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October 27, 2017

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VIA E-FILING

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

Re: **Docket No. FD 36137**
City of Fishers, City of Noblesville, and Hamilton County, Indiana –
Petition for Partial Revocation of Exemption

Reply in Opposition to the Petition of Mayor Dave Kitchell for Leave
to Late File Comments

Dear Ms. Brown:

The Cities of Fishers and Noblesville, Indiana, and Hamilton County, Indiana (collectively, the “Owners”) hereby urge the Surface Transportation Board (the “Board”) to deny the petition of Dave Kitchell (“Kitchell”), Mayor of the City of Logansport, Indiana,¹ to late file comments in this proceeding. If the Board accepts Kitchell’s late-filed comments – despite his blatant disregard for Board processes and evident intent to prejudice the Owners – then the Owners herewith offer a response. The Board may disregard the Owner’s substantive reply if the agency upholds the integrity of its procedures by denying Kitchell’s petition.

The procedural history of this case is well-documented in the Owner’s earlier filings. Suffice here to repeat that, on September 15, 2017, the Owners urged the Board to impose an order on the proceeding, and, if appropriate, prescribe a definitive comments deadline. In a September 22, 2017 Decision, the Board responded promptly, allowing interested parties to file comments until October 12, 2017, and the Owners to file a response by October 23, 2017.

¹ Kitchell arranged to have his filings served electronically upon counsel for the owners through Stone Spectrum of Arcadia, Indiana (an existing party of record). Kitchell states that he is acting on behalf of “our community,” but he does not indicate whether he has been authorized to file comments on behalf of the City of Logansport, and his filings are not clearly attributed to the city.

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Despite this procedural accommodation, which benefitted trails use opponents, Kitchell has tendered comments a full 12 days after the deadline, a day after the Owners filed a timely response to the comments to close the record. Kitchell's excuses for late filing can be characterized as follows:

- The Board received a late-filed and unexcused comment from an individual (Christopher Moore) registering his 32-word opposition to the Owners' trails use plans on October 16, 2017, so, if Mr. Moore were to be allowed to late file four days late, then Kitchell should be allowed to file 12 days after the deadline.
- The Owners allegedly have undertaken unspecified "recent actions and tactics" to avoid public input on their trails use plans, so Kitchell is compelled to comment.
- The Board accepted into the record on October 19, 2017, a letter from a member of Congress supporting the Owners' initiative. That letter, apparently, was the tipping point for Kitchell, who, until then, was content to remain uninvolved.

That there have been a few late-filed comments (which happen also to oppose trails use as Kitchell does) is no excuse for his own, even later, filing. Two wrongs do not make a right. Kitchell does not purport to respond to Mr. Moore, and he does not limit his comments to responding to Congressman Bank's letter. Kitchell admits to have been observing this proceeding (from afar) for some time. Yet Kitchell's vague allusion to "recent" events prompting him to attempt to participate at this late date is undone by his failure to offer a single post-October 12 development or circumstance justifying his late arrival.

Kitchell has no excuse for offering comments nearly two weeks late. Unlike other participants unfamiliar with government proceedings, Kitchell knows better. His disruptive filing and utter disregard for the Board's effort to impose an order in an unusually chaotic proceeding should not be countenanced. The Board explained in its September 22 Decision that it was prescribing deadlines to ensure the orderly development of the record and prompt agency action on the Owners' petition. Kitchell's tactic undercuts both objectives. Kitchell knows full well that his comments, timed as they are, prejudice the Owners. That, too, is reason for the Board to deny Kitchell's petition. Were the Board to accept Kitchell's comments, then such accommodation likely would encourage similar, egregious procedural abuse from others.

If the Board is content to allow Kitchell to flout its September 22 procedural order, then, in the interest of fairness, the Owners must be allowed to respond. And respond they do, although the Board need read no further if it denies Kitchell's petition.

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Kitchell fails to disclose that his filing is designed to advance the objectives of the Indiana Transportation Museum (ITM), a party of record here. He is doubtlessly acting at ITM's behest. Kitchell recently negotiated terms under which ITM has relocated its operations to Logansport, although he does not bother to share that information with the Board.²

Logansport is roughly 50 miles distant from the northernmost terminus of the Nickel Plate Line, although Kitchell fails here also to disclose that relevant detail.³ Nevertheless, Kitchell was welcome at all times to contact the Owners to discuss the Nickel Plate Line, and he could have participated in local decision making had he so desired. This is the first that the Owners have heard from Kitchell (or Logansport) on the issue, and his suggestion that the Owners have disregarded his previously-unarticulated views is disingenuous at best.

