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

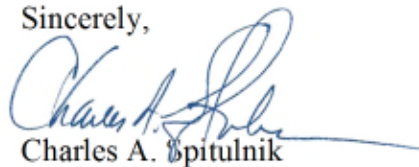
Re: *Hennepin County Regional Railroad Authority – Acquisition Exemption – In Hennepin County, Minnesota*, STB Docket No. FD 36177

Dear Ms. Brown:

I am attaching for e-filing in the above-captioned proceeding the Reply to Twin Cities & Western Railroad Company's Petition to Reject or Stay the Notice of Exemption.

Please do not hesitate to contact me with any questions.

Sincerely,



Charles A. Spitulnik

Enclosure

Cc: All Parties of Record

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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB FINANCE DOCKET NO. 36177**

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**HENNEPIN COUNTY REGIONAL RAILROAD AUTHORITY – ACQUISITION  
EXEMPTION – IN HENNEPIN COUNTY, MINNESOTA**

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**REPLY TO TWIN CITIES & WESTERN RAILROAD COMPANY’S  
PETITION TO REJECT OR STAY THE EXEMPTION NOTICE**

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*Counsel for Hennepin County Regional  
Railroad Authority*

Dated: May 2, 2018

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SURFACE TRANSPORTATION BOARD**

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**INTRODUCTION**

In this proceeding, the Hennepin County Regional Rail Authority (“HCRRA”) seeks authorization from this Board to acquire an operating easement over trackage owned by another carrier. Twin Cities & Western Railroad Company’s (“TCW”) early reference in its Petition to Reject or Stay the Notice (the “Petition”) to a fictional character sets the stage from that point forward to recognize its Petition to this Board as precisely that – a work of fiction that mischaracterizes the facts, the law and the outcomes of the transaction that is the subject of this proceeding. TCW presents no basis for this Board to reject or stay the Notice of Exemption (the “Notice”). TCW’s request for a “housekeeping stay” should be rejected promptly, and the request for revocation of the Notice should be denied.

**SUMMARY OF ARGUMENT**

While HCRRA will address the misstatements and erroneous arguments TCW presents more fully below, and the Metropolitan Council will elaborate further as well in its response to the equally fictional creation that TCW filed in *Metropolitan Council – Petition for Declaratory*

*Order*, STB Finance Docket No. 36178 (Filed Apr. 4, 2018),<sup>1</sup> the following summarizes HCRRA's response to TCW:

- TCW's assertion that the Notice is filed under the wrong section is manifestly erroneous. Since HCRRA acquired an ownership interest in the Kenilworth Corridor in 1995 and then subsequently acquired an interest in the Bass Lake Spur in 2002, first the Interstate Commerce Commission ("ICC") and now this Board have asserted jurisdiction over HCRRA.

- TCW was not excluded from discussions about the transaction. Rather, it consistently participated in discussions with both HCRRA and the Metropolitan Council for many months. Unfortunately, TCW was unwilling to finalize agreements that were the subject of long and inclusive deliberations. Even without TCW's participation as a party to the final agreements, however, HCRRA, the Metropolitan Council and Soo Line Railroad Company d/b/a Canadian Pacific ("CP") agreed to keep the relevant trackage rights agreements to which TCW is a party in full force while leaving untouched the rights and operating ability of TCW on those lines.

- The relocation of tracks to make room for the proposed Southwest Light Rail Transit ("SWLRT") Project will not impair the right or ability of TCW to conduct the operations permitted under the respective trackage rights agreements that apply to the two line segments.

- The environmental impacts of the SWLRT Project, including the relocation of tracks that will follow consummation of the proposed transaction and that are discussed in Finance Docket No. 36178, have been the subject of careful and exhaustive scrutiny in the

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<sup>1</sup> The Metropolitan Council has filed a Reply to the Initial Comments of TCW in Finance Docket No. 36178. HCRRA supports the Metropolitan Council's arguments therein and hereby

environmental review completed as part of the process for securing federal funds for the SWLRT Project. The STB was a Participating Agency in that environmental review process. The STB has consistently relied upon such findings in similar circumstances without requiring the interested parties to do further analysis.

- The Memorandum of Understanding between HCRRA and the City of Minneapolis (the “Minneapolis MOU”), Petition, Ex. A, when read in its entirety rather than only in the snippets that TCW presented to this Board, explicitly confirms that TCW’s trackage rights will not be impaired and that any limitations in that MOU will be subject to the requirements of federal law. If federal law requires a new shipper to receive service on the line, HCRRA will ensure that the prospective shipper receives that. HCRRA understands the Supremacy Clause of the U.S. Constitution, Art. VI, to mandate that, and the MOU with Minneapolis explicitly reflects that understanding.

- Notwithstanding TCW’s hyperbolic and foundationless descriptions of the parade of horrors that the proposed transaction will create, this transaction is of limited scope and is precisely the type of transaction that this Board envisioned when it created the class exemptions to implement its deregulatory mandate.

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incorporates them by reference as if set out fully in this Reply.

## ARGUMENT

### I. TCW PROVIDES NO BASIS FOR REJECTING THE NOTICE

#### A. HCRRA is a Rail Carrier Subject to the Jurisdiction of this Board

The Notice in this proceeding is properly filed because HCRAA is a rail carrier providing transportation subject to the jurisdiction of the Board.<sup>2</sup> TCW argues at length that HCRRA does not have common carrier obligations in the Kenilworth Corridor, and claims the Notice is therefore false and misleading, and filed under the wrong statutory and regulatory provisions. But the decisions of the ICC and this Board, along with the terms of the trackage rights agreements on both corridors, clearly show otherwise.

