -- bottom of the page, you state, "We have been  
2 engaged in active discussions with several shippers  
3 interested in restoring rail service via the  
4 Woodinville-Bellevue line segment."

5                   You see that statement?

6           A.    I see that.

7           Q.    So I'm going to ask you about CalPortland and Bob  
8 Wolford in a minute. I know about those two.

9           A.    Okay.

10          Q.    Tell me about all the others. Who else have you  
11 been engaged in active discussions with?

12          A.    We're not talking about hundreds, but on our  
13 other lines, we have some trans-loaders. Trans-loader is  
14 someone who has a warehouse or an open yard, hard surfaced  
15 yard, maybe a security fence around it, and has a rail  
16 siding where stuff from all over the country can be shipped  
17 by rail, which is cheaper per mile than by truck. Can be  
18 shipped by rail into the Puget Sound region, unloaded from  
19 the railcars, warehoused inside or outside, depending on  
20 the needs of the product, and then delivered the last few  
21 miles. In the trucker 's view, the last few miles is at  
22 least 150, if not 200 miles. That's a short haul for them  
23 these days on the freeways.

24                   So customer whose product is in the train gets it  
25 moved 95 percent of the way across the country at the

1 lowest possible rates because the rails are cheaper than  
2 the trucks by a factor of about 25 percent. And so that is  
3 a business called trans-loading, to get the product out of  
4 the railcars onto the ground or into a warehouse and send  
5 the boxcar, empty boxcar back to Burlington Northern. And  
6 then call the customer, Okay, your stuff has landed here,  
7 safe, no damage, and they make a deal to -- as to what the  
8 delivery schedule would be for the product. Maybe it's one  
9 chunk and it all goes on one truck or maybe it's something  
10 else. They dole it out month after month.

11 So I have two of those. We have two quite active  
12 trans-loaders on our line in Puyallup. And I've talked to  
13 those people about possible opportunity in Bellevue or  
14 Woodinville or Maltby. And those guys are always, their  
15 ears perk up. And they're little guys, like us, in most  
16 cases. And these people with, you know, some limits on  
17 their finances. They like the idea of them having another  
18 one of these distribution center reloads, trans-loading  
19 facility.

20 And so, it's hard for them to get too excited  
21 when all we are is in court, and we're the little guys  
22 against people with money they haven't counted yet. So you  
23 can only get them so excited about it, all right.

24 But those people, if we are able to make a deal  
25 to get down to Bellevue, it goes right through Totem Lake

1       where there's about, at least ten warehouses that use --  
2       that are right there to be served by rail, in some cases  
3       the sidings are still there even. What's inside of them,  
4       indoor basketball courts and all kinds of adaptive reuses.

5           Q.     Mr. Cole, we're going to get out of here at some  
6       point today if you would just focus on --

7           A.     I'm answering your question. Have we talked to  
8       other trans-loaders, to other people who would be  
9       interested, the answer is yes. If you want to settle that,  
10      that's it.

11          Q.     I want to know about the shippers interested in  
12      restoring rail service to serve businesses on the  
13      Woodinville-Bellevue segment, the line. That, as I said --

14          A.     That's the guys I've been talking about.

15          Q.     Who are they?

16          A.     I'm not giving you the names.

17          Q.     You're going to have to.

18          A.     I don't know that I do.

19          Q.     Okay.

20                 MR. COHEN: Mr. Montgomery, you should -- I  
21      won't address this to you.

22                 MR. MONTGOMERY: Thank you.

23          Q.     (By Mr. Cohen) I'm afraid, Mr. Cole, that if you  
24      don't share that information -- I can't even advise you.

25                 Who are the names of the shippers you've been

1        talking to about providing service on the  
2        Woodinville-Bellevue segment? Name all of them.

3            A.     Do I have to do this? These guys are already  
4        busy with their businesses, they're not big-time operators  
5        like Boeing or something. They don't need to be given a  
6        bumpy ride by people who don't want them to come to  
7        Kirkland and Bellevue. What do I do here?

8            MR. MONTGOMERY: I can't instruct you not to  
9        answer. It's your call.

10           THE WITNESS: I don't know. What happens to  
11        me if I don't answer? You're shaking your head, what does  
12        that mean?

13           Q.     (By Mr. Cohen) Mr. Cole, you made a  
14        representation to the Surface Transportation Board that  
15        Ballard Terminal Railroad is in active discussions with  
16        several shippers interested in restoring rail service via  
17        the Woodinville-Bellevue line segment. You mentioned two  
18        of them. We're going to talk about them shortly. I want  
19        to know if there are any others, and if so, who they are?

20           A.     I get calls from people in Portland, from people  
21        in Longview, from people in Spokane, they're often small  
22        trucking companies that have their toe in the trans-loading  
23        operation somewhere in those cities. I get -- it isn't  
24        like I get the call every day, but I get calls for those  
25        kind of people wondering about opportunities that might be

1 on our lines, our three lines here in the Northwest part of  
2 the state. And I've made some notes on a couple of those  
3 phone conversations.

4 But some of them I talk to and say, Well, these  
5 things are a possibility, why don't we try to get together  
6 sometime, drive up here and I'll show you what we've got  
7 and see if there's land that can be developed that would  
8 work that we already control. That's what's going on today  
9 down there where they dumped another, I don't know, 200  
10 tons of rock on the acre parcel without me being there.

11 I -- I -- doesn't seem right to me that they  
12 should come under whatever pressure you guys will apply to  
13 them just because they suggested they had an interest in  
14 trans-loading opportunity in the Northwest.

15 Q. Okay. So you're not willing to provide those  
16 names?

17 A. I'm afraid of what you would do to them. And it  
18 could end up that they say, Well, that guy Cole, he just --  
19 we were pestered to death and subpoenaed and so forth and  
20 so on. They're not going to like that. Can you make some  
21 kind of a pledge that you'll just talk to them and be nice  
22 and not give them a bunch of guff and make them be sitting  
23 in this chair next week?

24 Q. I can't give you that assurance.

25 A. Then that's not a very good deal. What kind of

1 They got telephone banks waiting for the phone to ring.  
2 When that rings and that guy calls, they have a  
3 knowledgeable guy with a proven track history, been in  
4 business for 30 years, and he can tell how much it will  
5 cost to unload the railcar and how much it will cost to  
6 dray it from there to the Port, which dock are you going,  
7 to, blah, blah, blah. In the end, we get paid 350 bucks  
8 for handling that boxcar.

9 Q. Have you --

10 A. That's the way business works.

11 Q. -- gotten any calls from anyone who is trying to  
12 deliver freight to Bellevue?

13 A. I don't think so. But sometimes, when I'm  
14 talking to these people, I say that there might -- you  
15 know, might be a possibility that we'd be in Bellevue  
16 sometime, but they, from the standpoint of looking for a  
17 trans-loading, they don't see a lot of difference between  
18 unloading in downtown Bellevue or unloading in downtown  
19 Woodinville. The few minutes of trucking. But if it was  
20 somebody, that said, well, I want to open up a gypsum board  
21 retail and wholesale outlet, Sheetrock, well, then it might  
22 make a difference to be downtown. That would be a close  
23 haul for a pot full of gypsum.

24 Q. Any calls from anyone trying to deliver freight  
25 to Kirkland?

1           A.    I don't think I've ever gotten any. But Kirkland  
2           does have an industrial district up there by the tracks,  
3           and there's one spur up there, and there used to be some  
4           others. You can see where there used to be some other  
5           spurs. I suppose might be able to be put back if, again,  
6           the right tenant was inside the building.

7           Q.    Any calls from any shippers seeking to move  
8           freight out of Bellevue?

9                     MR. MONTGOMERY: You mean other than --

10                    THE WITNESS: Other than the spoils people?

11           Q.    (By Mr. Cohen) Right. Other than Bobby Wolford  
12           and CalPortland, we'll talk about them.

13           A.    Bobby has a bunch of competitors. When these big  
14           giant basements are dug, there's, I don't know, I'll bet  
15           there must be a dozen truckers, or more than that maybe,  
16           that would be available for those things. I'm sure they'd  
17           partner up in partnerships that last as long as that  
18           excavation job is going, two or three of them get together  
19           and say, Look, together we can put 16 trucks on the road,  
20           three little guys and, you know, a few trucks. Wreckers  
21           are like that.

22           Q.    Has Ballard Terminal Railroad had any  
23           conversations with any truckers seeking to move?

24           A.    No. But, you know, if this goes the right way, I  
25           think phones will start to ring because Wolford is going to

1 have the best economic model and the other guys won't want  
2 to get left behind.

3 Q. I'll ask you about that. How about anybody  
4 trying to move freight out of Kirkland, any calls from  
5 shippers trying to move freight out of Kirkland?

6 A. No. The businesses look pretty small and a lot  
7 of what used to be -- I've walked the line a number of  
8 times. The buildings that are there and could be under  
9 lease or maybe they're owned, I haven't checked to see what  
10 they might be, but mostly they're the kind of a business  
11 that doesn't look like they need rail. You know, in-house  
12 television system installers and all kinds of things, but  
13 not something big like a distribution center for Sheetrock  
14 or plywood or roofing paper --

15 Q. Right. I'm sorry.

16 A. Well, roofing materials or something like that.

17 Q. Right. So let me ask you about CalPortland.  
18 Before this rail reactivation issue came up, did Ballard  
19 Terminal Railroad have a prior relationship with that  
20 company?

21 A. Boy, do we.

22 Q. Tell me about it.

23 A. So my partner has a business in Ballard, it's  
24 Salmon Bay Sand & Gravel Company. It's a ready-mix plant.  
25 And CalPortland is one of the major suppliers of the dry

1 in. So their costs to gather this piece of traffic is  
2 pretty darn low.

3 And then they would say, all right, let's see  
4 where it is. We'll figure out a rate and tell you it's so  
5 much a carload to get to Snohomish. And then we would just  
6 use our existing tariff to haul it to Woodinville and  
7 figure out what it's going to cost us to actually get over  
8 the next hill to Bellevue.

9 It's a little premature to ask about rates down  
10 to the last penny, but I imagine Doug has figured it out.  
11 Even if he just used the number that doubled the rate we  
12 have now, because we're doubling the distance, we got a  
13 hill on both of those to go over. Runs up the fuel bill, I  
14 can tell you that. So --

15 Q. Any written communications between Ballard and  
16 CalPortland about the service you're describing?

17 A. No. Doug may -- well, at least there was this  
18 letter done and I'm not sure if they have any other e-mails  
19 or not.

20 Q. Okay. Ballard doesn't have an off-loading  
21 facility in Bellevue?

22 A. How would we have one? How would we -- we can't  
23 get there. We're trying.

24 Q. And CalPortland doesn't have an off-loading  
25 facility in Bellevue?

1       darn thing.

2               Anyway, it looks like there could be a place  
3       somewhere where the railroad yard area is and the spurs to  
4       about a half dozen industries there.

5           Q.     But Ballard Terminal Railroad is not --

6           A.     I haven't made any overtures to anybody. Except  
7       Sound Transit, I would like to lease your old cardboard box  
8       building because it's ready to go.

9           Q.     To your knowledge, Wolford hasn't made any  
10       arrangements to land a loading facility in Bellevue?

11          A.     Yeah, I don't know of any. And he may have. Or  
12       he may be, you know, confident, if this things goes  
13       through, that will be simple.

14          Q.     Okay. Has Wolford talked to Ballard Terminal  
15       Railroad about a rate to haul freight --

16          A.     We haven't.

17          Q.     -- from Bellevue?

18          A.     Right, we haven't.

19          Q.     Okay.

20          A.     But he and Engle have talked about some rates.  
21       And I just haven't taken the time to analyze them and see  
22       if it works for us or not.

23          Q.     Mr. Cole, do you know where the -- this would be  
24       construction debris that Wolford wants to haul out of  
25       Bellevue, do you know where its destination would be, where

1           Q.     So this is the document that your interrogatory  
2     answer represents is the basis for your calculation of the  
3     \$10 million estimate. Have you ever seen this document  
4     before?

5                     MR. MONTGOMERY: Hold on a second. Object  
6     to the form and object to the extent it mischaracterizes  
7     the interrogatory response.

8           Go ahead.

9                     THE WITNESS: I don't think so. I think  
10    this is Doug Engle's work. But Doug and I have been joined  
11    at the hip for three years. And we think pretty much  
12    alike. And he's got this, this -- based on this is what's  
13    really the most important, and that's RailWorks. And so, I  
14    would have done the same thing. I would look at the  
15    RailWorks quote and say, Well, okay, let's see what this  
16    would be if we do this.

17          Q.     (By Mr. Cohen) And how do you know that this  
18    document is based on RailWorks?

19          A.     Well, something here that made me think of it.  
20    Because it talks about the Woodinville wye and blah, blah,  
21    blah, so much money to get this far. RailWorks total, it  
22    says right there.

23          Q.     Mm-hm (answers affirmatively).

24          A.     So it's RailWorks' footprint all over it. That's  
25    okay. RailWorks does nationwide, they probably do a

1       hundred bids a day. They're the biggest outfit in North  
2       America. And they're really good. That's the good news.

3           Q.     So --

4           A.     They're not the most expensive out there.

5           Q.     So --

6           A.     So I don't think anything wrong with using that.  
7       This is what someone has told us they'd be willing to do a  
8       job for. He's adapting the parts of it that make sense on  
9       the segment from downtown Bellevue to the end of the  
10      holding at Woodinville. It's the best numbers we can get.  
11      Why would they start from nothing. I wouldn't start from  
12      nothing if I was him. This is the thing I'd go to too.

13          Q.     So the bottom line is the \$10 million estimate in  
14      your verified statement is not your personal estimate at  
15      all?

16          A.     No.

17          Q.     Okay.

18          A.     That doesn't make it invalid --

19          Q.     That's okay.

20          A.     -- I'd say.

21          Q.     Let me ask you to look at one more exhibit.

22                   MR. FERGUSON: Let's take a three-minute  
23      break and make a copy of it.

24                   MR. COHEN: Off the record a minute.

25                   (Discussion held off the record.)

1 Q. (By Mr. Cohen) Mr. Cole, showing you what's been  
2 marked as Exhibit 32, could you take a minute and look at  
3 that document.

4 A. Okay.

5 Q. Let me know when you're ready to talk about it.

6 A. Okay. I will. It's going to be a minute or two.  
7 God, this is ancient history here. It's back in  
8 November 2012. I don't know anything about it. November  
9 we were just starting to get our arms around --

10 MR. MONTGOMERY: Would you wait for a  
11 question.

12 THE WITNESS: Oh, but you asked me.

13 Q. (By Mr. Cohen) Are you ready?

14 A. Yeah, ask me the question.

15 Q. Here's the question -- I want to ask you about  
16 Doug Engle's e-mail to Kurt Triplett and Sung Yang, that's  
17 the lower half of the page.

18 A. Yes.

19 Q. Doug testified two days ago that he made this  
20 proposal to Kirkland and to King County, and that in that  
21 proposal, as you can see in line one, he offered to drop  
22 the freight plans.