Similarly, Kitchell's unsupported allegation that the Owners have disregarded the views of other municipalities (presumably, those actually located along the Nickel Plate Line) is gratuitous and unfounded. Kitchell speaks for himself and his office (and possibly also for the City of Logansport) only. He does not speak on behalf of any other allegedly "disaffected communities," of which he has listed none. In point of fact, the communities along the Nickel Plate Line were consulted. Under the proposed interim trails use, each of the affected communities along the line, such as Fishers, Noblesville, Indianapolis, Cicero, and Atlanta, will be granted the discretion to remove Nickel Plate Line trackage within its community (in the furtherance of developing recreational trails) if it so chooses, or to keep it in place.

Logansport is home to multiple active railroad lines, including lines of Norfolk Southern Railway Company and Toledo, Peoria & Western Railway Corp. (the latter of which is a short line railroad enjoying connections with various short lines and Class I carriers).⁴ With the abundance of railroad service options radiating from Logansport, Kitchell's objection to trails use as detrimental to freight service in the "region" rings hollow. He never explains how the robust

² <http://itm.org/indiana-transportation-museum-plans-new-location-in-logansport/>

³ It is fascinating that Kitchell, who describes Logansport as a "disaffected community" despite its distance from the Nickel Plate Line, criticizes a member of Congress for sharing his views on this proceeding, when the Nickel Plate Line is not within that Congressman's district. There is a glaring incongruity in Kitchell's railing against an alleged offense to "representative democracy" and his involvement in this proceeding, where he would have this agency override the prerogative of other local government leaders.

⁴ https://www.gwrr.com/railroads/north_america/toledo_peoria__western_railway#m_tab-one-panel

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network of active railroad lines in the area is insufficient to meet the needs of his community, or how preservation of the Nickel Plate Line for freight service purposes is relevant to Logansport.

Kitchell complains that the Owners' interim trails use plan would undercut the potential future development of rail transit. Getting beyond the unanswered question of why Logansport would be concerned about transit on a rail corridor some 50 miles distant, Kitchell ignores facts. Specifically, in undertaking an interim trails use arrangement, the Owners would preserve the corridor for future public transportation should there be sufficient need for transit, adequate funds, and accord among the involved state and local stakeholders.

Finally, the Owners recognize that this proceeding has engendered very strong feelings among those in the community who disagree with the Owners' decision to pursue trails use. Some, unfortunately, have taken to resorting to inappropriate personal attacks; an example of which (an email recently sent to the undersigned from a party of record in this proceeding) is attached as information.

For the foregoing reasons, Kitchell's petition to late file comments in this proceeding should be denied. If the Board chooses to accept the comments, then the Owners have shown that Kitchell's remarks and accusations lack substance, and that his request that the Owners' petition for partial revocation be denied is meritless. Instead, the Board should proceed promptly to granting the relief that the Owners seek.

Respectfully submitted,



Robert A. Wimbish

Attorney for City of Fishers, Indiana, City of
Noblesville, Indiana, and Hamilton County, Indiana

RAW/ekf
Enclosure

Robert A. Wimbish

From: Kurt Haines <KHaines14@hotmail.com>
Sent: Thursday, October 26, 2017 8:17 AM
To: Robert A. Wimbish
Subject: Rails not Trails

I just completed reading your latest E Filing to Cynthia Brown. I don't know how you can look at yourself at the end of the day and not cringe. You are representing a mayor in Fishers that has no interest in what anyone wants but himself. The Noblesville Mayor is gutless and won't stand up to him.

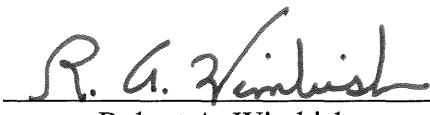
Lawyers get a bad name. The fact that you are sitting in Chicago with no interest whatsoever in the outcome, arguing with the minority to get something passed that few want and even fewer want to pay for and collecting a surely exorbitant fee from the same taxpayer that is against the trails is disgusting. Shame on you.

Harry Kurt Haines

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CERTIFICATE OF SERVICE

I hereby certify that, on this 27th day of October, 2017, a copy of the foregoing letter filing was served by U.S. Mail, first class postage prepaid, or by more expeditious means of delivery, upon all parties of record.


Robert A. Wimbish