It is undisputed that HCRRA owns the Kenilworth Corridor. It is also undisputed that TCW's operating rights in the corridor do not allow TCW to serve local shippers within the corridor, or to admit another carrier without HCRRA's consent. See *Kenilworth TRA, Metropolitan Council*, STB Finance Docket No. 36178, Vol. II, Attach. 2, Ex. 4d ¶ 2.3 (Filed Apr. 4, 2018). Accordingly, if a new shipper were to seek service today on the Kenilworth Corridor, TCW could not provide that service without HCRRA's consent.

Thus TCW cannot itself hold the full, residual common carrier obligation on this Corridor, yet TCW insists that HCRRA does not hold it. Those things cannot both be true, because then no entity would hold the ultimate legal responsibility to both ensure that TCW and CP can carry out their service obligations on the line and at the same time meet the federal

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<sup>2</sup> HCRRA is vested with robust statutory authority under Minnesota law to “plan, establish, acquire, develop, construct, purchase, enlarge, extent, improve, maintain, equip, operate, regulate, and protect railroads and railroad facilities, including but not limited to

requirement of serving shippers (if any present themselves) on an active freight line. Rather, under the Board's rulings that are applicable to HCRRA, if this Board were to determine that the shipper's request was reasonable, HCRRA would have the obligation as the holder of the residual common carrier obligation on the corridor to fulfill that request. HCRRA could do so on its own, by contracting with TCW or CP to provide the service, or by contracting with some other party to fulfill that obligation.

The decisions of this Board with respect to HCRRA confirm all of this. HCRRA acquired its first rail line in 1995. As explained further below, the ICC retained jurisdiction over HCRRA, albeit for limited purposes. Then, in 2002, HCRRA acquired another line of railroad. At the time, HCRRA did not seek dismissal of its notice of exemption, retaining instead full rights and responsibilities as owner of a line of railroad that is subject to this Board's jurisdiction. HCRRA therefore retains the status of a rail carrier providing transportation subject to the jurisdiction of this Board.

HCRRA acquired the Kenilworth line, to which the Bass Lake Spur is adjacent, in 1995. When the (former) Chicago & North Western Transportation Company ("CNW") abandoned its interest in a line in Hennepin County over which both CP and TCW held trackage rights, HCRRA acquired CNW's interest. *Chi. & Nw. Transp. Co. – Abandonment and Discontinuance of Service Exemption in Hennepin Cty., Minn.*, ICC Docket No. AB-1 (Sub-No. 252X) (Service Date Dec. 20, 1995) ("*CNW Abandonment*"). In that decision, the ICC was responding to HCRRA's request for reconsideration of the statement that when HCRRA acquired CNW's

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terminal buildings, roadways, crossings, bridges, causeways, tunnels, equipment, and rolling stock." Minn. Stat. § 398A.04 subdiv. 2.

interest in the line “it will acquire a common carrier obligation to provide service over that line segment.” *Id.* at 1. The ICC denied that request, stating: “When assuming CNW’s obligations under the trackage rights agreements [with CP and TCW], Hennepin will also assume the common carrier obligation to assure that Soo and TCW will be permitted to continue service.” *Id.* at 2. Although in that decision the ICC exempted HCRRA from compliance with the requirements of Subtitle IV,<sup>3</sup> it did not remove its jurisdiction over HCRRA. HCRRA has, since 1995, held a common carrier obligation – limited, to be sure, but nonetheless firmly in place.

Moving now to the Bass Lake Spur which is the subject of this Notice of Exemption, HCRRA then acquired another line, 300 feet of the Bass Lake Spur, in 2002. *Hennepin Cty. Reg’l R.R. Auth. – Acquisition Exemption – Soo Line R.R. Co.*, STB Finance Docket No. 34217 (Service Date July 10, 2002). HCRRA did not seek a determination at that time that it had not acquired a common carrier obligation on the line, and as a result, its status as a rail carrier providing transportation subject to the jurisdiction of the Board remained.

TCW’s attempts to use the language of the 2002 filings as evidence that HCRRA is not a rail carrier providing transportation subject to the Board’s jurisdiction, and thus should have filed its Notice under a different section of the Board’s regulations, are unavailing.<sup>4</sup> The Board’s

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<sup>3</sup> The ICC’s decision included the statement that it was exempting Hennepin County “to the extent we can” from the requirements of Subtitle IV. *Id.*, slip op. at 2. Neither the ICC nor this Board has elaborated further upon the precise meaning of that, but it is clear that there was never an unfettered or unrevocable exemption.

<sup>4</sup> Even if HCRRA should have filed under a different section, that would be harmless error because the Notice HCRRA filed includes nearly all of the information that would be required under the part of the regulations TCW cites. The Board may, in such circumstances, on its own motion (see, e.g., *CNW Abandonment* at 2 (exempting HCRRA “on our own motion from the requirements of Subtitle IV”)) determine that its previous statements about HCRRA’s

long-standing interpretation of the ICCTA and the regulations confirms that TCW is wrong. As the ICC explained, where a public entity acquires a line of railroad it assumes responsibility for contracting with and assuring continued service by a rail operator, and thus that public entity acquires a common carrier obligation. *State of Maine – Acquisition and Operation Exemption – Me. Cent. R.R. Co.*, 8 I.C.C. 2d 835, 837 n.5 (1991) (citing *City of Austin, Tex. – Acquisition – S. Pac. Transp. Co.*, ICC Finance Docket No. 30861(A) (Service Date Nov. 4, 1986)).