23 A. I see that.

24 Q. And therefore, reactivation as part of the deal?

25 A. Yes. He's going down a different path.

1 Q. He's going down a different path. And you were  
2 at the table for that testimony, right, you were here, you  
3 heard him testify?

4 A. Just two days ago?

5 Q. That's right.

6 A. Yeah.

7 Q. All right. And do you recall him saying that  
8 this was a big give on his part, but that he was willing to  
9 do it, if it would get the support of Kirkland and King  
10 County for excursion service?

11 A. I don't remember his exact words.

12 Q. Am I --

13 A. I don't think -- I'm not sure that I've ever seen  
14 this thing, so --

15 Q. Right.

16 A. -- I don't know much about it.

17 Q. My question is, in making that proposal, did he  
18 have your support as well?

19 A. I don't think --

20 MR. MONTGOMERY: Hold on a second.

21 No objections, I mean, nothing, go ahead.

22 THE WITNESS: I don't really know anything  
23 about this. It's so long ago. I haven't heard. I didn't  
24 hear about it then and I haven't heard about it since, so  
25 it must be dead as a doornail.

1           Q.     (By Mr. Cohen)   So in offering to drop freight  
2     service and reactivation, Doug didn't first consult with  
3     you and get your buy-in to that proposal?

4           A.     I don't recall.

5                     MR. MONTGOMERY:   I'm just going to object to  
6     the extent it asks you to comment on prior testimony which  
7     is improper.   And document speaks for itself.

8           Go ahead.

9                     THE WITNESS:   I don't remember anything  
10    about it.

11          Q.     (By Mr. Cohen)   You don't recall any  
12    conversation --

13          A.     No.

14          Q.     -- about this proposal?

15          A.     I mean, we've had a lot of phone conversations.  
16    You know, he spends two-thirds of his time in San Francisco  
17    where he lives.   Talk to him on the phone down here.   Talk  
18    to him when he's up here.   If this works, that's okay, too.  
19    It's like, this would be a scheme to get new track, I  
20    imagine, but on a fast track, not years and years later.

21                    But if a person is going to do this, I don't  
22    know.   You have to get some pledge from the bikers because  
23    once that trail is built, boy, it's impossible to get rid  
24    of it.

25          Q.     If you'd flip to the second page of that exhibit.

1 and Byron Cole with Ballard Terminal Railroad had won the  
2 competition. And then a year went by before we got to  
3 start running the railroad.

4 Q. Right.

5 A. So -- I haven't really looked at the thing very  
6 much since then. Started running it and we just ran.  
7 Never hardly hear a peep out of the Port ever. They never  
8 come to visit us, ask for a train ride, want to audit what  
9 we do, see if we're safe, nothing.

10 Q. So really, I want to go back to my last question,  
11 is it your understanding that the lease agreement between  
12 you -- between Ballard and Eastside Community Rail has  
13 taken effect?

14 MR. MONTGOMERY: Same objections I had.

15 THE WITNESS: Well, I'm not sure I want to  
16 hazard a guess. I'd have to talk to Doug.

17 Q. (By Mr. Cohen) Okay.

18 A. We've been running so long without getting paid  
19 by anybody, nobody would do this but me. And it's like,  
20 it's been 100 percent accident free, incident free, paid  
21 all the bills, and made up for that by working extra hard  
22 on our other two railroads. And have received no guff or  
23 guidance from the Port in all that time.

24 Q. When you say made it up by working extra hard on  
25 our other two railroads?

1           A.    Yeah, going out and beating the bushes and  
2           getting more trans-load business and whatever else we can  
3           do.

4           Q.    Is what you're making up on the other two  
5           railroads losses on this one?

6           A.    Yeah.  Like not getting paid.  Yes.

7           Q.    I wanted to call your attention to Paragraph 1 on  
8           Page 2.

9           A.    Of which document?

10          Q.    The lease agreement.  What is it?  Exhibit 30.

11          A.    Paragraph 1.

12          Q.    Paragraph 1.

13          A.    This little line?

14          Q.    Yes.

15          A.    I'd say --

16                   MR. MONTGOMERY:  Wait for a question.  Read  
17           it, I guess.

18          Q.    (By Mr. Cohen)  Yes, please read it.  And let me  
19           know when you have.

20          A.    Okay.  So all --

21                   MR. MONTGOMERY:  Please wait for a question.

22                   THE WITNESS:  All right.

23          Q.    (By Mr. Cohen)  My question is this, it sounds to  
24           me reading Paragraph 1, that Eastside Community Rail is  
25           basically turning over this line to you to operate a

1 railroad as Ballard sees fit.

2 Is that your understanding as well?

3 MR. MONTGOMERY: Object to the form.

4 THE WITNESS: Pretty much. On the other  
5 hand, we know how to do it and have been doing it for  
6 whatever it is, 16 years, no accidents, no incidents, et  
7 cetera. And not to say that Doug couldn't do it. He  
8 hasn't tried to do it. His interests are, you know, not  
9 quite the same as mine are, which is okay.

10 Q. (By Mr. Cohen) You see the statement in here  
11 that says the "Line shall be used by Ballard exclusively  
12 for railroad purposes"?

13 A. Right, well, so?

14 MR. MONTGOMERY: Do you see it?

15 THE WITNESS: I see it. I read it twice.

16 Q. (By Mr. Cohen) Okay. Do you read that statement  
17 to include excursion trains?

18 MR. MONTGOMERY: Object to the extent it  
19 calls for a legal conclusion.

20 THE WITNESS: We're not going to fund,  
21 finance, build, acquire an excursion train and the pieces  
22 of power to run it ever. It's way too expensive for us.

23 Q. (By Mr. Cohen) For "us," meaning Ballard?

24 A. Ballard.

25 Q. Yes.

1       agreement. I want to ask you about the lease compensation  
2       terms.

3           A.     Okay.

4           Q.     So, as best I can understand this document, it  
5       appears to me that Ballard's sole obligation to pay  
6       anything here to Eastside Community Rail is that you're  
7       going to pay Eastside \$10 a car and you're going to pay  
8       Eastside's \$10 a car fee to the Port?

9           A.     Mm-hm (answers affirmatively).

10          Q.     Am I getting it right?

11          A.     That's it.

12          Q.     So Eastside is leasing you their rail line?

13          A.     Mm-hm (answers affirmatively).

14          Q.     You're going to pay them \$10 a car?

15          A.     (Witness nods head affirmatively.)

16          Q.     What's in it for them?

17                   MR. MONTGOMERY: Objection; form and  
18       foundation.

19                   THE WITNESS: Can I --

20                   MR. MONTGOMERY: Go ahead.

21                   THE WITNESS: We're going to run the freight  
22       railroad, which is a federal obligation that they have.  
23       We're going to do it safely and not have it be something  
24       that the STB is always dropping in on us because we're  
25       chiseling on this or that or the other thing.

1 coincidence, after IP had moved out, there was a salvage  
2 guy who salvaged the track. And he just, I don't know,  
3 looked through the phone book, he called me up and asked me  
4 if I was interested in buying the track. I went out and  
5 looked at it and said, Yeah.

6 So we have the 90-pound rail and a pretty good  
7 set of ties and tie weights and spikes to put the spur back  
8 in. We have it down at our Puyallup yard.

9 But if Sound Transit's plans are such that you  
10 don't need that building until 7 years from now or  
11 something, maybe we could put a tenant in there and be easy  
12 to put the track back in.

13 Q. Another subject.

14 A. Could you respond to that?

15 Q. No. Sorry, I can't Mr. Cole. That's not how it  
16 works.

17 A. How does it work?

18 Q. Maybe we can talk about it offline, but right now  
19 I get to ask you questions.

20 A. Okay.

21 Q. Doug Engle, when he testified on Wednesday,  
22 suggested that there was an outstanding safety issue at a  
23 crossing in Maltby. Do you know anything about that?

24 A. I do.

25 Q. Can you tell me about it?

1           A.     There's actually two of them.

2           Q.     Okay.

3           A.     I was seeking some help from -- from Snohomish  
4     County on one of the crossings. It got mowed down by a  
5     18-wheeler making a sharp U-turn and the tractor got around  
6     the post that has the lights and the gates on it. But in  
7     making this U-turn, his trailer took a much shorter course  
8     and flattened the entire signal. And there was a hit and  
9     run, nobody saw it. Maltby is unincorporated, there's no  
10    cops.

11          Q.     How long ago was that?

12          A.     It's been about three months. And so I looked at  
13    the problem and decided that we should put a bunch of  
14    ecology blocks out in front of the signal when they replace  
15    it. It's just a signal mass, lights and so.

16          Q.     This one signal that came down, we're not talking  
17    cross bars or anything like that?

18          A.     No, this is isolated signal here and diagonally  
19    across the street the other isolator. But the street --

20          Q.     It's just a light and --

21          A.     It has gate arms.

22          Q.     Okay.

23          A.     These have a pair of gate arms, but only one was  
24    affected by this. The traffic pattern around this one is  
25    really bad. The other one is really benign and on the

1 other side of the street.

2 Anyway, this is getting a little cooperation with  
3 Public Works in Snohomish for getting some kind of a  
4 barrier around this so it doesn't get mowed down. It's  
5 like a \$30,000 project to, you know, build a new crossing  
6 there. And it's not protected from that kind of thing.  
7 So --

8 Q. That's okay. Who is --

9 A. Through Public Works.

10 Q. Whose responsibility do you think it is to  
11 replace that crossing arms and signals?

12 A. Well, in some cases it's the railroad's. It kind  
13 of depends what document was made when the signal was put  
14 up.

15 Q. So what about this case?

16 A. I don't know. I haven't taken time to try to  
17 research the archives. I don't have data on it. Certainly  
18 we didn't get that as a package --

19 Q. So you don't?

20 A. -- for one reason or another.

21 Q. You don't know whose responsibility it is to  
22 repair that signal at that crossing?

23 A. I don't. But there's been some cooperation with  
24 the Public Works director and people up that chain. And  
25 the fellow -- the second meeting out there with a fellow

1       who said, Well, look, we can make a barrier here. We've  
2       got some of these highway segments, of the barriers along  
3       the side of the highways, he said we've got some with a  
4       real sharp curve already formed in them. We can bring a  
5       couple of those down. We have the posts. We can build the  
6       barrier around the nose of this thing.

7               But I haven't heard from him since. And he had  
8       to go talk to his boss, could this be done. And I haven't  
9       heard from the boss and I've been really busy.

10       Q.     Is there any FRA requirements for this crossing  
11       to be signalized in order to allow cars to cross?

12               MR. MONTGOMERY: Foundation, and to the  
13       extent it calls for a legal conclusion.

14       Q.     (By Mr. Wagner) That you know?

15       A.     I don't know. I don't think it's a very good  
16       answer to just take it out. You know, there's more and  
17       more traffic year after year, not less and less. I think  
18       the answer is to build a barricade around the nose of it so  
19       it doesn't get run over.

20       Q.     Well, I'm not talking about protecting it. I'm  
21       asking about having it work. It's broken right now,  
22       correct?

23       A.     It's broken off at ground level.

24       Q.     So --

25       A.     I'm not putting anything back until we can have

1       some protection.

2           Q.     Okay.  So what about the other safety issue at  
3       Maltby?

4                   MR. MONTGOMERY:  Is this necessary to do on  
5       the record for the STB proceeding?

6                   MR. WAGNER:  Yes.

7                   MR. MONTGOMERY:  Can you tell me why at 5:30  
8       after we've been here eight and a half hours?

9                   MR. WAGNER:  I'm almost done.  I really am.

10                  MR. MONTGOMERY:  Object to the form.

11                  THE WITNESS:  That's why I thought it was  
12       off the record because it seemed so far out of whack.

13                  Do you want me to finish up?

14                  MR. MONTGOMERY:  What is the other issue?

15                  THE WITNESS:  It's another grade crossing  
16       that's damaged.  It's the one at Maltby Road intersection  
17       with -- it crosses our tracks, two tracks there.  And I  
18       don't know what the north/south road is there.

19           Q.     (By Mr. Wagner)  How long ago was that --

20           A.     This was like a maintenance deal.  Bad paving in  
21       the approach to the tracks.  So I went to look at it.  I  
22       met with somebody again, about the paving issue.  I got a  
23       voicemail from that guy's boss a couple days ago, that  
24       basically said, we don't want to hear from you.  We're  
25       going to go do it as we marked it out.

1           Q.    Mr. Cole, you're talking about Snohomish County's  
2   Public Works Department?

3           A.    I guess so, yeah.

4           Q.    So they told you that they are going to do the  
5   work to --

6           A.    I think they did it. I haven't been up there to  
7   see.

8           Q.    Were they planning to charge you for it?

9           A.    No. They would do it for free, but the problem  
10   is that this is a grade crossing where it doesn't meet the  
11   AREMA standards for the slope, the post slopes, AREMA  
12   standards are almost flat. So when you run a lowboy, a  
13   tractor with a lowboy across there, the lowboy high centers  
14   on our rails and it drags them out of gauge. And it  
15   doesn't necessarily break them, but it can derail the  
16   train.

17                I said, While you're fixing these approach slabs,  
18   which are pot holed on both sides, you need to sawcut and  
19   fill and make the approach not like this for our double  
20   tracks, but much more gradual slope so the lowboys don't do  
21   that. The code for how to engineer grade crossings points  
22   this out, please follow the code. This is no longer the  
23   1920s.

24           Q.    Okay.

25           A.    And I think they just did it anyway. They did

1        what they wanted to do and that's it. But I haven't been  
2        up there to see.

3            Q.     Mr. Cohen had asked you a lot of questions about  
4        your maintenance of way over the freight segment?

5            A.     This is all on that freight segment.

6            Q.     Right. And I'm paraphrasing, you currently don't  
7        have the funds to maintain the right of way to a level that  
8        would get it to Class 1?

9            A.     No, but we don't skimp on the maintenance on the  
10       grade crossing gates, lights, masts and all that stuff.

11          Q.     But you suggested that you prefer not to be  
12        hanging by your fingernails on an expected level?

13          A.     Yeah, yes.

14          Q.     So if you're at that point, why didn't you just  
15        raise your tariffs?

16                MR. MONTGOMERY: Object to the form. Object  
17        to the extent it mischaracterizes earlier testimony.

18                THE WITNESS: Can I go?

19                MR. MONTGOMERY: Sure.

20                THE WITNESS: We're going to.

21          Q.     (By Mr. Wagner) Okay.

22          A.     They are still at GNP's initial tariff set forth  
23        in like January 1, 2010.

24          Q.     What do you intend to raise them to?

25          A.     Burlington Northern takes about four and a half

1           So we've never -- reserve freight easement has  
2           never been in our hands. It was in GNP's, and it was  
3           probably the most valuable thing in the collection of  
4           assets, which was darn small, that GNP's trustee in  
5           bankruptcy had to offer. Doug bought the package. And we  
6           got the freight easement for that.