So too, here. In 1995, HCRRA attempted to convince the ICC that it had not assumed any common carrier obligation, and the Board disagreed, declining HCRRA's request. In 2002, reflecting the fact that it was not actually conducting any rail carrier operations, HCRRA submitted a notice of exemption in Finance Docket 34217 that stated HCRRA was not a carrier. The STB reflected HCRRA's statement in the Notice it published. However, there is no doubt that after that filing, HCRRA assumed the obligations described in *City of Austin*. HCRRA filed no request, as *State of Maine* invites public entities to do, for a determination that it has not assumed common carrier status. Absent such a filing and a subsequent determination by this Board, HCRRA was and remains a common carrier subject to this Board's jurisdiction. Indeed, as the Board has recently stated:

[I]t is well established that an exemption granted under 49 U.S.C. § 10502 – like LACMTA's exemption here from most provisions of Subtitle IV – may remove the agency's regulatory authority under those provisions, *but does not remove the agency's jurisdiction over the rail carrier or rail line at issue*.

*L.A. Cty.. Metro. Transp. Auth. – Petition for Declaratory Order*, STB Finance Docket

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status as subject to the Board's jurisdiction did not require HCRRA to file under the section of the regulations that governs acquisitions of additional rights by existing carriers (49 C.F.R.

No. 36112, *slip op.* at 4 (Service Date Oct. 27, 2017) (emphasis supplied).

HCRRA is not alone among public entities that have acquired active rail lines and remain common carriers providing transportation subject to the jurisdiction of this Board, even though those public entities provide no freight service themselves. *See, e.g., S. Pac. Transp. Co. – Abandonment Exemption – L.A. Cty., Cal.*, 8 I.C.C.2d 495 (1992); *L.A. Cty. Transp. Comm’n – Acquisition Exemption – The Atchison, Topeka & Santa Fe Ry.*, ICC Finance Docket No. 32172 (Service Date Dec. 2, 1992); *S. Pac. Transp. Co. – Abandonment Exemption – L.A. Cty., Cal.*, 9 I.C.C.2d 385, 387-88 (1993); *Orange Cty. Transp. Auth. – Acquisition Exemption – The Atchison, Topeka & Santa Fe Ry.*, 10 I.C.C.2d 78 (1994); *Peninsula Corridor Joint Powers Bd. – Petition for Declaratory Order*, STB Finance Docket No. 35929 (Service Date July 2, 2015). In each of those instances, this Board and its predecessor, the ICC, have retained a jurisdictional hook into the public entities that own the lines used by freight carriers in interstate commerce to ensure that the public agency owner does not interfere with the freight railroad’s ability to fulfill its retained common carrier obligation. Indeed, this Board recently confirmed that practice and the result of that retention of jurisdiction. *L.A. Cty. Metro. Transp. Auth.*, STB Finance Docket No. 36112, *slip op.* at 4.

The Board should therefore reject TCW’s unsupported assertions that HCRRA could leave shippers without a designated common carrier in the Bass Lake Spur Corridor. Moreover, HCRRA has contractually confirmed the STB’s regulatory jurisdiction. In Section 5.6 of the Bass Lake Spur Freight Rail Easement Agreement between CP and HCRRA (Attachment 2 to

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§ 1150.41), and may treat the matter as having been correctly submitted under 49 C.F.R. § 1150.31. The information required is virtually identical.

HCRRA's Notice of Exemption) HCRRA agrees it "shall not discontinue or abandon rail freight service on the Bass Lake Spur Trackage without required authorization from the Surface Transportation Board . . . ."

**B. HCRRA's Notice is Neither False Nor Misleading**

HCRRA remains ready and willing, as it has been since 1995, to undertake and fulfill the obligations associated with being an owner of a line that is used in interstate commerce and over which this Board (and its predecessor) have concluded that it has a residual common carrier obligation. Nothing in the lengthy process of negotiating the agreements for this transaction, and nothing in the years prior, could create the impression that HCRRA is interfering with the operations of the freight railroads operating on the corridor HCRRA now owns, on which it will have new easement rights and common carrier obligations after the transaction that is the subject of this proceeding is consummated. HCRRA has not until now, and cannot in the future. This Board's retention of jurisdiction over HCRRA ensures that.

*1. The Minneapolis MOU confirms TCW's preexisting rights and obligations on the Kenilworth Line.*

TCW's piecemeal citation to the Memorandum of Understanding with the City of Minneapolis highlights the weakness of TCW's arguments. Petition at 8–9. First, the Minneapolis MOU has nothing to do with the transaction that is the subject of this proceeding. It relates to the Kenilworth Corridor, the line over which HCRRA acquired its common carrier obligation by virtue of the transaction that was the subject of the *CNW Abandonment* proceeding.

Second, TCW did not inform the Board that HCRRA's right in the MOU to approve the addition of new carriers on the corridor was made "to the extent lawfully permissible and not in breach of the Trackage Rights Agreement" with TCW, thus explicitly preserving all of TCW's

non-exclusive rights and all federal obligations.<sup>5</sup> Minneapolis MOU ¶ 1. Nor did TCW inform the Board that to avoid any doubt, Section 7 of the MOU is even more explicit about preserving TCW's rights and complying with all federal obligations:

- d. The purpose of this MOU is to limit, to the extent lawfully permissible, detrimental changes in the frequency or nature of freight service over the Freight Rail Property. Nothing in this MOU, however, requires HCRRA to take any action or decline to take any action that would be in breach of the Trackage Rights Agreement or in derogation of any rights of TCW or Soo in the Trackage Rights Agreement.
- e. The parties acknowledge and agree that contractual relations with railroads, and matters collateral thereto, are governed by various federal and state laws, rules and regulations and decisions of various regulatory bodies, as well as by general law. Nothing in this MOU shall be construed to require HCRRA to take any action or decline to take any action in whole or in part if to do so would be contrary to any applicable federal or state law, rule, or regulation or any applicable decision of any court or any decision or order of any regulatory authority of appropriate jurisdiction.

Minneapolis MOU ¶ 7.

TCW's omissions of these explicit promises by HCRRA are telling, but the omissions do not change the fact that if the law requires HCRRA to consent to a request for service by a new shipper, then HCRRA will – as it has been required to do since 1995 with respect to this corridor – comply with its obligations under the applicable law.<sup>6</sup>

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<sup>5</sup> Under the TRA, TCW's operations are "in common" with CP and any other railroad company or companies CP admits to use the line and sidings. Bass Lake Spur Trackage Rights Agreement ¶ 1.4, Notice, Attach. 3, Ex. C.

<sup>6</sup> TCW also references an outdated statement by HCRRA that HCRRA would not transfer the Kenilworth Corridor to the Metropolitan Council unless HCRRA were relieved of all of its obligations in the Corridor. Petition at 8. That assumption was correct until the Metropolitan Council was unable to finalize the anticipated agreement for TCW to assume the common carrier obligation on the line. At that point, the property transfer agreement between HCRRA and the Metropolitan Council was completely rewritten so that HCRRA would retain residual common carrier obligations. *See infra* at 12.

2. *HCRRA remains ready, willing and able to ensure that the common carrier obligations on the line are fulfilled in the event it is called upon to do so.*

TCW's claim that HCRRA is unable to fulfill its common carrier obligation and that this Board is unable to enforce it are manifestly wrong. See Petition at 9–10. Although this Board on its own motion exempted HCRRA from the requirements of Subtitle IV, it also retained jurisdiction in the event that it needs to assert it. If HCRRA acts in a way that limits TCW's ability to fulfill its common carrier obligation, TCW can come immediately to this Board seeking expedited or emergency relief, and this Board can immediately reinstate the obligation to comply with any part of Subtitle IV that is required. The ICC took that exemption action on its own motion, and this Board can as easily undo it upon request by an aggrieved party.

TCW's reference to cases where the Board has found that an acquiring entity could not fulfill its common carrier obligation are not relevant. *Id.* To date, HCRRA has not been required to act to provide freight service because there are currently two carriers with authority to operate on the lines HCRRA owns. The documents HCRRA has submitted demonstrate and confirm that it is taking no action that will interfere with the ability of the carriers currently serving those lines (a point which will be discussed further below) to conduct the operations that are permitted by the current trackage rights agreements. Nothing in the statute requires HCRRA to demonstrate how it will fulfill its obligations should they arise. No shipper on the Kenilworth Corridor has come forward seeking service, and TCW and CP have respectively been able to provide whatever service is necessary to connect their lines elsewhere to the points they reach at the end of the Kenilworth Corridor and Bass Lake Spur.

Moreover, HCRRA's Board of Commissioners was quite clear in its recognition of the obligations that HCRRA is undertaking and its willingness to undertake them. The publicly-

available information accompanying the HCRRA Board's action approving the transactions contemplated herein explicitly explained that HCRRA's prior position regarding common carrier obligations was changing because the TCW negotiations fell apart:

When HCRRA and CP transfer the corridors identified above to the Metropolitan Council for the project, there are certain federal requirements that must be maintained relating to the provision of common carrier freight service in the corridors. HCRRA and the Metropolitan Council had previously negotiated a property transfer agreement (which was never executed) relieving the HCRRA of all such responsibilities, assuming that the Twin Cities and Western Railroad Company (TC&W) would assume the responsibilities. However, contemplated agreements with TC&W were not consummated, which caused the structure of the HCRRA and CP property transfers to be re-evaluated. The new revised agreements now provide that HCRRA will be responsible for that federal common carrier obligation in the event that a shipper requests service on those lines, and that HCRRA will have freight easements and trackage rights agreements appropriate to provide such service.

Regional Railroad Authority Board Action Request, 18-HCRRA-0011 (Mar. 20, 2018), at <https://www.hennepin.us/your-government/leadership/board-meeting-materials> (**Attachment 1**).

3. *TCW has been kept fully apprised of the discussions concerning this proposed project and has been a party to extensive negotiations concerning the rail lines at issue.*

TCW's equally exaggerated claims that it was unaware of the arrangement that HCRRA and the Metropolitan Council have presented to this Board similarly provide no basis for this Board to delay the effective date of the Notice. TCW's statement that it was not invited to participate in structuring the proposed transaction, Petition at 10, ignores the lengthy period of discussion in which the parties engaged with TCW to attempt to achieve a mutually agreed upon arrangement for future operations and construction. Further, when TCW raised obstacles to implementation of the negotiated arrangements, the Metropolitan Council and HCRRA restructured their proposed property transfer in a way that explicitly preserved all of the

operating rights TCW enjoys under the Bass Lake Spur and Kenilworth Corridor trackage rights agreements. Finally, TCW's feigned ignorance is belied by the facts. Both HCRRA and the Metropolitan Council addressed this matter in discussions in open public board meetings before their filings with this Board, and the publicly-available material described the proposed transactions. As well, on March 8, 2018 (several weeks before the STB filings), the Chair of the Metropolitan Council sent a letter to TCW (**Attachment 2**), informing TCW of all of the relevant facts about which TCW now claims ignorance:

In light of TC&W's new conditions, we felt we had no other choice but to pursue another path forward; therefore, the Council has determined that our mutual interests are best advanced by acquiring the freight rail properties in the Kenilworth Corridor and Bass Lake Spur subject to your existing Trackage Rights Agreements (TRAs). Under this approach, we have carefully crafted a transaction that will allow TC&W to continue operating and serving its shippers under the TRAs it has today. Following Council approval, the Council intends to petition the Surface Transportation Board to acquire the rights-of-way, subject to the existing TRAs.