7           So we don't -- we don't have any -- we don't have  
8           any skin in the game anywhere on anything. So we don't --  
9           the only asset we have that's sort of in place is a cyclone  
10          fence around our locomotive and caboose behind the bar and  
11          grill at the Woodinville wye. I mean that's the only kind  
12          of thing that's stuck into the real estate. We haven't  
13          replaced a single tie or anything that we could say, Well,  
14          we put in 500 cross ties a year or so ago. We haven't done  
15          anything like that. So I don't think -- I don't think we  
16          have any assets there

17          Q.     (By Mr. Marcuse) Let me ask my question a  
18          slightly different way. Is it true that Ballard Terminal  
19          Railroad owns no property on the line south of milepost  
20          23.8?

21          A.     Where is 23.8?

22          Q.     I will represent to you that milepost 23.81 is  
23          south of the Woodinville wye and marks the northern most  
24          extent of the railbanked segment of the corridor.

25          A.     If you don't think that it's all railbanked, all

1 the way to Renton?

2 Q. I am asking you, does Ballard own any property on  
3 the Woodinville subdivision south of Woodinville?

4 A. No.

5 Q. Thank you.

6 A. Okay. Nor north of Woodinville.

7 Q. Thank you. To your knowledge, does CalPortland  
8 presently own any property on the line in Bellevue or  
9 Kirkland?

10 A. Well, you probably mean, not a piece of the right  
11 of way but facing on the right of way; is that true? When  
12 you say on the line, along the line?

13 Q. That's fine, yes.

14 A. Okay. Not -- I have no idea.

15 Q. Thank you. To your knowledge, does Wolford  
16 Trucking and Demolition own any property on or along the  
17 line south of Woodinville?

18 A. I think maybe they do.

19 Q. And where would that property be?

20 A. I think it's somewhere in upper Kirkland.

21 Q. What kind of property is that?

22 A. Zoning? I don't know. It looks to me like  
23 walking the line up there, it looks as though it's --  
24 was -- has been industrial for many years. The actual  
25 occupants of the buildings, I'm sure have turned over a

1 more precarious every day. At that point in time, were you  
2 not getting paid?

3 A. Yeah.

4 Q. Why is that?

5 A. Well, I mean we had two railroads, the Ballard  
6 Terminal and the Meeker Southern, they were running  
7 normally and producing income above expenses. But the  
8 freight business over here between Woodinville and  
9 Snohomish was just a drain because we weren't, for most of  
10 three years, we weren't getting any money. And then the  
11 bankruptcy judge took over, at least we started getting  
12 paid some, but he never was able to pay us the full amount.

13 Q. Or timely?

14 A. Or timely, yeah, I got about maybe three total  
15 payments from him. He's a nice guy, I didn't take him to  
16 task for it. He had a thankless job. He was probably glad  
17 when it was done.

18 But now, we have control of that. We do the  
19 invoicing and the payments are made directly to us, so  
20 that's quite a bit better. It's still a cumbersome system.  
21 We should become a handling carrier, I'm trying to address  
22 that with Burlington Northern. Takes forever to get paid,  
23 I mean like 60 days.

24 Q. It's predictable?

25 A. It's predictable?

C E R T I F I C A T E

STATE OF WASHINGTON       )  
                                  ) ss  
COUNTY OF KING           )  
                                  )

I, the undersigned Washington Certified Court Reporter, pursuant to RCW 5.28.010, authorized to administer oaths and affirmations in and for the State of Washington, do hereby certify: That the foregoing deposition of the witness named herein was taken stenographically before me and reduced to a typed format under my direction;

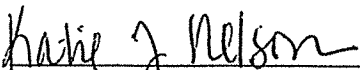
That, according to CR 30(e), the witness was given the opportunity to examine, read and sign the deposition after same was transcribed, unless indicated in the record that the review was waived;

That all objections made at the time of said examination have been noted by me;

That I am not a relative or employee of any attorney or counsel or participant and that I am not financially or otherwise interested in the action or the outcome herein;

That the witness coming before me was duly sworn or did affirm to tell the truth;

That the deposition, as transcribed, is a full, true and correct transcript of the testimony, including questions and answers and all objections, motions and exceptions of counsel made at the time of the foregoing examination and said transcript was prepared pursuant to the Washington Administrative Code 308-14-124 preparation guidelines;

  
Katie J. Nelson, CCR, RPR,  
Certified Court Reporter 2971 for  
the State of Washington residing at  
Redmond, Washington. My CCR  
certification expires on 10/22/13.

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7 Wednesday, May 29, 2013

8 To: Thomas C. Paschalis  
9 Fletcher & Sippel  
10 29 North Wacker Drive, Suite 920  
11 Chicago, IL 60606

12 Re: Surface Transportation Board  
13 Deposition of: BYRON COLE  
14 Date Taken: Friday, May 24, 2013

15 PLEASE TAKE NOTICE THAT:

16 Enclosed are two forms: "Affidavit" and a "Correction  
17 Sheet." Instruct the deponent to review the deposition,  
18 record any corrections on the Correction Sheet, and sign  
19 the Affidavit before a Notary Public. Return both forms to  
20 this office for their inclusion in the original transcript  
21 and distribution to other parties. The transcript will be  
22 forwarded to the appropriate party: July 1, 2013.

23 Thank you for your assistance in obtaining signature.

24 By: Katie J. Nelson, RPR, CCR, CCR No. 2971

25 cc: MATT COHEN, ANDREW MARCUSE, JORDAN WAGNER, TOM  
MONTGOMERY

## A F F I D A V I T

STATE OF WASHINGTON )  
 ) ss.  
COUNTY OF KING )

I have read my within deposition, and the same is true and correct, save and except for changes and/or corrections, if any, as indicated by me on the "CORRECTIONS" flyleaf page hereof.

\_\_\_\_\_  
BYRON COLE

SUBSCRIBED AND SWORN to before me  
this \_\_\_\_\_ day of \_\_\_\_\_, 2013.

\_\_\_\_\_  
NOTARY PUBLIC in and for  
the State of \_\_\_\_\_,  
residing at \_\_\_\_\_.  
My commission expires \_\_\_\_\_.

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7 C O R R E C T I O N S H E E T

8 PLEASE NOTE ALL CHANGES OR CORRECTIONS ON THIS SHEET BY  
9 PAGE AND LINE NUMBER, AND THE REASON THEREFOR.

| 10 PAGE | 11 LINE | 12 CORRECTION AND REASON |
|---------|---------|--------------------------|
| 13      | 14      | 15                       |
| 16      | 17      | 18                       |
| 19      | 20      | 21                       |
| 22      | 23      | 24                       |
| 25      | 26      | 27                       |
| 28      | 29      | 30                       |
| 31      | 32      | 33                       |
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| 88      | 89      | 90                       |
| 91      | 92      | 93                       |
| 94      | 95      | 96                       |
| 97      | 98      | 99                       |
| 100     | 101     | 102                      |

# **EXHIBIT 5**

BEFORE THE SURFACE TRANSPORTATION BOARD

-----

|                              |   |
|------------------------------|---|
| STB FINANCE DOCKET NO. 35731 | ) |
| BALLARD TERMINAL             | ) |
| RAILROAD COMPANY, L.L.C.     | ) |
| -ACQUISITION AND EXEMPTION-  | ) |
| WOODINVILLE SUBDIVISION      | ) |
|                              | ) |
| STB DOCKET NO. AB-6          | ) |
| (SUB. NO. 465X)              | ) |
| BNSF RAILWAY COMPANY         | ) |
| -ABANDONMENT EXEMPTION-      | ) |
| IN KING COUNTY, WA,          | ) |

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(Contains Confidential Testimony)

Deposition Upon Oral Examination Of

MICHAEL R. SKRIVAN

-----

May 28, 2013

300 Fifth Avenue, 1st Floor Conference Room

Seattle, Washington

REPORTED BY: PEGGY FRITSCHY HAMILTON, RPR, CSR, CLR

29906/No. 2704

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16

17

18

19

20

21

22

23

24

25

1 A. Yes, I do.

2 Q. Is that your signature?

3 A. Yes, it is.

4 Q. How did you come to write this letter?

13:17:32 5 A. It was a request from Mr. Payne, and I don't  
6 recall why he needed it. I really don't.

7 Q. Do you recall much discussions with Mr. Payne  
8 back and forth about the letter?

9 A. Not other than just a request Could you,  
13:17:58 10 Could you write a letter that you have -- there's a  
11 possibility of moving material. There's a potential  
12 to move materials.

13 Q. Okay. How would you describe CalPortland's  
14 interest in the ability to move material on a rail  
13:18:13 15 line between -- well, let's say the whole thing:  
16 between Snohomish through Woodinville down to  
17 Bellevue?

18 MR. STONE: Object to the form of the  
19 question.

13:18:24 20 A. Can you rephrase that? What is our interest?

21 Q. Let me ask you this way: Why would you write  
22 a letter like Exhibit-47 on behalf of CalPortland?  
23 What's the upside, if you will, to CalPortland?

24 A. If he builds his railroad, I get to sell him  
13:18:43 25 aggregate.

1 Q. With Mr. Payne it was selling him aggregate  
2 directly?

3 A. Correct.

4 Q. In your discussions with Mr. Payne back in  
13:18:52 5 2010, was there any consideration of being able to  
6 supply other customers using the rail?

7 A. He always brought that as a subject of  
8 conversation, that if we get this up and running, you  
9 know, you can utilize the rail to move, move  
13:19:09 10 materials, and I'd never had experience with that  
11 until he started educating me that that was the  
12 possibility.

13 Q. And did anything come of that? Did you ever  
14 sell --

13:19:23 15 A. No.

16 Q. -- materials to Mr. Payne?

17 A. No.

18 Q. Have you -- by "you," I mean CalPortland --  
19 ever used the freight service that exists now between  
13:19:31 20 Woodinville north to Snohomish?

21 A. No.

22 Q. After this December 3rd letter -- actually,  
23 let me back up and ask you this: Take a look at the  
24 letter. You mentioned there's some projects scheduled  
13:19:48 25 for the SR520 Bridge -- this is the third line --

1 into the marketplace. And when you talk with  
2 contractors and truckers numbers start to be carried  
3 out, and part of my job is to forecast out for the  
4 future.

13:30:50 5 And so these are kind of what I was -- you  
6 know, I was kind of in the back of my mind, I've got  
7 to be ready for these kind of volumes coming up not --  
8 maybe not this year or the next year, but in the next  
9 years. It's going to be coming down the road. That's  
13:31:08 10 just what I do. We talk. We try and stay abreast of  
11 the market and understand what the potential is,  
12 because by the time a job comes out and it's written  
13 on Builders Exchange, I'm dead if I don't know about  
14 it before that.

13:31:22 15 Q. Do you know why Mr. Engle wanted this letter  
16 from you?

17 A. Not exactly. He mentioned he had a meeting  
18 with City of Kirkland. He had a hearing or something  
19 with the City of Kirkland, so that was kind of what I  
13:31:39 20 thought it was for, showing his support.

21 Q. At the time you wrote this letter, were you  
22 still thinking primarily of being able to sell  
23 aggregate to Eastside Community Rail for use on the  
24 rail line, or were you thinking of other uses of the  
13:31:53 25 rail?

1           A.    Oh, absolutely, that's my primary focus was  
2   to -- at least that was more finite to me. But like I  
3   mentioned earlier, I think kind of in the abstract I'm  
4   thinking, Okay, if I can make a friend that has a  
13:32:07 5   service that I can utilize that my competitors don't,  
6   that had my wheels turning also.

7           Q.    At the time you wrote the March 19 letter,  
8   did you have any contracts to either remove any of the  
9   spoils from any of the projects you mentioned, the  
13:32:25 10   I-405 or SR520 projects, the excavated materials that  
11   are mentioned in the letter?

12          A.    No contracts, no.

13          Q.    Did you consider this letter to be a request  
14   from Eastside Community Rail to provide rail service  
13:32:40 15   to you?

16          A.    No. Not a request to provide service, no.

17          Q.    At the time you wrote this letter, did you,  
18   CalPortland, have a need for Eastside Community Rail  
19   to provide rail service for you?

13:32:50 20                 MR. MONTGOMERY: Object to the form of the  
21   question.

22          A.    Define "need."

23          Q.    Did you need something moved by rail, you  
24   know, in the immediate future, foreseeable future  
13:33:02 25   looking forward from March 19?

1 the time when Hunter and I were talking.

2 Q. About this deposition?

3 A. Yeah.

4 Q. Putting aside the deposition, you didn't talk  
13:41:04 5 to any lawyers representing Eastside Community Rail or  
6 Ballard about your letter to the STB?

7 A. No, I did not.

8 Q. Now, at the time you signed the March 25th  
9 letter, sort of the same series of questions I had  
13:41:29 10 about the March 19 letter: Did you consider this

11 letter to be a request to Eastside Community Rail or  
12 to Ballard to provide rail service to CalPortland?

13 MR. STONE: Object to the form of the  
14 question.

13:41:42 15 A. Could you say that again, so I can listen.

16 Q. Sure. Did you consider this March 25th  
17 letter to be a request to Eastside Community Rail or  
18 to Ballard Rail to provide freight rail service to  
19 CalPortland?

13:41:58 20 MR. STONE: Object to the form of the  
21 question.

22 A. No, I did not.

23 Q. At the time that you wrote this letter, did  
24 you have an immediate, within the next three weeks,  
13:42:07 25 need for Eastside Rail or Ballard Rail to transport

1 material by rail?

2 A. No, I did not.

3 Q. Again, the March 25th letter also references  
4 projects -- I'm looking at the very end of the third

13:42:23 5 paragraph. "We are currently targeting projects on  
6 I-405 and SR520 for the 2013 and 2014 construction  
7 seasons." Do you see that in the third paragraph?

8 A. Yes.

9 Q. Did CalPortland have any contracts for those  
13:42:41 10 jobs at the time you wrote the letter?

11 A. No contracts, no.

12 Q. Had they been bid yet? Had you submitted any  
13 bids?

14 A. We submitted a bid on a project on 405, but  
13:42:56 15 we had not been informed of any involvement.

16 Q. I'm sorry. When you say "not been informed  
17 of any involvement," what do you mean?

18 A. You put out a bid, you don't always get it,  
19 and you may not know till the project is actually a  
13:43:10 20 couple of weeks from taking delivery. A lot of  
21 contractors keep their cards very close to the vest.

22 Q. I see. You submitted it but didn't know  
23 whether it had been accepted or rejected yet.

24 A. No.

13:43:22 25 Q. Did your bids include an assumption that

1 CalPortland would use rail to deliver material?

2 A. Not in my bid, no.

3 Q. Okay. Did you discuss this March 25th letter  
4 with anyone else at CalPortland?

13:43:52 5 A. I did not.

6 Q. Now, the letter says that you were targeting  
7 these projects on I-405 and SR520 for the 2013 and  
8 2014 construction seasons. When would you have to  
9 know that freight rail service was available to be  
13:44:26 10 able to take advantage of freight rail to serve those  
11 projects if you got the work; in other words, how much  
12 lead time would you need that there was freight  
13 service to be had in order to take advantage of it?