4. *The transactions at issue are explicitly structured to protect all of TCW's operating rights and thus the rights of their shippers.*

TCW's assertion that its operating rights (and by extension the rights of its shippers) will be materially impacted by the contemplated property transactions (or by the proposed light rail transit project) is also factually and legally incorrect:

- As noted, TCW will continue to operate under the exact same trackage rights agreements in the two corridors after the contemplated property transfers as TCW operates under today<sup>7</sup> – not a single word of those TRAs will be changed, and thus TCW will continue to have the same rights to transport its shippers' goods as it has today.

- The parties to the proposed property transactions (the Metropolitan Council, HCRRA and CP) have explicitly structured the property rights among those parties to guarantee non-interference with TCW's operations:

- The Bass Lake Spur Freight Rail Easement Agreement guarantees as follows: “[t]he Council, its successors and assigns, agrees that its construction and operation of the Southwest LRT will not unreasonably interfere with the ability of HCRRA to continuously operate as a rail carrier and fulfill its common carrier obligations along the Bass Lake Spur Trackage or unreasonably interfere with TCW's overhead operations as permitted under the TRA.” Notice, Attachment 2, ¶ 7.2.

- The Rail Freight Operating Easement provides that the Metropolitan Council's use of the Bass Lake Spur for the SWLRT project must “not unreasonably interfere with . . . TCW's use of the Bass Lake Spur Trackage for overhead service pursuant to the provisions of the TRA.” Notice, Attachment 2, Ex. C ¶ 6.2.

- HCRRA is reserving its easement rights in the Kenilworth Corridor subject to non-interference with TCW's operating rights in that corridor:

The Council's use of the Easement Area for the construction, operation and maintenance of the LRT is subject to the condition that the Council will not unreasonably interfere with the ability of HCRRA to operate as a rail carrier and fulfill its common carrier obligations along the Kenilworth Corridor Trackage or unreasonably interfere with freight rail operations under the TRA as defined in Section 2.4.

HCRRA Freight Rail Operating Easement and Consent to LRT, *Metro. Council – Petition for Declaratory Order*, STB Finance Docket No. 36178, Petition for Declaratory Order, Attachment 2, Ex. 4 (Filed Apr. 4, 2018).

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<sup>7</sup> See *Twin Cities & W. R.R. Co. – Acquisition and Operation Exemption – Soo Line R.R. Co.*, ICC Finance Docket No. 31912 (Served Aug. 14, 1991).

- The environmental documentation performed for the SWLRT Project that is related to the transactions described here and in Finance Docket No. 36178<sup>8</sup> acknowledges the importance of minimizing disruption of TCW operations:

In order to mitigate short-term impacts to freight rail operations related to construction activities, the Council will develop and implement freight rail operation coordination plans. The purpose of these plans is to facilitate coordination between the Project and the affected freight railroads during construction activities affecting freight rail operations. As part of this effort, Council staff will also work with affected freight rail owners and operators to provide provisions in the construction contract to identify how the contractor will interact with the railroads. Further, Council staff will work with affected freight rail owners and operators to sequence construction to minimize effects on freight movements and to identify optimal periods for closing the rail service and reducing speeds. Dates and times for all stoppages will be determined through coordination with the railroad owners and operators.

During construction activities, flaggers will be used to allow freight rail operations to continue. The use of flaggers will require construction activities adjacent to active freight rail to halt while freight trains traverse the construction area.

Federal Transit Administration, Southwest Light Rail Transit Project (METRO Green Line Extension) (July 15, 2016), at <https://metro council.org/Transportation/Projects/Light-Rail-Projects/Southwest-LRT/Environmental.aspx>; Final EIS ¶ 4.4.5.2 (May 13, 2016)

- The Metropolitan Council has unequivocally assured TCW that the non-material adjustments on account of the SWLRT Project will be consistent with TCW's obligations to serve shippers in the corridor. In the March 8, 2018 letter from the Chair of the Metropolitan Council to TCW, referenced above, TCW was assured:

[T]he Project intends to follow the construction specifications and protocols TC&W and the Project Office have discussed and collaboratively developed in great detail, to the extent consistent with the TRAs and applicable safety

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<sup>8</sup> See Section D.3, *infra*.

protocols. This includes construction phasing and work windows that allow TC&W to operate its overhead service during construction.

**Attachment 2.**<sup>9</sup>

The Metropolitan Council spent long hours working with TCW to develop protocols both to minimize any construction disruptions, for the benefit of TCW's shippers and to allow those operations to continue after completion of the transaction. The project will *not* operate on the same tracks as TCW, and the Metropolitan Council and HCRRA are fully aware of the need to preserve the safety of users of the light rail and the adjacent trail, while guaranteeing the ability of TCW to continue safely conducting the operations it has the right to carry out on the affected rail lines. Even though TCW withdrew from the negotiations with respect to this project, the Metropolitan Council has confirmed that it stands by those commitments. TCW's unsupported protestations to the contrary notwithstanding, its interests under the agreements that govern its operations in this corridor will remain.

In short, the agreements that the parties have reached that have been presented to this Board in this proceeding and in the related proceeding in Finance Docket No. 36178, in which the Metropolitan Council seeks a declaratory order, confirm the lengths to which the parties have gone to ensure the ability of TCW to conduct its operations. HCRRA's statements in its Notice are neither false nor misleading, and the Notice is correctly filed under the appropriate sections of this Board's regulations. The Board should promptly deny TCW's Petition.

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<sup>9</sup> This attachment include only the letter from Alene Tchourumoff, Chair of the Metropolitan Council, to Mark Wegner, President & CEO of TCW. The attachments to the letter, which include the details of the settlement offer that are not pertinent to this point, are not included here.

**C. This Matter is Appropriately Handled Under a Notice of Exemption**

By inducing a raft of shippers located on the TCW system to file nearly identical (and identically unsupported) statements with respect to the proposed HCRRA and Metropolitan Council transactions, TCW attempts to create the illusion that this proceeding is of sufficient complexity and importance that a Notice of Exemption is not appropriate. However, the law and the facts together confirm that TCW's request has no merit.

First – the law. The statute permits this Board to exempt transactions that would otherwise require a full application and inquiry into the public convenience and necessity when

the application in whole or in part of a provision of this part (1) is not necessary to carry out the transportation policy of section 10101 of this title; and (2) either (A) the transaction or service is of limited scope; or (B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.

49 U.S.C. § 10502. When listing the types of transactions that are exempt from the full panoply of regulations under 49 C.F.R. § 1180.2(d), which include the “acquisition of a line of railroad which would not constitute a major market extension,” the Board “found that its prior review and approval of these transactions” is not necessary because they meet the criteria in Section 10502.

Second – applying the law to the facts. There is no reason to recite all of the elements of the Rail Transportation Policy listed in 49 U.S.C. § 10101 because none are impacted by this transaction. No carrier rights are changed. No carrier is entering or exiting the rail transportation market place. HCRRA, as previously described, has long been considered a rail carrier providing transportation subject to this Board's jurisdiction, albeit with limited regulatory requirements at present as a result of the Board's self-initiated exemption from the requirements of 49 U.S.C., Subtitle IV. HCRRA will not extend the territory over which it has control and

over which TCW has operating rights. And TCW's rights under existing trackage rights agreements on the Kenilworth Corridor and the Bass Lake Spur will remain unchanged, TCW's protestations to the contrary notwithstanding.

The transaction is of limited scope. HCRRA is acquiring the right and the obligation to ensure, as it currently does on the Kenilworth Corridor and has done since 1995, the availability of a rail corridor over which other rail carriers have the right to conduct operations that are described in the trackage rights agreement. HCRRA's obligation is to make the corridor available and to avoid interfering with the freight carriers' ability to fulfill their common carrier obligation. The Trackage Rights Agreements under which TCW operates on both the Kenilworth Corridor and the Bass Lake Spur remain in place and unchanged. As noted, any disruption during construction will be short-lived, and the Metropolitan Council is prepared to undertake the actions it has described to TCW as necessary to minimize those disruptions and assure the continued movement of freight as required under existing trackage rights agreements and federal law.

Abuse of market power is not an issue. HCRRA has no plans to hold itself out as a competitor rail carrier. TCW will retain the right and ability to operate to the extent permitted under the existing Trackage Rights Agreement. There will be no new entrant in the market, and no limitation by any competitor of TCW as a result of this transaction on TCW's ability to compete in the market.

TCW's suggestion that this transaction requires a full blown application and full review is a red herring. The Board should dismiss this suggestion, as is the case with all of the other arguments TCW presents, out of hand.

**D. The Proposed Transaction is Not Subject to Environmental & Historic Reporting**

TCW also asks the Board to reject the Notice for an alleged failure to comply with the Board's environmental and/or historic reporting requirements. But this argument fails because HCRRA demonstrated in its Notice of Exemption that the proposed transaction is exempt from such reporting and, even if it were not, the Board may adopt the Environmental Impact Statement ("EIS") and Record of Decision ("ROD") prepared by the Federal Transit Administration ("FTA").

1. *An Environmental Report is not necessary because the proposed transaction would not result in significant changes in carrier operations.*

The Board regularly exempts an acquisition under 49 U.S.C. §§ 10901–10902 from environmental reporting requirements when it “does not result in significant changes in carrier operations.” 49 C.F.R. § 1105.6(c)(1)(i). A “significant change” is one that would exceed any of the environmental thresholds established by 49 C.F.R. § 1105.7(e)(4) or (5). *Id.*; see also *N.Y. & Atl. Railway Co. – Operation Exemption – The Long Island R.R. Co.*, STB Finance Docket No. 33300, *slip op.* at 4 (Service Date Nov. 17, 1997). HCRRA's Verified Notice certified that the proposed transaction would not result in this sort of significant change in carrier operations, and TCW fails to provide any basis for the Board to conclude otherwise.

As described above, the proposed transaction would *not* result in an environmentally significant change in carrier operations. By acquiring CP's common carrier obligation, subject to TCW's existing and *unmodified* Trackage Rights Agreement, no material change in carrier operations will occur, except for the relocation of the tracks and the minimal disruption of operations during construction as discussed previously. Indeed, TCW appears to admit that the “thresholds contained at 49 C.F.R. § 1105.7(e)(4) & (5) are not exceeded as a direct result of

HCRRA's acquisition of CP's common carrier obligation . . . ." Petition at 13. Instead, TCW relies on the mere specter of potential interference with its operations as a result of the SWLRT. However, as described above, the SWLRT Project, and the proposed transaction, have been carefully constructed to ensure that TCW's existing rights over the Bass Lake Spur are *not* materially impacted.