14 A. That's hard to say, because it depends on  
13:44:45 15 what kind of communication I get from a customer on  
16 his needs or wants. Sometimes I get six months'  
17 advanced notice, sometimes I get six hours. I mean,  
18 it's not an exact science.

19 Q. Okay. Has CalPortland signed any kind of a  
13:45:22 20 contract or agreement with Eastside Community Rail?

21 A. We have not.

22 Q. Any kind of contract or agreement with  
23 Ballard Terminal?

24 A. We had a material supply agreement with  
13:45:32 25 Ballard.

1 Q. What was that for?

2 A. To sell them ballast material for their rail  
3 needs. In order to be able to move forward with a  
4 formal quote, I had GNP set up with a credit account.

13:45:47 5 So we submitted a credit application, and in order to  
6 get the credit application approved, we had to see  
7 that they were going to purchase some material from  
8 us, so I had them sign a material supply agreement.

9 Q. Who was it between? CalPortland and GNP?

13:46:07 10 A. GNP and Thomas Payne.

11 Q. My question was whether you had any contract  
12 with Eastside Community Rail.

13 A. No.

14 Q. Or with Ballard?

13:46:18 15 A. No.

16 Q. And the contract with GNP, about when was  
17 that? When did you enter into that?

18 A. I don't recall. If I had to guess, it would  
19 be in the 2010 range. I took over as aggregate sales  
13:46:42 20 manager in approximately January of 2010, so I  
21 wouldn't have been in a position to discuss any of  
22 that, but it would have been in that calendar year  
23 probably.

24 Q. Other than the I-405 and SR520 projects that  
13:47:09 25 are mentioned in the March 25th letter, are there any

1 other projects that you would be targeting or aware of  
2 on behalf of CalPortland in the area that would be  
3 served by the line between Woodinville and Bellevue?

4 A. Firm projects that are out on the street?

13:47:28 5 Q. Yes.

6 A. No. There's a lot of rumors.

7 Q. And then are there, whether you call them  
8 rumors or potential projects, those are other projects  
9 you might -- are you targeting them?

13:47:41 10 A. Absolutely.

11 Q. I take it there are potential projects. You  
12 have no contracts?

13 A. Correct.

14 Q. There's no need for CalPortland to use rail  
13:47:49 15 service or any other kind of transportation service  
16 for those projects; is that correct?

17 A. Not today.

18 (Exhibit-53 marked.)

19 Q. Let me hand you what we've marked as  
13:48:24 20 Exhibit-53. This is an email chain. The top email at  
21 the top of the page appears to be from you to  
22 Mr. Engle dated May 1st, 2013. Do you recognize that?

23 A. Yes.

24 Q. Do you recognize this as an email you wrote?

13:48:41 25 A. Yes, I do.

1 Q. Turning now to the section of the line  
2 itself, the railroad line itself between Woodinville  
3 and Bellevue. Does CalPortland own any property along  
4 the rail line?

14:11:54 5 A. No, we do not, that I'm aware of.

6 Q. Let me take a minute.

7 (Exhibit-56 marked.)

8 Q. I've handed you what we've marked as  
9 Exhibit-56. I'll represent to you that the section of  
14:12:35 10 rail line that's highlighted or bounded in red is  
11 approximately the section of line we're talking about  
12 here between Woodinville and Bellevue on which Ballard  
13 is trying to reinstate service. Have you seen a map  
14 of that line before?

14:12:51 15 A. Just from articles in the newspapers  
16 depicting it.

17 Q. Are you familiar with this rail corridor at  
18 all?

19 A. Not with Eastside Rail, but I have been in --  
14:13:07 20 there's -- I don't know want to call it abandoned  
21 because I think there's still some movement, but there  
22 is a grossly underutilized rail switchyard across  
23 I-405 in Bellevue that I have looked at.

24 Q. Do you know approximately where that is?

14:13:28 25 A. Just south of the Home Depot where 520 comes

1 across. You can see the Home Depot down, I believe --

2 Q. Would you put a red X by it.

3 A. I believe it's right in this area here  
4 (indicating).

14:13:44 5 Q. Right where 520, 520 and 405?

6 A. Right.

7 Q. When you say "rail switchyard," what does  
8 that mean?

9 A. I don't know. That's my interpretation of  
14:13:53 10 it. I'm not a rail expert.

11 Q. That's why I'm asking what do you think it  
12 is?

13 A. There's a lot of warehouses in there that are  
14 not being used and there's a lot of rail lines going  
14:14:04 15 in and out of and there's a lot of different switches.

16 Q. Why do you say it's grossly underused?

17 A. A lot of abandoned warehouses and property in  
18 there, so it looks like there could be some  
19 opportunities.

14:14:17 20 Q. Looking at this map of the line, does this  
21 help you determine whether or not to your knowledge  
22 CalPortland owns any property along the line?

23 A. It really doesn't help me, because I'm not  
24 involved in that part of our business. I just don't  
14:14:41 25 know land.

1 Q. I'm going to follow up with the same kind of  
2 question, but are you aware of any land that  
3 CalPortland leases along the rail line?

4 A. I am not.

14:14:51 5 Q. Or any agreements to make use of any land  
6 along the line?

7 A. I am not.

8 Q. Okay. In connection with your consideration  
9 of what Eastside Rail is proposing, do you know if you  
14:15:03 10 or anyone else at CalPortland has looked at locations  
11 where aggregate or other materials could be off-loaded  
12 from a train onto trucks for delivery to a customer?

13 MR. STONE: Object to the form of the  
14 question.

14:15:16 15 Q. Let me back up and ask you this: One of the  
16 things you said was that the rail could provide an  
17 opportunity for CalPortland to sell aggregate.

18 A. Correct.

19 Q. I assume that the aggregate would be  
14:15:29 20 transported from one of CalPortland's facility down  
21 the line to someplace, and then I assume that it would  
22 have to be removed from railcars to be delivered to  
23 the customer's site. Is that a fair assumption?

24 A. Yes.

14:15:43 25 Q. My question is whether you or anyone at

1 seven-man rock like the size of this table. I just  
2 don't have a deposit that makes that. But everything  
3 smaller than that we do.

4 Q. What you would ship I suppose would depend on  
14:25:59 5 whether someone orders it?

6 A. That's correct.

7 Q. As of now you have no contracts that would  
8 require you to deliver any of that material by rail  
9 along the Eastside Community Rail lines; is that  
14:26:11 10 correct?

11 A. That's correct.

12 Q. If you can give me a minute, let me  
13 double-check things, but I think we're almost done.

14 (Discussion off record.)

14:28:18 15 Q. I've got nothing further remember. Thank  
16 you.

17 E-X-A-M-I-N-A-T-I-O-N

18 BY MR. MONTGOMERY:

19 Q. I'll ask you a few questions, if I may.  
14:28:30 20 My name is Tom Montgomery and I represent  
21 Ballard Terminal Railroad.

22 Mr. Skrivan, how are you today?

23 A. Good. How are you?

24 Q. Fine. Just be aware the court reporter to  
14:28:39 25 your left is going to be trying --

## 1 C E R T I F I C A T E

2 STATE OF WASHINGTON )  
 ) ss.  
3 COUNTY OF KING )

4 I, the undersigned Registered  
5 Professional Reporter and Washington Certified Court  
6 Reporter, hereby certify that the foregoing deposition  
7 upon oral examination of MICHAEL R. SKRIVAN was taken  
8 before me on May 28, 2013 and transcribed under my  
9 direction;

10 That the witness was duly sworn by me  
11 pursuant to RCW 5.28.010 to testify truthfully; that  
12 the transcript of the deposition is a full, true, and  
13 correct transcript to the best of my ability; that I  
14 am neither attorney for, nor a relative or employee  
15 of, any of the parties to the action or any attorney  
16 or counsel employed by the parties hereto, nor  
17 financially interested in its outcome.

18 IN WITNESS WHEREOF, I have hereunto set  
19 my hand and seal this date: May 30, 2013.

20

21 \S\ PEGGY FRITSCHY HAMILTON, RPR, CSR, CLR

22 Court Reporter in and for the State of  
23 Washington, residing at Seattle. License expires  
24 07-02-12.

25

## **EXHIBIT 6**

---

BEFORE THE SURFACE TRANSPORTATION BOARD

---

STB FINANCE DOCKET NO. 35731                   )  
BALLARD TERMINAL                                   )  
RAILROAD COMPANY, L.L.C.                        )  
-ACQUISITION AND EXEMPTION-                   )  
WOODINVILLE SUBDIVISION                        )  
STB DOCKET NO. AB-6 (SUB. NO. 465X)           )  
BNSF RAILWAY COMPANY                            )  
-ABANDONMENT EXEMPTION-                        )  
IN KING COUNTY, WA                                )  
)

---

DEPOSITION UPON ORAL EXAMINATION

---

OF

BOBBY WOLFORD

---

Taken at 600 University Street, Suite 3600

Seattle, Washington

DATE: Thursday, May 16, 2013

REPORTED BY: Katie J. Nelson, RPR, CCR  
CCR NO.: 2971

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1           A.     Just got a job driving a truck and then I bought  
2     my own truck and now I have 20 trucks.   Worked real hard  
3     all my life.

4           Q.     Okay.   I read in your letter to the STB that you  
5     formed your company in 1972?

6           A.     Mm-hm (answers affirmatively).

7           Q.     Is that correct?

8           A.     Back in there sometime, a long time ago.

9           Q.     Okay.   And the company, you formed it as Wolford  
10    Trucking and Demolition, Inc.?

11          A.     Wolford Trucking and Salvage was the corporate  
12    name at that time.

13          Q.     Okay.   And you're the owner of Wolford Trucking  
14    and Demolition, correct?

15          A.     Yes.

16          Q.     Do you have any other -- do you hold any other  
17    offices in the company?

18          A.     I have two corporations, one is an equipment  
19    sales and rental company, too.

20          Q.     What's the name of your other company?

21          A.     Bobby Wolford Equipment Sales and Rentals, Inc.

22          Q.     Okay.   Does it share office space with --

23          A.     Yes.

24          Q.     -- with Wolford Trucking and Demolition?

25          A.     Same office.

1           A.     Mm-hm (answers affirmatively).

2           Q.     We asked for all materials concerning the  
3     construction projects that Wolford, your company, Wolford  
4     Trucking and Demolition is, quote, "currently targeting as  
5     stated in your March 27th, 2013, letter to Cynthia Brown,  
6     including any invitations for bids, proposals for bids,  
7     studies or estimates, and contracts."

8           A.     These aren't out yet. In the next two years,  
9     they'll be looking for bids to move dirt out of Bellevue.

10          Q.     So are you saying that you haven't received any  
11     invitations for bids?

12          A.     Not yet.

13          Q.     Okay.

14          A.     But it's coming.

15          Q.     If you turn to the second to last page of this  
16     Exhibit 2, you'll see a Number 29 in the right-hand corner.

17          A.     Mm-hm (answers affirmatively), yes.

18          Q.     Okay. Is this part of the letter that you signed  
19     that was sent to Cynthia Brown of the Surface  
20     Transportation Board?

21          A.     No. I didn't sign this, I don't believe. Did I?  
22     This isn't the one that Ernie wrote? Oh, sorry. Oh, yeah,  
23     that's part of the dirt removal, I'm sorry, yes --

24          Q.     Did you just say that Ernie wrote this letter?

25          A.     Yes.

1 Q. That would be Ernie Wilson?

2 A. Yes.

3 Q. Of Eastside Community Rail?

4 A. Yes.

5 Q. He wrote this letter?

6 A. Yes. I read it and approved everything he wrote.

7 He did a great job.

8 Q. So, Mr. Wolford, if you take a look at the second  
9 page of the letter you signed, first full paragraph, can  
10 you read the sentence beginning with the words, "We are  
11 currently"?

12 A. Yes.

13 Q. Would you read it out loud?

14 A. We are currently targeting projects on 405 and  
15 520 for the 2013, '14 construction seasons.

16 Q. Okay.

17 A. Yes.

18 Q. Turning back to the Attachment A in this exhibit,  
19 so it's back towards the front.

20 A. Mm-hm (answers affirmatively).

21 Q. Do you understand what's numbered here as  
22 Number 6 asking for all materials concerning the  
23 construction projects that your company is, quote,  
24 "currently targeting," do you understand that was in  
25 reference to the sentence you just read in your letter to

1 Cynthia Brown?

2 MR. MONTGOMERY: Object to the form.

3 THE WITNESS: Yes.

4 Q. (By Mr. Ferguson) Okay. I just want to make  
5 sure that you understood what we were referencing in the  
6 document request.

7 A. Yes.

8 Q. Okay. And you said that you haven't received any  
9 invitations for bids --

10 A. Not yet.

11 Q. -- for these projects?

12 So are you aware of any invitations for bids for  
13 these referenced projects? Are you aware -- let me  
14 rephrase that, it's a little bit garbled.

15 Are you aware that any invitations for bids exist  
16 for these projects you're currently targeting?

17 A. When they come out, then we give them prices. So  
18 they're not let yet, they're not even out to bid yet. They  
19 will.

20 Q. Okay. So does your company have any documents  
21 for these projects that it's targeting?

22 A. Not yet because they're not out yet. They will  
23 in the next two years.

24 Q. Okay. Thank you. Finally, looking at the  
25 request that's under Number 7.

1 Q. Does your company have any business dealings with  
2 Ballard Terminal Railroad currently?

3 A. Not now. We were going to put some ecology  
4 blocks and do some work for them but we never did.

5 Q. Okay.

6 A. A truck hit a railroad crossing sign in Maltby  
7 and we were going to -- it was discussed, but we haven't  
8 got a contract with them to do the repair yet.

9 Q. Okay. The subpoena that we sent to you, this is  
10 Exhibit 1, other than your attorney Ms. Alvord, did you  
11 discuss this with anyone?

12 A. You. You called and asked if it would be all  
13 right. I should have said no, but here I am.

14 Q. Anyone else?

15 A. No.

16 Q. Did you discuss it with Mr. Engle?

17 A. Oh, yes. I told him I was coming to this meeting  
18 today.

19 Q. Did you discuss it with Mr. Cole?

20 A. No, I haven't talked to Byron Cole about it.

21 Q. What did you tell Mr. Engle about the subpoena?

22 A. Said I'm going to come here and -- that letter I  
23 signed, everything in it was true, so I signed it. That  
24 was what I was going to stick to. That's...

25 Q. Did he tell you anything about the subpoena?

1 MS. ALVORD: Sure. Here Tom.

2 MR. MONTGOMERY: Thank you.

3 MS. ALVORD: Oh, thank you. Let me see,  
4 which one is 3?

5 MR. FERGUSON: Three should be the general  
6 map.

7 MS. ALVORD: I've got two of the same.

8 MR. WAGNER: Here, switch one with Tom.

9 MS. ALVORD: Okay. 3 is the colorful one.

10 MR. FERGUSON: The general map, not the  
11 photograph.

12 Q. (By Mr. Ferguson) Mr. Wolford, I understand that  
13 your facility is on what is marked on the general map, this  
14 is Exhibit 3, the freight segment; is that correct?

15 A. Yes.

16 Q. Can you --

17 MS. ALVORD: Over here.

18 THE WITNESS: No, over here.

19 MS. ALVORD: I'm sorry, for clarification  
20 are we looking at Exhibit 3?

21 Q. (By Mr. Ferguson) Let's look at Exhibit 3 first.

22 Would you mark on the map with this felt pen,  
23 which should show up, the approximate location of your  
24 business's yard?

25 A. Which one? The one in Kirkland or the one in

1 MR. FERGUSON: That --

2 THE WITNESS: -- got off the Internet.

3 MR. FERGUSON: No, someone in the Kirkland  
4 Planning Department helped to create the map.

5 MS. ALVORD: Kirkland Planning, okay.

6 THE WITNESS: Probably there (indicating).

7 Okay. You know this big, I presume that's where it is.

8 MS. ALVORD: Off of 522.

9 THE WITNESS: Mm-hm (answers affirmatively).

10 MR. MONTGOMERY: Is that the Maltby one?

11 THE WITNESS: It's a 10-acre facility. This  
12 is my recycling facility.

13 Q. (By Mr. Ferguson) Is that the only facility of  
14 Wolford Trucking and Demolition, Inc.?

15 A. Yeah.

16 Q. There are no other properties where Wolford  
17 Trucking and Demolition conducts its business?

18 A. No, that's it.

19 Q. Okay. Just to be clear, I'm just trying to get  
20 an idea of where your business is?

21 A. It's right there.

22 Q. Okay. And turning to Exhibit 4, is Wolford  
23 Trucking and Demolition's facility located on this map?

24 A. Yeah, right there.

25 Q. Okay. If you can, would you draw an outline

1 spoils."

2 That's going on currently on Highway 522 right  
3 now. They're removing spoils that could be utilizing  
4 railroad now.

5 Q. We'll come to it. If you could finish reading  
6 the paragraph.

7 A. "We estimate the volume of these projects at over  
8 three million cubic yards of construction spoils over the  
9 next several years."

10 Q. Thank you.

11 MR. MONTGOMERY: Did you skip a sentence?

12 THE WITNESS: It's all gobbledygook. Who  
13 cares.

14 Q. (By Mr. Ferguson) When you say it's  
15 gobbledygook, what do you mean?

16 A. You're overbearing. All of this is gobbledygook  
17 to me. I'm a cut and dry guy, just want the railroad left  
18 in so we can save the taxpayers some money transporting  
19 dirt.

20 Q. Okay. You've said in this letter that you are  
21 currently targeting projects on I-405 and SR520 for the  
22 2013 and 2014 construction seasons?

23 A. Yes.

24 Q. Is that correct?

25 A. That's correct.

1 Q. Are there particular projects that you are  
2 targeting?

3 A. Not yet, they haven't been let. The contracts  
4 haven't been let, but when they do, we'll be there to  
5 service them if the rail is there.

6 Q. When you say you're targeting projects, what do  
7 you mean?

8 A. They're in the future, when the contract is let,  
9 we will bid on it.

10 Q. Are there particular projects that you have in  
11 mind, though?

12 A. Moving spoils out of the -- by Lincoln Square is  
13 our biggest one in Bellevue.

14 Q. But is there a particular highway project that  
15 you are specifically planning to bid on?

16 A. We'll give prices to all of them. Right now,  
17 they're not let yet.

18 Q. But how do you -- do you know whether there are  
19 any projects planned?

20 A. According to the papers, I read them, you read  
21 them, yes, there's big projects in the works for the city  
22 of Bellevue.

23 Q. For I-405, are there particular areas where  
24 construction is to take place that you are considering  
25 bidding on?

1           A.     Merlino just got a huge contract for 405. We  
2     would give him dirt prices if we had a rail.

3           Q.     Merlino, you said?

4           A.     Merlino Construction just did a huge, I don't  
5     know how many million project for 405. It's still going  
6     on.

7           Q.     Merlino is a contractor?

8           A.     Merlino Construction, yeah.

9           Q.     Has Merlino Construction approached you about  
10    working with it on a highway project?

11          A.     No, because we don't have our rail in place yet.

12          Q.     Are there any other projects on I-405 other than  
13    the contract that Merlino has that you are targeting?

14          A.     I'd have to talk to my superintendent and  
15    estimator. It's not my -- I don't run that part of my  
16    company.

17          Q.     Are there projects on 520 that your company is  
18    targeting?

19          A.     Yeah, we work with Scarsella Construction,  
20    they're currently doing one on 520.

21          Q.     You are currently working on a project for  
22    highway 520?

23          A.     Scarsella Construction is, and we subcontract to  
24    them, yes.

25          Q.     Are there other projects on 520 that you are

1 currently targeting?

2 A. That I'm aware of, no, but my estimator would  
3 know. You have to understand my role in my company. I  
4 work in the yard.

5 Q. Just to clarify, is your company currently  
6 working on a project for 520?

7 A. Subcontracted, I believe. I'm not sure. I have  
8 20 trucks, they work every day, there's different  
9 contractors. Again, my superintendent and estimator would  
10 know.

11 Q. Is your estimator -- who are you referring to  
12 when you refer to your estimator?

13 A. Scott Miller, Ollie, Jack, that's my group that  
14 runs my company.

15 Q. So three individuals?

16 A. Yes.

17 Q. Okay. When you refer to your superintendent, who  
18 are you referring to?

19 A. Scott Miller, estimator.

20 Q. So is it accurate that you yourself do not know  
21 whether your company --

22 A. That's accurate, yes.

23 Q. Let me finish, please.

24 Is it accurate that you yourself do not know  
25 whether your company is working on a project on 520?

1 Q. (By Mr. Ferguson) Mr. Wolford, this property  
2 that you've been referencing, do you know if it is north or  
3 south of the Home Depot?

4 A. Sir, you have to ask Doug Engle. You're going to  
5 see him next week. You ask him these questions. These  
6 aren't for me.

7 Q. This property that you've referenced that is near  
8 the Home Depot, what would it be used for?

9 A. Staging area to load trucks. The gondolas to go  
10 up the track that you want to rip out.

11 Q. Would this be called a trans-loading facility?

12 A. Yes, it would.

13 Q. Okay. And do you plan to run -- excuse me, do  
14 you know if, is your plan to have railcars run --

15 A. Staged.

16 Q. -- to that area?

17 A. Staged and loaded. They would go night and day.

18 Q. After the railcars go to that area, where would  
19 they go?

20 A. Up to Snohomish to build the trails to rail  
21 nature trail for people for Snohomish County.

22 Q. Okay. I'd like to hand you what's been marked as  
23 Exhibit 10. When you say dirt will go to Snohomish, what  
24 do you mean? Will it go to the city of Snohomish?

25 A. No. Another question for Doug Engle. I've never

1       been up there. I've just been told. That's -- there's  
2       23 miles of road or trails we're going to build with these  
3       spoils out of Bellevue. I don't know the particulars,  
4       you'll have to ask Mr. Engle. He's involved in that. I'm  
5       not. I will be, if you don't rip the rail out.

6           Q.     Let's take a look back at, looking back at  
7       Exhibit 10.

8           A.     Okay.

9           Q.     Is it your testimony that you do not know where  
10       the excavation spoils will be deposited?

11          A.     Yes, that's my testimony. Ask Mr. Engle, he  
12       knows.

13          Q.     So when you said earlier that the materials would  
14       be taken to Snohomish, were you incorrect?

15          A.     No, it's some place along here. I don't know  
16       where. I've never been to this project. He's got the  
17       rapport with the people that want the spoils. I don't.

18          Q.     But you would be involved in building the trail,  
19       correct?

20          A.     Placing the spoils as the railcars come in and  
21       dump, our bulldozers would place the material, yes.

22          Q.     Okay.

23          A.     That's my only part of that project, placing the  
24       spoils.

25          Q.     Looking at your letter to Ms. Brown, what's been

1 years?

2 A. That's a true statement and I signed it.

3 Q. Okay.

4 A. I'm not saying I will haul all of them, but  
5 that's the calculation of dirt coming out of the city of  
6 Bellevue in the next three years.

7 Q. Okay. Looking at exhibit, let's see, it's titled  
8 Map 9, I think it's Exhibit 9 there.

9 MR. FERGUSON: Elizabeth, you might want to  
10 get your Number 9 from him.

11 MS. ALVORD: This is mine, thank you.

12 Q. (By Mr. Ferguson) Okay. Mr. Wolford, do you  
13 know if you plan to use any of the property along the rail  
14 line between Highway 520 and NE 8th as a staging area?

15 A. It's a possibility. Mr. Engle is in charge of  
16 that, not me. He was going to show us where a staging area  
17 was after we make sure the rail is in.

18 Q. Okay. Do you or do any of your companies own any  
19 property visible on this map, Exhibit 9?

20 A. No. North of here in Kirkland, I own property on  
21 the rail.

22 Q. Okay. Do you have any contracts to haul  
23 excavation spoils for a project in Bellevue?

24 A. Not yet. We can't till we know the rail is going  
25 to be in.

1           A.    I don't think he -- he was there.  I haven't met  
2   Byron that much.  Couple brief -- well, at council  
3   meetings, I've met Byron.

4           Q.    Okay.  Have you ever asked Eastside -- have you  
5   ever asked Doug Engle or Eastside Community Rail for a rate  
6   to haul spoils out of Bellevue by rail?

7           A.    Me personally, no.

8           Q.    Do you know if anyone with your company --

9           A.    I don't know.

10          Q.    -- has asked Doug Engle or anyone else at  
11   Eastside Community Rail for a rate quote?

12          A.    I don't know if they have.

13          Q.    Looking back at Exhibit 9, please, do you know --  
14   have you made any inquiries about acquiring any of the  
15   property along the rail corridor between Highway 520 and NE  
16   8th?

17          A.    No.

18          Q.    Do you know if Doug Engle had made any inquiries  
19   to obtain property --

20          A.    I don't know for sure.

21          Q.    -- in that area?

22          A.    No.

23          Q.    Do you know --

24          A.    I don't know.

25          Q.    Do you know if his company, Eastside Community

1 Rail, has made any attempt to obtain property --

2 A. I don't --

3 Q. -- along that corridor?

4 A. -- know, no.

5 Q. What about for Byron Cole, do you know if he has  
6 made any attempt --

7 A. No.

8 Q. -- or inquiries to obtain property along the  
9 corridor?

10 A. I don't know. Ask Doug Engle.

11 Q. And do you know if Mr. Cole's company, Ballard  
12 Terminal Railroad, has made inquiries or attempted to  
13 obtain property along the corridor?

14 A. I don't know.

15 Q. Okay. You testified earlier that you own  
16 property in the city of Kirkland; is that correct?

17 A. Yes.

18 Q. Okay. Taking a look here at Exhibit 11 --

19 MR. MARCUSE: I'm sorry, is this 11?

20 MR. FERGUSON: No, sorry, this is 11.

21 I'm sorry, this should be -- you marked the  
22 photocopy of the map as 12?

23 THE COURT REPORTER: Yes.

24 MR. MARCUSE: Thank you.

25 MS. ALVORD: I'm sorry, is there an extra

1 copy?

2 MR. MARCUSE: I'm sorry, I'm holding onto  
3 what is now 11.

4 MS. ALVORD: What's this one?

5 MR. MARCUSE: The reproduction of the map  
6 from the map book is 12.

7 MS. ALVORD: And this is 11?

8 MR. FERGUSON: Correct.

9 MR. MARCUSE: The one labeled as "Map 8  
10 Railbanked Segments: Woodinville-Bellevue" is Exhibit 11.

11 Q. (By Mr. Ferguson) Do you know how many parcels  
12 in Kirkland that you own?

13 A. Four.

14 Q. Do you own them personally or does one of your  
15 companies own them?

16 A. Personally.

17 Q. Do you know the locations of those four --

18 A. Of course I do.

19 Q. -- properties?

20 Could you indicate on the map where they're  
21 located, please?

22 A. I need to know where the road comes from 405 down  
23 to the lake is.

24 Q. Or do you know the addresses?

25 A. Sure. One there. One there. One there. I'm

1 missing some. I recently sold one up here. Anyway, I'm a  
2 big taxpayer.

3 Q. So do you only own three properties, then, in  
4 Kirkland?

5 A. Yeah, it was four, I just sold one.

6 Q. Okay. Can you tell me the addresses of each  
7 three of those properties?

8 A. Sure, you want me to write it here?

9 Q. That would be fine.

10 A. This one is Cedar Street.

11 Q. Okay. So, just draw a line, just so the record  
12 is clear, I think I understand what you're doing, just draw  
13 a line to each X indicating what the address is for,  
14 please.

15 A. (Witness complies.)

16 Q. Are those residential properties?

17 A. Two are. One is commercial.

18 Q. Okay. The two residential properties, those are  
19 the ones that are located on the lake?

20 A. Yeah.

21 Q. Or near the lake?

22 A. Yeah. I do own another one, but only half of it.  
23 No big deal, I'm not on the tax record, another person is.

24 Q. The commercial property that is located on Cedar  
25 Street, what is that used for?

1           A.     Storage.

2           Q.     For your equipment business?

3           A.     No.   I rent it out now.

4           Q.     Okay.   Do you know who is currently occupying it?

5           A.     The new storage facility there.   Brand-new.   I  
6     forget what they call themselves.   Five-year lease there.  
7     But I pay big taxes in Kirkland.

8           Q.     Do you know what the square footage of these  
9     properties is?

10          A.     The dirt?   Or the building?

11                   MS. ALVORD:   Can you clarify, do you mean  
12     all together?

13                   THE WITNESS:   This structure here is  
14     1,100 square feet.   The structure at my residence is  
15     4,000 square feet.   This is a small piece of commercial  
16     property on the rail up there.

17          Q.     (By Mr. Ferguson)   Do you know how big that  
18     commercial property is?

19          A.     It's fairly small.

20          Q.     Is it bigger than an acre?

21          A.     Oh, God, no, it's just a postage stamp piece.

22          Q.     Think it's about a half acre?

23          A.     No, not even a quarter.

24          Q.     Smaller than a quarter acre?

25          A.     Yeah.

1 Q. Is it located on the rail line?

2 A. It is. Maybe we use that for a staging area.

3 Little small. But then again, we'll need the rail. That's

4 why I bought the property. Because it was on the rail.