Indeed, the Board has already evaluated the SWLRT and determined that neither the anticipated construction, including the relocation of the rail line, nor the instant proceeding, required environmental review. Specifically, the Director of the Office of Environmental Analysis, in agreeing to become a participating agency in the Federal Transit Administration's environmental review of the SWLRT Project, determined:

since it appears that the only potential Board licensing action would involve trackage rights (Mike Higgins will be getting back to you on that issue), there's no need for the Board to be involved in the environmental review--under the Board's environmental rules, trackage rights are categorically excluded from NEPA review by the Board.

FTA, SWLRT Final EIS, app. N at #51.

The Board's prior decisions cited by TCW also do not support its argument. In *Fredonia Valley R.R., Inc. – Abandonment Exemption – In Calwell, Cty., Ky.*, STB Docket No. AB-592X, *slip op.* at 1 (Service Date Aug. 9, 2001), the proponent of an exempt abandonment failed to provide the Board with any evidence that the abandonment would not result in significant changes in carrier operations. That, of course, is not the case here. As detailed above, HCRRA provided the Board with all pertinent agreements which demonstrate that TCW's trackage rights over the Bass Lake Spur will remain *exactly* as they stand prior to the consummation of the proposed transaction. See Notice at 2–3.

Moreover, *Fredonia Valley* involved a notice of exemption for the *abandonment* of a rail line. In sharp contrast to the mere acquisition of a rail line, the Board generally requires *at least* an environmental assessment for an abandonment. 49 C.F.R. § 1105.6(b)(2). Here, consistent with the Board’s ordinary practice with respect to rail line acquisitions, HCRRA has certified and demonstrated that no changes to carrier operations – much less environmentally significant changes – will occur as a result of the proposed transaction. Because TCW provides no evidence to the contrary, environmental reporting is not required.

TCW also cites a string of cases rejecting a notice of exemption when the proponent failed to comply with various procedural requirements. *See, e.g., Consol. Rail Corp. – Abandonment Exemption – In Middlesex Cty., N.J.*, STB Docket No. AB-167 (Sub-No. 1184X), *slip op.* at 1 (Service Date Dec. 4, 2003) (where proponent sent copies of an environmental report only one day before filing the notice of exemption and did not serve all required parties). These cases are inapposite because they all involve failures to comply with *applicable* procedures. Here, the proposed transaction does not require environmental reporting.

2. *An Historic Report is unnecessary because further STB approval is required to abandon any portion of the Bass Lake Spur.*

The Board also exempts the acquisition of a rail line from historic reporting where the acquisition is “for the purpose of continued rail operations where further STB approval is required to abandon any service and there are no plans to dispose of or alter properties subject to STB jurisdiction that are 50 years old or older.” 49 C.F.R. § 1105.8(b)(1). The proposed transaction satisfies the requirements of this exemption, as well.

TCW’s only argument to the contrary is that HCRRA, by virtue of its existing exemption from Subtitle IV with respect to the line acquired from CNW, will not be required to seek

abandonment authority from the Board. But, as demonstrated above, TCW's understanding of HCRRA's status is simply incorrect. As described previously, HCRRA has been and remains subject to the Board's jurisdiction. Moreover, any exemption that HCRRA enjoys with respect to Subtitle IV would *not* apply to HCRRA's acquisition of CP's common carrier obligation over the Bass Lake Spur. Rather, HCRRA is assuming *all* the rights and obligations of CP to provide common carrier service should such service be requested. That includes, of course, an obligation to seek abandonment authority from the Board before salvaging any portion of the Bass Lake Spur that is subject to the Board's jurisdiction. As noted previously, this obligation is also contractually assumed in Section 5.6 of the Bass Lake Spur Freight Rail Easement Agreement between CP and HCRRA (Attachment 2 to HCRRA's Notice of Exemption): "HCRRA shall not discontinue or abandon rail freight service on the Bass Lake Spur Trackage without required authorization from the Surface Transportation . . . ."

Accordingly, the several cases cited by TCW in support of its argument are anything but "analogous." See Petition at 15-16. Each of *Longhorn Railway Co. – Discontinuance Exemption – In Burnet Cty., Tex.*, STB Docket No. AB-501X (Service Date Apr. 1, 1997), *Boston & Me. Corp. – Discontinuance of Service Exemption – In Essex Cty., Mass.*, STB Finance Docket No. AB-32 (Sub-No. 106X), Environmental Assessment (Service Date Mar. 3, 2015), and *The Cincinnati, New Orleans & Tex. P. Railway Co. – Discontinuance of Service Exemption – In Scott Cty., Tenn.*, STB Docket No. AB-290 (Sub-No. 354X), involved "discontinuances by common carriers who are operating over track owned by an unregulated entity." *Id.* at 2. But here, HCRRA is a regulated entity. *Supra* at 4–7. And because further approval from the Board would be required for HCRRA to discontinue or abandon freight

service, there is no need to subject the proposed transaction to extraordinary historical reporting.<sup>10</sup>

3. *Even if environmental or historic reporting were required, the Board may adopt the comprehensive EIS and ROD issued by the FTA.*

Finally, even if environmental and/or historic reporting were required for HCRRA's acquisition of CP's common carrier obligation (and it is not), the Board can adopt the EIS and ROD issued by the FTA in connection with the SWLRT Project. The Board participated in this review as an participating agency. FTA, SWLRT Final EIS ¶ 4.4.2.1.

The Board may adopt an EIS prepared by another federal agency if the actions covered by the EIS and the proposed transaction are substantially the same. 40 C.F.R. § 1506.3. Indeed, for passenger rail projects such as the SWLRT Project, the Board commonly adopts the environmental and historic analysis prepared by the FTA or Federal Railroad Administration as lead agency. *See, e.g., Cal. High-Speed Rail Auth. – Construction Exemption – In Merced, Madera & Fresno Ctys., Cal.*, STB Finance Docket No. 35724 (Service Date June 13, 2013); *Eastern Iowa Indus. Center Rail Project – Construction & Operation Exemption – City of Davenport, Iowa*, STB Finance Docket No. 35237 (Service Date Oct. 26, 2009).