5 Now some guy from the City of Kirkland wants to rip it out,  
6 how rude.

7 Q. Is there a spur track going to your property on  
8 Cedar Street?

9 A. No.

10 Q. Have you ever asked for rail service to that  
11 property?

12 A. No.

13 Q. Mr. Wolford, whose name is that property on Cedar  
14 Street --

15 A. Mine.

16 Q. -- held?

17 A. Mine.

18 Q. Personally?

19 A. Yes.

20 Q. For the property on Cedar Street, do you have a  
21 plan to use that in moving demolition spoils from Bellevue?

22 A. It's a bit small for that.

23 Q. So do you -- you don't intend to use that as part  
24 of any hauling operation?

25 A. Possibly if they leave the rail in.

1 Q. What would you use it for?

2 A. Load a railcar there. Well, there's not room for  
3 a spur really there.

4 Q. Okay.

5 A. But if it's not very well used, they could just  
6 spot a car there while they loaded them and go down the  
7 track. Doesn't sound like it's going to have a lot of use  
8 anyway except for maybe a dinner train or to service the  
9 wineries. That's what we really need this rail left in  
10 for. I don't know what's -- what that question is.  
11 There's a huge group of people that want this rail left in  
12 for a dinner train to service the wineries.

13 Q. Can you tell me more about that? I thought this  
14 was about hauling freight.

15 A. That's my concern. As a taxpayer in the city of  
16 Kirkland, I got a huge problem with ripping the track out  
17 because of that, that was a wonderful thing, the dinner  
18 train and the winery.

19 Q. And --

20 A. You'll find out. There's another group coming at  
21 you.

22 Q. I'm curious to know what you know about the plan.

23 A. I've heard bits and pieces, but there's strong  
24 people that want -- you'll see later, that's all I can say.

25 Q. Is this the train that is referred to as Bounty

## E X A M I N A T I O N

BY MR. MARCUSE:

Q. I'm Andrew Marcuse. Just to clarify, Andrew Marcuse with the King County Prosecutor's Office, I'm in the civil division, I do land use and real estate law for the county, so I'm not a criminal prosecutor. We're not at the courthouse, for those of you who were on the call the other day with the STB.

You testified earlier that Bobby Wolford Trucking and Demolition facility is in Maltby in Snohomish County.

A. Mm-hm (answers affirmatively).

Q. And has it always been located in Maltby?

A. Yes.

Q. And during the time that you operated that business in Maltby, have you ever received rail service at that facility?

A. No.

Q. Did you ever ask BNSF Railway for a rail quote?

A. Yes, they subcontract all their spurs out. And Condon out of Spokane was -- I think we got some prices from them to throw a rail in there, or a spur. It was a long time ago, kind of a blur.

Q. So you asked BNSF for a quote on a spur to your facility?

A. We asked if it's possible. And they said, we'd

1       table from you and heard that answer, I wasn't sure what  
2       you were saying. Were you saying the only reason to leave  
3       the rails in is the dinner train?

4           A.    I was trying to get to that topic real quick when  
5       I said that. I just wanted that out there, that the dinner  
6       train and the wineries are supportive of leaving the rail  
7       in as well.

8           Q.    As well as?

9           A.    As well as my use of hauling dirt on the rail.

10          Q.    And others?

11          A.    And others. There's talk that Safeway might want  
12       to haul their flour up that track for their bakery.

13                   MR. MONTGOMERY: I don't have any further  
14       questions. Thank you, Mr. Wolford.

15                   THE WITNESS: All right.

16                   MR. MARCUSE: Can I ask one follow-up  
17       question, couple follow-up questions to Ms. Alvord's  
18       question.

19                   MR. FERGUSON: Sure, then I'll have some.

20  
21                   F U R T H E R   E X A M I N A T I O N

22       BY MR. MARCUSE:

23           Q.    Mr. Wolford, a moment ago, you characterized the  
24       idea of a spur track on your current operation in Maltby as  
25       blue sky.

1           A.     Hopefully I get it.

2           Q.     Did you ever ask GNP Railway for a quote for  
3     service?

4           A.     It's been so long, I inquired. And they referred  
5     me to Condon, it's a company in Spokane that does their  
6     sidings for them, to get a price. I even forget what it  
7     was.

8           Q.     And did you ever ask Tom Payne or Doug Engle with  
9     GNP Railway for a quote for service?

10          A.     Not a quote, but he said that because I built  
11     that, the trail I did build, in compensation, he'd get me a  
12     spur.

13          Q.     Did he ever provide you with an estimate of the  
14     charges for freight service?

15          A.     No. There's a base -- I know, I know that, like,  
16     Tom Payne got paid for every service that Byron Cole did,  
17     he runs the train. And there is a set price per -- he told  
18     me what it was, it escaped me.

19          Q.     Have you ever asked Doug Engle for a quote for  
20     the rate for service?

21          A.     No.

22          Q.     Have you ever spoken with anyone else from  
23     Eastside Community Rail about a quote for service?

24          A.     No. I need a spur first and that may not happen.

25                     MR. MARCUSE: Thank you.

C E R T I F I C A T E

STATE OF WASHINGTON       )  
                                  ) ss  
COUNTY OF KING           )  
                                  )

I, the undersigned Washington Certified Court Reporter, pursuant to RCW 5.28.010, authorized to administer oaths and affirmations in and for the State of Washington, do hereby certify: That the foregoing deposition of the witness named herein was taken stenographically before me and reduced to a typed format under my direction;

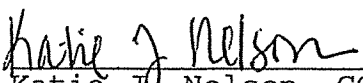
That, according to CR 30(e), the witness was given the opportunity to examine, read and sign the deposition after same was transcribed, unless indicated in the record that the review was waived;

That all objections made at the time of said examination have been noted by me;

That I am not a relative or employee of any attorney or counsel or participant and that I am not financially or otherwise interested in the action or the outcome herein;

That the witness coming before me was duly sworn or did affirm to tell the truth;

That the deposition, as transcribed, is a full, true and correct transcript of the testimony, including questions and answers and all objections, motions and exceptions of counsel made at the time of the foregoing examination and said transcript was prepared pursuant to the Washington Administrative Code 308-14-124 preparation guidelines;

  
Katie J. Nelson, CCR, RPR,  
Certified Court Reporter 2971 for  
the State of Washington residing at  
Redmond, Washington. My CCR  
certification expires on 10/22/13.

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6 info@starkovichreporting.com

7 Friday, May 17, 2013

8 To: ELIZABETH A. ALVORD  
9 CROMWELL LAW  
10 1509 56th Ct. NW  
11 Gig Harbor, Washington 98335

12 Re: Surface Transportation Board  
13 Deposition of: BOBBY WOLFORD  
14 Date Taken: Thursday, May 16, 2013

15 PLEASE TAKE NOTICE THAT:

16 Enclosed are two forms: "Affidavit" and a "Correction  
17 Sheet." Instruct the deponent to review the deposition,  
18 record any corrections on the Correction Sheet, and sign  
19 the Affidavit before a Notary Public. Return both forms to  
20 this office for their inclusion in the original transcript  
21 and distribution to other parties. The transcript will be  
22 forwarded to the appropriate party: June 17, 2013.

23 Thank you for your assistance in obtaining signature.

24 By: Katie J. Nelson, RPR, CCR, CCR No. 2971

25 cc: HUNTER FERGUSON, ANDREW MARCUSE, JORDAN WAGNER, TOM  
MONTGOMERY

## A F F I D A V I T

STATE OF WASHINGTON )  
 ) ss.  
COUNTY OF KING )

I have read my within deposition, and the same is true and correct, save and except for changes and/or corrections, if any, as indicated by me on the "CORRECTIONS" flyleaf page hereof.

\_\_\_\_\_  
BOBBY WOLFORD

SUBSCRIBED AND SWORN to before me  
this \_\_\_\_\_ day of \_\_\_\_\_, 2013.

\_\_\_\_\_  
NOTARY PUBLIC in and for  
the State of \_\_\_\_\_,  
residing at \_\_\_\_\_.  
My commission expires \_\_\_\_\_.

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7 C O R R E C T I O N S H E E T

8 PLEASE NOTE ALL CHANGES OR CORRECTIONS ON THIS SHEET BY  
9 PAGE AND LINE NUMBER, AND THE REASON THEREFOR.

| 10 PAGE | 11 LINE | 12 CORRECTION AND REASON |
|---------|---------|--------------------------|
| 13      | 14      | 15                       |
| 16      | 17      | 18                       |
| 19      | 20      | 21                       |
| 22      | 23      | 24                       |
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| 97      | 98      | 99                       |
| 100     | 101     | 102                      |

# **EXHIBIT 7**

## Kurt Triplett

---

**From:** Doug Engle <Doug.Engle@EsCRail.org>  
**Sent:** Monday, March 11, 2013 7:44 AM  
**To:** Kurt Triplett  
**Subject:** EsCR - Cross Kirkland Corridor  
**Attachments:** EsCR\_PublicBusinessPlan\_Woodinville\_2013Feb19.pdf; STB Revenue Adequacy 9Oct12.pdf

Good morning Kurt,

In preparation for our meeting this morning, here is the current business plan, which does not include Kirkland as that is a step beyond our reach at this time.

Additionally, this is how EsCR will price its works for entity's utilizing its services.

Also, we have asked for documents concerning the rail corridor.

In order for EsCR to move forward with a more detailed, alternate 'trail with rail' proposal these items:

1. Overall vision statement, summary of City's objectives based on public processes to date, and relationship to future 'master plan';
2. All budgets for revenue and planned expenditures for the Cross Kirkland Corridor;
3. Existing plans & specifications, especially including typical cross-section(s) and proposed trail structure (depth of rock, pavement material, etc.);
4. Unusual or special provisions/requirements, e.g., trailhead parking, pedestrian bridges alongside track, art, ADA-compliance features, etc.;
5. Conceptual approach to trail requirements/design alongside Totem Lake and associated wetlands, including observation platforms;
6. Proposed budget or preliminary engineer's estimate, along with any grant conditions or limitations;
7. Interest level of COK for self-constructing portions of trail or partnering w/ECR;
8. City of Bellevue permitting requirements for COK R/W within Bellevue City limits.

Best regards,

Doug

Douglas Engle, MBA, CBI  
Managing Director  
Eastside Community Rail  
425-891-4223  
Member IBBA

Bounty of Washington: Tasting Train Facebook





# EASTSIDE COMMUNITY RAIL BRIDGING THE GAP

19 February 2013

Richard Leahy  
Woodinville City Manager

Cc: Woodinville City Council

Re: Eastside Community Rail – Business Plan

## **1. Business Plan**

This past December, Eastside Community Rail (EsCR) acquired the 14.45-mile freight operating easement from the federal Bankruptcy Court for the railroad between Woodinville and Snohomish, WA. EsCR will be operated as a non-profit serving for profit entities utilizing the corridor.

Three core values of transparency, integrity and accountability will guide EsCR in its planning, agreements and operations. EsCR has adopted the mission to help maximize the utilization and overall public benefit of the Eastside Rail Corridor (ERC). Our vision for the rail corridor is for multiple uses of rail, trail, utilities and other public benefits.

We intend on using the Eastside TRailway Alliance as a public advisory board for strategic input. EsCR will work in full cooperation with public entities along the rail corridor. We have also worked diligently to bring together a solid business executive board of directors representing fundamental areas of business.

EsCR creates value primarily by maintaining the operating line right of way (ROW) for rail operations such as freight, excursion and potentially future commuter use. For managing the maintenance of way (MOW), agreements and extensions, EsCR will collect a percentage of gross revenues to cover its direct costs and overhead. This frees the users of the rail corridor to focus on their main businesses. Best of breed partners will conduct the rail structure, bridge and crossing works. Eastside Community Rail would like to partner with the communities along the corridor to provide a MOW road that could be used for a public trail system that connects to a labyrinth of trails.

The main market opportunity lies first in re-establishing an excursion service between downtown Woodinville and Snohomish, which successfully operated on the line for 14 years and only stopped service when I-405 was widened, a bridge structure removed and BNSF sold the ROW to the Port of Seattle. Given the track is publically rehabilitated, the Bounty of Washington Tasting Train will represent more than 90 percent of EsCR's income.

**DRAFT for Discussion Purposes Only**

## **DRAFT for Discussion Purposes Only**

Partnering with a developer to build a hotel in Woodinville next to the excursion platform is a high priority to enhance the experience. It is important that the railroad own the land to have input on design, kitchen capacity, guest waiting areas, a gift shop, other amenities and to fit within the long-term vision of the city.

Secondarily, freight traffic has waned from over 300 cars per year three years ago to just over 200, and car movements need to be bolstered to at least 400 annually. This can be accomplished with marketing and extensions to the operating line. EsCR has an operating agreement with Eastside Freight Service operated by Ballard Terminal Railroad, which has operated on the line for more than three years. Freight operations will help cover maintenance of way costs for the excursion operation.

Strategically, long-term extensions to the corridor are contemplated:

- Re-establish 3-miles of service from the Woodinville wye to Ste San Michelle, the heart of the Wine District
- In the north, develop a new 8-miles connection to Everett from Snohomish, which provides access to Amtrak service and the Canadian market
- Re-establish 12-miles of service from Woodinville to north Bellevue with additional access to the Seattle market and cruise ship passengers

Presently, there are public efforts under consideration to utilize a portion of the corridor for a public trail. EsCR supports this and is willing to construct a MOW road for such a use. Current estimates indicate that this can be done at considerable savings to the public. MOW costs for the road will be based on the width being utilized by the trail, excluding track structure costs.

There have been studies completed by Sound Transit and other groups affirming the viability of commuter rail on the line. This may be possible in the long-term in a public private partnership arrangement with EsCR. It is ECR's policy is to support, but not lead, community efforts to use the corridor for regional rail transit that is consistent with other public works.

Transit also opens the door to transit oriented developments along the ROW.

### **Financing**

No private company will invest in publically owned rail infrastructure because it cannot be used as collateral to secure the investment. Until the portion of track owned by the Port of Seattle is upgraded, passenger service is not possible. The previous owners of the Spirit of Washington Dinner Train and Iowa Pacific Holdings concur on this point.

Therefore, EsCR and interested local governments are seeking \$6.26 million from the state of Washington to improve the railroad. If this funding is secured, EsCR will bear the ongoing cost of maintaining the railroad, which is about \$1.1 million annually.

Once the public infrastructure improvements are secured;

- the Port of Seattle will affirm a long-term agreement for excursion service,

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- EsCR will secure \$3 million in private investment,
- EsCR will secure a Small Business Administration loan of \$3.5M, and
- EsCR will secure a \$3.5M motive power and rolling stock capital lease.

Importantly, no EsCR financing activities can be completed until the public appropriation commitments have been achieved. This will be an iterative process over 90-days following public funding. Finally, detailed plans, drawings, etc. for capital assets will not be completed until track maintenance has been committed to.

### **2. Excursion Train Operations**

The excursion train business is not a pipe dream or just any private venture, but based on a highly successful run that brought economic vitality to the region.

The Spirit of Washington Dinner Train ran on the Eastside Rail Corridor for 14 years with annual rate of 100,000 passengers, \$10 million in revenue and created jobs and tourism business from Renton to Woodinville. The only reason they stopped running was due to the reconfiguration of I405 and thus eliminating their ability to get to their station in Renton. The Dinner Train was a train ride from Renton to Woodinville with a brief visit to Columbia Winery with outside catered meals with a few selections of wine offered on the train.

After dozens of interviews with stakeholders and analyzing the current state of dining, the Bounty of Washington: Tasting Train concept was formed. Localism is not a fad but a strong trend. Farmer's market are on an annual 10% growth trend, small plates offering at fine dining restaurants are the rage, and wine, beer, and other drinks tastings are popular. Thus, the Tasting train is flipping the Dinner train concept. Passengers will experience the best of what Washington offers, fresh seafood, grass-fed meat, and award-winning wines and beer on the train. With about 1000 wineries, breweries, and distilleries, it will be easy to rotate the flavors and their makers. After analyzing all of the excursion trains nationwide, we developed an algorithm for our pricing. We will price the experience from \$55 to \$125 depending on the beverage and potential guest chef. We have had conversations with some of the award-winning chefs in the area and they are eager to participate. We have estimated an average price of \$85 and growing to a bit more than 100,000 passengers which is in line with previous Dinner Train results.

We will have additional revenue streams of promotional items and sponsorships. We will offer sponsorships of train car names along with customer take-home items such as the glasses. Certain ingredient items such as Washington Apples or Washington Pork will also be potential sponsors. We will be able to sell wine and other featured food items initially on board the train and later at our train stations.

Operationally we assumed a mid-range staffing level at one staff person per 16 people. Since service will be staggered per car, we can use some staff as expeditors to ensure

## **DRAFT for Discussion Purposes Only**

prompt service and reduce staffing needs. The participating wineries and breweries will provide staff for educational purposes that will move to each car. Other volunteers can provide historical and regional overviews of the area. We will start at the wine-focused Woodinville with a stop in the quaint beautiful river view town of Snohomish and back to Woodinville along a beautiful valley. Depending on the winery partner, winery tours will be included. We will have partnerships for winery tours for our guests who want to have an entire day of exploration. In addition, we plan to have a mid-week Tulalip special where guests will bus from the top-rated Tulalip Resort to Snohomish and make the trip to Woodinville.

Our target market is tourists wanting a convenient way to experience the best of Washington such as the 435,000 cruise passengers and the 10 million out-of-town visitors annually in King County alone. Since the Tasting Train experience will rotate featured beverages and food, we expect locals to bring family and friends more often to enjoy their favorite wine or dining.

The rolling stock of seven cars, plus a baggage car, will be designed with a comfortable Northwest elegance more like a fine dining contemporary restaurant in Seattle rather than a stuffy old-fashioned look. We will mix the historic lore of train travel with contemporary style for an experience they will never forget on the Bounty of Washington: Tasting Train.

### **3. Train Movements**

Currently, freight operates on the line two days per week in off-commuter hours. This is not expected to change at double the volumes in the future where trains may consist of ten cars. Presently, Boise Cascade and Spectrum Glass are the two biggest freight customers on the line. There is more freight business available if we can operate on the two miles of track down SR-202 toward Redmond that are currently not accessible or included. Eastside Freight Service has operated on the line for the past three years and is expected to continue into the future.

The Bounty of Washington excursion train is expected to operate year-round, excluding January when annual car maintenance will be conducted. The expected 400 annual trains will service both public (70%) and private passengers (30%), with overall volumes reaching 100,000+. The peak period will be the summer tourist season with expectations for bountiful holiday operations. The schedule will be oriented around evenings and two trips on weekends. Additional mid-week day trips may be developed to service Snohomish to Woodinville passengers seeking to spend the afternoon experiencing local Woodinville wines, brews and foods. Although the exact times have not been determined, trains are likely to start after 6:00 PM typically returning two hours later.

The freight operator, Eastside Freight Service, will continue to provide track clearances and train crews.

## **DRAFT for Discussion Purposes Only**

### **4. Railcar Storage and Maintenance**

Freight operations will be very similar to today, and the addition of excursion service will require nightly railcar inspections. This will be conducted utilizing a 200' maintenance shop with a 100' pit in the area north of the wye near the warehouses.

Presently, the Eastside Freight Service locomotive and caboose are stored in a fenced "pen" at the wye. This will be moved provided access to the Wine District and/or Bellevue. The primary maintenance and railcar storage area will be in a fenced area at or very near the maintenance shop.

The exact location will be determined once Woodinville's SR-202 bridge planning is completed.

### **5. Platforms and Parking**

Two platform types are being considered – raised wooden platform or stone/concrete pavers. The 900' platform will be on the north side of the tracks in Woodinville across from the fire station and post office, south of the NE 178th PL crossing.

A partially covered area will be constructed, including a portable ADA loading lift.

Paved diagonal parking for roughly 250 cars will be constructed inside the right of way with access points to the road every 100 yards. A barrier will be created between the parking and road to facilitate this configuration. Lighting and video camera's will also be installed.

We are hopeful that Snohomish and Woodinville will participate in the construction of platforms in both communities as public assets that reflect the experience they want for their visitors. Diverse public agency involvement is critical to securing future federal funding to extend the rail corridor and add a public trail alongside the track.

### **6. Capital Facilities**

#### **Snohomish Station**

Initially, Snohomish Station will require a platform, covered areas, and ADA lift. In the future, restrooms and an enclosed visitor center will enhance the experience.

#### **Wolford Spur**

A new 1,000' spur will be developed into the Wolford Demolition and Trucking site in Maltby to support their business, process potential construction spoils business and initiate new trans-load freight business.

## **DRAFT for Discussion Purposes Only**

### **Woodinville Station**

Initially, Snohomish Station will require parking, a platform, covered areas, and ADA lift. In the future, either a hotel or improvements similar to Snohomish will be required.

### **Woodinville Hotel**

There are indications that the city has the need for at least one new hotel. EsCR has identified an opportunity to extend a hotel's normal business with expansions to help service the excursion train. These include

- Additional kitchen capacity
- Expanded waiting and conference area
- Excursion gift shop
- Coffee bar
- Restrooms
- Historical information
- Ticketing

Beyond the excursion train, the Woodinville Hotel will service Wine District tourism. When operating line extensions are completed, particularly to Everett and Amtrak, package deals will improve market awareness occupancy year around.

### **Maintenance Shop**

A 200' maintenance facility is required to service the motive power and rolling stock. The site location will determine the maximum width inside the ROW. Long-term, an additional 100' of enclosed space may be added to facilitate nightly cleaning of equipment before the inspections.

The construction type will be 40' shipping containers along both sides, with a white "vinyl" roof over an arched metal structure. The inexpensive containers will be painted and provide secure storage of heavy tools, parts and equipment. The roof will be affixed to the containers.

A 100' heated concrete inspection pit will be installed with stair access at either end. Long-term, track mounted heavy lift equipment may be installed over the pit.

A 100' railcar wash area will be enclosed after the inspection pit with an oil and water separator.

### **Business Office**

Initially, the current wye "shack" site will be maintained, painted and covered areas extended for MOW operations.

A new 20' x 35' multi-level business office will be built next to the shack for general, administrative, sales and marketing purposes. A covered watchman's look-out for the wye will be constructed atop this building. Long-term, the Woodinville Hotel may be the better site for these business activities, nearer the heart of the city and its business services.

## **DRAFT for Discussion Purposes Only**

### **7. Possible Construction Spoils**

There are no written plans, agreements or otherwise to move spoils from Bellevue to Snohomish County, although there have been many conversations and some analysis. No other freight has been identified in Bellevue. EsCR will support this should it be needed in a partnership with Wolford Demolition and Trucking.

The most likely train configuration is 17 sidedump cars moving twice a day, once in and once out, during peak construction periods. Such operations would be conducted around primary commuter hours. Train operations would be suspended when construction projects would not need the service.

### **8. Other Positive Civic Impacts**

EsCR is willing to work with Woodinville to develop a new 134th Ave NE crossing and orchestrate train movements to minimize traffic congestion.

Overflow parking for civic events could be constructed on the south side of the tracks near 132<sup>nd</sup> Ave NE in Woodinville.

Park and ride transit parking should be explored at the Woodinville platform site since there may be only nominal conflict between the two needs.

A MOW road connecting the wye area to NE Woodinville should be explored for construction in the near term. Wolford has nearly completed one mile of base trail southwest of Maltby, which would make connecting to the Burke-Gilman trail available to more people.

Previously, Woodinville has expressed interest in widening the 131st Ave NE railroad bridge, which can be orchestrated with EsCR to consider trail and potential future track requirements.

Eastside Community Rail and the Bounty of Washington: Tasting Train provide these benefits;

- Enable a rolling billboard for Washington agriculture and viticulture by celebrating local food and beverages
- Showcase the beautiful valley, Snohomish River bridge and historic rail route
- Direct sales tax revenue of approximately \$1 million a year (based on \$10 million of annual revenue from Dinner train)
- Direct excursion train jobs of 80 and trade jobs of 240
- Indirect jobs and economic development (former excursion train brought \$140 million in tourism dollars) Generate awareness of the benefits of Woodinville,

## **DRAFT for Discussion Purposes Only**

Snohomish and the entire Eastside. The Spirit of Washington: Dinner Train sparked the awareness of Woodinville as a wine district. The Bounty of Washington: Tasting Train can be the catalyst of awareness of King and Snohomish counties as a tourism and livable destination

- Remove trucks from the highways which greatly reduces roadway wear and tear, toxic pollution, and traffic congestion
- Allows for future passenger rail service
- Potential redundancy to the slide-prone BNSF/Sounder route
- ECR will maintain the track for the next 35 years
- Protects the Eastside Rail Corridor assets while allowing the infrastructure to be productive now. The track structure will be maintained for more cost effective upgrades in the future.

In summary, EsCR wants to provide a non-profit service to more quickly utilize the corridor for rail, trail and other public and private uses.

Respectfully,



Douglas Engle  
Managing Director  
Eastside Community Rail

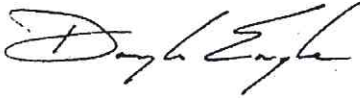
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In summary, EsCR wants to provide a non-profit service to more quickly utilize the corridor for rail, trail and other public and private uses.

Respectfully,



Douglas Engle  
Managing Director  
Eastside Community Rail

**DRAFT for Discussion Purposes Only**

**Bounty of Washington: Tasting Train Proposed Schedule**

**Wednesday & Thursday Tulalip Special: Without winery tour**

12 p.m. Leave Tulalip

12:30 p.m. Arrive Snohomish

12:30 to 2:30 p.m. Lunch and Shopping in Snohomish

3:00 p.m. Embarkation Snohomish: Appetizers and wine tastings

4:00 p.m. Return from Woodinville: Dessert and wine tastings

5:00 p.m. Disembark Snohomish

6:00 p.m. Arrive Tulalip

Base Price: \$100 including bus service

**Wednesday & Thursday Tulalip Special: With winery tour**

12 p.m. Leave Tulalip

12:30 p.m. Arrive Snohomish

12:30 to 2:30 p.m. Lunch and Shopping in Snohomish

3:00 p.m. Embarkation Snohomish: Appetizers and wine tastings

4:00 p.m. Return from Woodinville: Dessert and wine tastings

5:00 p.m. Disembark Snohomish

6:00 p.m. Arrive Tulalip

Base Price: \$120 including coach service

**Friday Cruise Special or Mid-week Convention**

1:00 p.m. Coach leaves Seattle

2:00 p.m. Arrive Woodinville, Embark in Woodinville Small Appetizers and wine tasting

3:00 p.m. Disembark Snohomish: Shopping

4:30 p.m. Embark Snohomish, Small Plates and wine tasting

**DRAFT for Discussion Purposes Only**

5:30 p.m. Arrive Woodinville

6:30 p.m. Coach arrives in Seattle

Base Price: \$110 (with coach service)

**Friday Evening Happy Hour: Late Fall to early Spring**

5:00 p.m. Embark Woodinville: Appetizers and Wine tastings

6:00 p.m. Disembark Snohomish: Entertainment and shopping

7:00 p.m. Embark Snohomish: Small Plates and Wine tastings

8:00 p.m. Arrive Woodinville

Base Price: \$75

**Saturday and Sunday Afternoon** (dependent on demand in Late fall to Early Spring, every weekend Late Spring to Early Fall)

1:00 p.m. Embark Woodinville: Snacks and beer or wine tastings

2:00 p.m. Disembark Snohomish

3:30 p.m. Embark Snohomish: A small plate and beer or wine tastings

4:40 p.m. Arrive Woodinville

Price: \$65, extra fees for premium winemakers and other special events

**Saturday evenings: Winter Late Fall to early Spring**

Optional Winery tour before embarkation

6:30 p.m. Embark Woodinville: Small Plates and Wine tastings

7:30 p.m. Disembark Snohomish: Entertainment

8:30 p.m. Embark Snohomish: Small Plates and Wine tastings

9:30 p.m. Arrive Woodinville

Base Price: \$85

**DRAFT for Discussion Purposes Only**

**All evenings: Late Spring to Early Fall**

Optional Winery tour before embarkation

6:30 p.m. Embark Woodinville: Small Plates and Wine tastings

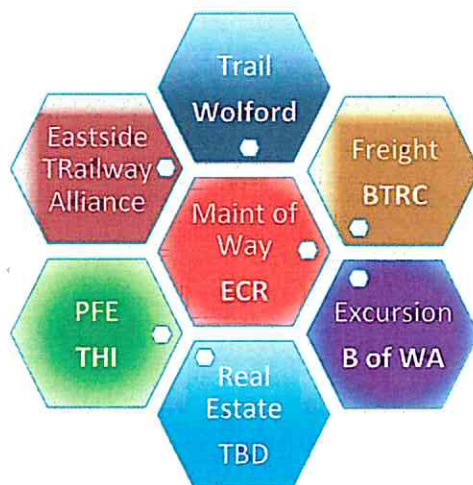
7:30 p.m. Disembark Snohomish: Entertainment

8:30 p.m. Embark Snohomish: Small Plates and Wine tastings

9:30 p.m. Arrive Woodinville

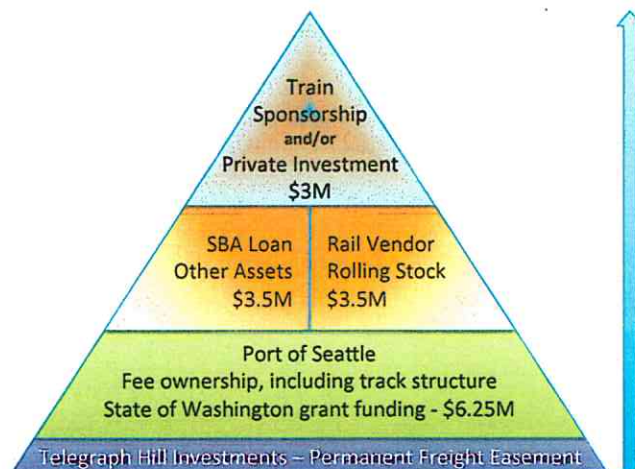
Base price: \$85

## Organization

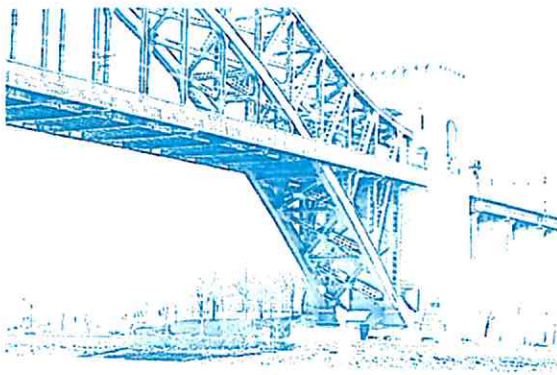


EASTSIDE COMMUNITY RAIL BRIDGING THE GAP

## Financing Approach



EASTSIDE COMMUNITY RAIL BRIDGING THE GAP



# Eastside Community Rail

Bridging the Gap

9 October 2012

## Cost Plus Pricing Policy

Eastside Community Rail, LLC (ECR) requires that the return it earns for rail operations and projects is the rate set by the Surface Transportation Board (STB) for "revenue adequacy" of the railroad industry. ECR will use a 4-year weighted average to reasonably minimize fluctuations in the rate. This federal rate is the most independent and impartial means available to establish fair and reasonable "cost plus" pricing.

ECR expects to have a substantially lower overhead rate and cost structure than local governmental agencies or large private firms. ECR will support public works inside the rail corridor to the extent possible that do not conflict with rail operations or existing agreements. ECR will not enter into any agreement that infringes on its rights or authorities as a federal railroad.

## Surface Transportation Board – Revenue Adequacy

"The annual determination of revenue adequacy is made in accordance with standards and procedures developed after passage of the Staggers Rail Act of 1980, which substantially deregulated railroads. A main goal of Staggers was to restore the railroad industry to a return on investment that would at least match its cost of investment capital."

"In Railroad Cost of Capital—2010, EP 558 (Sub-No. 14) (STB served Oct. 3, 2011), we determined that **the 2010 railroad industry cost of capital was 11.03%**. By comparing this figure to the 2010 ROI data obtained from the carriers' Annual Report R-1 Schedule 250 filings, we have calculated a revenue adequacy figure for each of the Class I freight railroads that were in operation as of December 31, 2010."

**DECISION FOUND THAT ONE CLASS I RAILROAD (UNION PACIFIC RAILROAD COMPANY) ACHIEVED REVENUE ADEQUACY FOR THE YEAR 2010, IN ACCORDANCE WITH THE BOARD'S STANDARDS AND PROCEDURES DEVELOPED TO MAKE THAT DETERMINATION.**

Following is STB's summary of the Returns on investment for all Class I railroads in 2010:

|                                       |        |
|---------------------------------------|--------|
| BNSF Railway Company                  | 9.22%  |
| CSX Transportation, Inc.              | 10.85% |
| Grand Trunk Corporation Consolidated* | 9.21%  |
| Kansas City Southern Railway Company  | 9.77%  |
| Norfolk Southern Railway Company      | 10.96% |
| Soo Line Railroad Company*            | 8.01%  |
| Union Pacific Railroad Company        | 11.54% |

\*(Including all Canadian and U.S. affiliates)

## Historic Rates and ECR's Weighted Average

In Railroad Cost of Capital, STB Ex Parte No. 558, each year the Board determines the rail industry's after-tax cost of capital. ECR will apply annual weights to determine the "Weighted Average" to be used when pricing its works for public projects or operations.

|      | <u>Cost of Capital</u> | <u>Weight</u> | <u>Weighted Average</u> |
|------|------------------------|---------------|-------------------------|
| 2010 | 11.03%                 | 40%           | <b>11.02%</b>           |
| 2009 | 10.43%                 | 30%           |                         |
| 2008 | 11.75%                 | 20%           |                         |
| 2007 | 11.33%                 | 10%           |                         |
| 2006 | 9.94%                  | 0%            | (5-yr Avg = 10.90%)     |

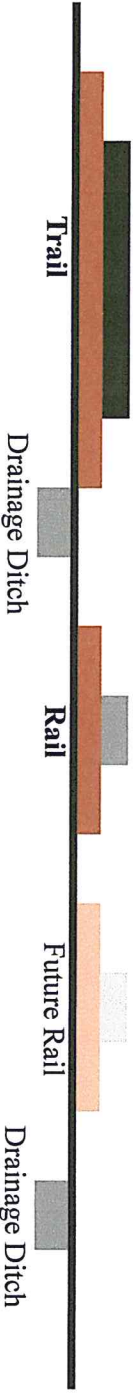
## **EXHIBIT 8**

# Eastside Community Rail Corridor Alignment - Cost Sharing Example As of 2013 May 3

| Sound Transit = 100% + high capital and overhead requirements |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |     |
|---------------------------------------------------------------|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|-----|
| Width                                                         |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |     |
| 5                                                             | 10 | 15 | 20 | 25 | 30 | 35 | 40 | 45 | 50 | 55 | 60 | 65 | 70 | 75 | 80 | 85 | 90 | 95 | 100 |

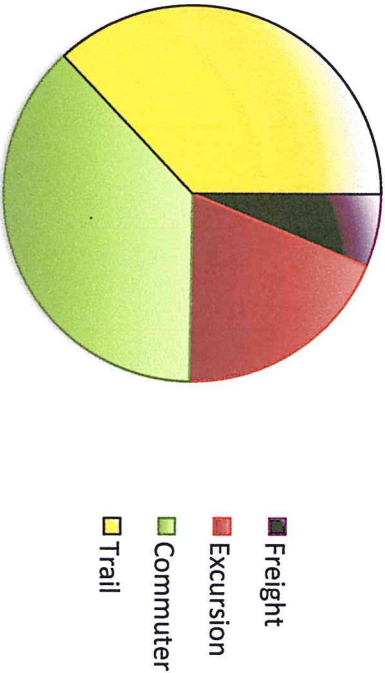
Trail only expenses not shared with rail ops.

Rail only expenses shared amongst rail operations only.



| Trail expenses do not include rail structure costs. | Net      |           | Gross Vehicle Miles |       |
|-----------------------------------------------------|----------|-----------|---------------------|-------|
|                                                     | 6%       | Freight   | 50,000              | 10%   |
|                                                     | 19%      | Excursion | 150,000             | 30%   |
|                                                     | 38%      | Commuter  | 300,000             | 60%   |
| Trail 37%                                           | Rail 63% |           | 63%                 | TOTAL |
|                                                     |          |           | 500,000             | 100%  |

Cost Sharing = Lower Operating Costs



ECRR is a zero-sum entity, with excess year-end funds added to the ECRR capital sinking fund.



## **EXHIBIT 9**

## Kurt Triplett

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**From:** Kurt Triplett  
**Sent:** Friday, November 16, 2012 11:04 AM  
**To:** 'Doug Engle'; Yang, Sung  
**Subject:** RE: Eastside Community Rail

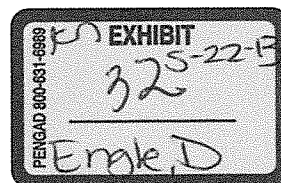
Doug – I also appreciate the time we spent together and the attempt at a recap. I agree there is a POTENTIAL win-win here. There are also many pitfalls and obstacles. Also, even though it was a positive meeting and we did discuss each of these points, for Sung's benefit I need to say that the recap is more specific and implies a greater sense of agreement than what was discussed. For example, I did say we had never done a statistically valid survey. I did not say we would do one. How I recall we left it was that I would think hard about what you are proposing, that I would think about a potential framework agreement that I would give to you for review, and if you could agree to it, we would shop it with the Kirkland Councilmembers. That agreement would likely include many of the points you make below, but it might not include them all and I might include other elements as well. I am committed to exploring this in good faith and will get back to you soon. I am happy to arrange a follow-up meeting after Thanksgiving to continue our discussions.

Thanks again,

Kurt

---

**From:** Doug Engle [<mailto:dengle76@comcast.net>]  
**Sent:** Friday, November 16, 2012 6:29 AM  
**To:** Kurt Triplett; Yang, Sung  
**Subject:** Eastside Community Rail  
**Importance:** High



Kurt/Sung,

Thank you both for your time yesterday.

We believe that there is room here to create a win-win situation provided enough time to get facts on the table. Attached is a brief regarding our partners in Chicago who have 17 pieces of rolling stock that we can use for the excursion train.

To summarize yesterday's emerging opportunity, the main deal points are:

1. The railroad drops its freight plans and therefore reactivation to pursue this process
2. Our focus will be on real estate development and excursion to the So. Kirkland P&R with the primary depot in Totem Lake
3. Kirkland delays track removal 60-days to the end of March to provide mutual time to investigate the opportunity
4. The railroad will cooperate fully in dual use and lead efforts to implement rail and trail in a timeline consistent with Kirkland's existing plans
5. A mutually satisfactory project plan to develop these options will be agreed to with monthly management updates
6. City staff will cooperate fully investigating viable options
7. The railroad will fully cooperate in providing the city information, excluding limited confidential information that need not be public
8. A statistically valid survey will be completed regarding the corridor use, primarily of Kirkland residents
9. We agree to a final City Council decision on the matter

Additionally, we would ask the county to allow the railroad use of the portions of the corridor that provide access to Kirkland and the wine district in Woodinville. Further, the county can facilitate this process by identifying funding sources for the development of a trail at the north end along the right of way constant with Kirkland's design.

Provided the above process is acceptable and we agree that starting the excursion service in 2014 is desirable, then we should explore grant opportunities with the Port to improve the track structure for excursion operations. To this end, I've already called Osmose this morning to get them moving on bridge inspections and upgrades and Byron is contacting Railworks for upgrade options. If improvements are made to the "property," consistent with existing agreements, the railroad will maintain them.

Needless to say, time is of the essence, and we hope that we can make a decision based on factual options.

Can we meet the week after Thanksgiving to discuss this further, please?  
Tuesday afternoon through Friday are available for me as I can shift most things for such a meeting.

Thank you for your consideration,

Doug

Douglas Engle  
Managing Director  
Eastside Community Rail, LLC  
425-891-4223

# **EXHIBIT 10**

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# THE WASHINGTON STATE CONSTITUTION

## A Reference Guide

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Robert F. Utter and  
Hugh D. Spitzer

REFERENCE GUIDES TO THE STATE CONSTITUTIONS OF THE  
UNITED STATES, NUMBER 37

G. Alan Tarr, *Series Editor*



GREENWOOD PRESS  
Westport, Connecticut • London

Emergency indebtedness to preserve the health of the citizens is not unconstitutional when it exceeds the constitutional debt limit. In 1924, the Board of Health barred the public from drinking the water then available in Kelso. A new municipal water plant cost \$25,000, an amount that exceeded the city's constitutional debt limit. Yet, because of the public health emergency, the Washington Supreme Court allowed an exception to the Section 6 restrictions (*McCarthy v. Kelso*, 1924).

## SECTION 5

**Credit not to be loaned.** The credit of the state shall not, in any manner be given or loaned to, or in aid of, any individual, association, company, or corporation.

## SECTION 7

**Credit not to be loaned.** No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation.

This provision is similar to Article VII, Section 1 of the 1879 Iowa Constitution and has counterparts in the constitutions of many other states. Section 7 is similar, in part, to Article XI, Section 9 of the 1857 Oregon Constitution; Article VII, Section 11 of the 1874 amended New York Constitution; Article XII, Section 9 of the 1878 draft Washington Constitution; and the Hill proposed constitution, Article XI, Section 6 (Rosenow, 1962, 680).

During the convention, Section 7, addressing local governments, received much more attention than the state-oriented Section 5, mainly because local concerns with the railroads dominated the discussion. However, a textual difference between Sections 5 and 7 is that Section 7 allows for the "necessary support of the poor and infirm." Nevertheless, because of increasing state responsibility for the poor and infirm, Sections 5 and 7 are interpreted identically (*Citizens for Clean Air v. Spokane*, 1990; Washington Health Care Facilities Auth. v. Ray, 1980).

One of the most highly debated issues of the convention, the gift and loan prohibitions of Sections 5 and 7 were as stubbornly contested as any other provision. Many personal and local issues were involved in what was seen as a railroad subsidy question (Airey, 1945, 484). In order to attract a railway spur line, the citizens of Walla Walla had urged adoption of a clause allowing counties to subsidize railroads or other corporations when it was deemed to be for the public good (*Seattle Post-Intelligencer*, July 13, 1889). The convention's

Committee on State, County and Municipal Indebtedness was hopelessly divided on the issue (*Seattle Post-Intelligencer*, July 22, 1889).

The president of the Oregon and Washington Territory Railroad Company had promised Walla Walla a line connecting that city with the Northern Pacific Railroad system, in return for a subsidy.

The lack of railroad competition had caused problems for eastern Washington farmers, and agriculturalists saw a competing railroad line as necessary to stop unfair practices (*Walla Walla Weekly Union*, June 22, 1889). But the Union Pacific Railroad, already building lines in Walla Walla County, did not want competition from the Northern Pacific Railroad, so Union Pacific worked to defeat the subsidy scheme at the convention (Fitts, 1951, 65). Sections 5 and 7 are seen as anti-railroad provisions, so it is ironic that one of the two major railways sided with anti-corporate populists to gain their enactment.

Many lobbyists appeared before the convention on this issue, including some of the delegates themselves. One delegate who moved to accept the subsidies was himself the president of a railroad company, looking to establish subsidies for his own interests (Fitts, 1951, 70-71). Further, a scandal arose when the *Seattle Post-Intelligencer* accused the chair of the legislative committee, a Northern Pacific Railroad lobbyist, of taking a bribe from the railroad (*Seattle Post-Intelligencer*, July 13, 1889). A reporter witnessed "enough cases of liquor to stock a small saloon for two years" being delivered to the residence of delegate J.Z. Moore on the night the committee was due to meet there. The *Seattle Post-Intelligencer* reported that it was common for the railroads to use money or whiskey to get delegates to vote their way. Several days after the story on J.Z. Moore was released, Moore addressed the convention, denied the charges, and produced a bill for the whiskey (*Seattle Post-Intelligencer*, July 17, 1889).

However, the discussions always focused on the railroads. The supporters of subsidies noted that railroads were a quasi-public concern and that it was a good principle for the government to aid them. Another delegate argued that the difference between the railroads and, for example, water works owned by a city was that the profits of the railroad would go into private pockets. Some delegates looked beyond the railroad issue and feared to what other purposes subsidies would go. The vote for a provision prohibiting subsidies passed by a 2-to-1 margin. Motions for exceptions for irrigation canals, grain terminals, and shipping facilities were also defeated (Rosenow, 1962, 681-84).

Five of the counties associated with the railroad subsidy scheme—Asotin, Walla Walla, Franklin, Columbia, and Garfield—rejected the constitutional ratification when it went before the voters (Fitts, 1951, 194).

Over the last 100 years, the breadth and depth of application and interpretation of Sections 5 and 7 have led to several analytical approaches by the Washington Supreme Court. The court has struggled with the approach to Sections 5 and 7 just as much as the framers struggled with drafting those sections. As late as the 1970s, the court was taking a relatively strict view of government loans or credit to the private sector (*Port of Longview v. Taxpayers*, 1974). In the 1981