Here, the FTA has issued a ROD with respect to the larger SWLRT Project, which includes a Section 106 Memorandum of Agreement with the Minnesota Historic Preservation Office. *See* Federal Transit Administration, Southwest Light Rail Transit Project (METRO

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<sup>10</sup> TCW's argument that Board authority is required for the planned relocation of certain track in support of the SWLRT Project is premature and, in any event, undercuts its argument. If TCW were correct, then that would only be an *additional* opportunity that the Board would have to conduct an appropriate environmental and/or historic analysis of the impacts of such relocation.

Green Line Extension) (July 15, 2016), at <https://metro council.org/Transportation/Projects/Light-Rail-Projects/Southwest-LRT/Environmental.aspx>. The extensive environmental review undertaken by the Metropolitan Council and FTA has taken the requisite “hard look” at the environmental and historic impacts of the SWLRT Project and, indeed, TCW does not even attempt to argue otherwise. Thus, if the Board determines that the proposed transaction is subject to environmental and/or historic reporting, it may adopt the FTA’s EIS and ROD.

## **II. THE BOARD SHOULD REJECT THE PETITION TO STAY**

As TCW acknowledges, the Board generally entertains two forms of stay. The first requires a petitioner to establish (1) a likelihood of success on the merits, (2) that they would suffer irreparable harm in the absence of a stay, (3) that other interested parties would not be substantially harmed, and (4) that the public interest supports granting a stay. TCW Petition at 21-22 (citing *Washington Met. Area Transit Corp. v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)). The second is known as a “housekeeping stay,” by which the Board postpones a transaction in order to give interested parties time to develop a record and/or the Board to fully consider the issues raised. Neither stay is appropriate in this matter.

TCW appears to be requesting the first type of stay, asking the Board to hold this proceeding in abeyance until such time that the U.S. District Court for the District of Minnesota resolves its complaint. But, TCW does not even attempt to establish the elements required for the first type of stay and, indeed, could not. See Petition at 21-22. Aside from its clearly erroneous positions on the merits, as discussed above, TCW cannot demonstrate irreparable harm were the proposed transaction to proceed. See *Ind. Harbor Belt R.R. Co. – Trackage Rights – Consol. Rail Corp., CSX Transp., Inc. & Norfolk S. Ry. Co.*, STB Finance Docket No. 36100,

*slip op.* at 4 (Service Date Mar. 14, 2017) (consolidated cases omitted) (citing *Del. & Hudson Ry. – Lease & Trackage Rights – Springfield Terminal Ry.*, ICC Finance Docket No. 30965 (Sub-No. 1) (Service Date Nov. 2, 1995)).

To the extent TCW requests a “housekeeping stay,” its request goes well beyond the circumstances recognized by the Board. First, TCW primarily argues that the U.S. District Court action it commenced in the District of Minnesota requires a stay, because it may “moot” the proposed transaction. In that action, TCW asserts that certain proposed actions of HCRRA and/or CP breach those parties’ agreements with TCW.<sup>11</sup> But the Board has squarely rejected these sorts of claims as a basis for staying a Board proceeding. “[C]ontractual dispute[s] . . . [are] a matter for another forum to decide and need not be resolved before the Board’s permissive authority is allowed to take effect.” *Lehigh Railway, LLC – Lease Exemption Containing Interchange Commitment – Norfolk S. Railway Co.*, STB Finance Docket No. 36062, *slip op.* at 2 (Service Date Oct. 14, 2016) (denying stay where a third-party alleged that a lease acquisition breached the terms of its agreement with the lessor); *see also Jackson Cty., Mo. – Acquisition and Operation Exemption – Union Pac. R.R. Co.*, STB Finance Docket No. 35982, *slip op.* at 2–3 (Service Date Feb. 4, 2016) (denying telecommunication companies’ petition for a housekeeping stay where it was concerned that its easement rights could be impacted by the sale of a rail line).

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<sup>11</sup> TCW also argues that certain proposed actions of HCRRA, the Metropolitan Council and/or CP are preempted under the Interstate Commerce Act. However, those arguments also provide no basis for staying the present proceedings. The Board has primary jurisdiction over such issues and, as the Metropolitan Council notes in its Reply to TCW’s “Initial Comments,” the present proceeding should take precedence because they were earlier filed.

Second, TCW strings together a lengthy list of cases in which the Board imposed a housekeeping stay, to make it appear as though that practice was so routine as to be virtually automatic. TCW Petition at 22-23. But each of those cases involves complex factual issues, novel questions of law, or immediate threats to continued freight service.

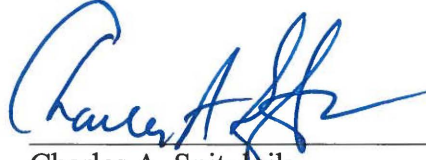
None of those issues are present here. HCRRA has conclusively demonstrated that its Notice was neither false nor misleading, that it was filed under the proper statutory and regulatory provisions, that environmental and/or historic reporting was not required, and that the documents governing the proposed transaction guarantee that TCW will enjoy precisely the same rights on the Bass Lake Spur after HCRRA's acquisition as it does today. TCW's unfounded, unsubstantiated and unwarranted accusations regarding the veracity of HCRRA's Notice or its intent in carrying out the SWLRT Project warrant no further attention from the Board.

### **CONCLUSION**

After all has been said and done, the furor that TCW attempts to create about the proposed transaction boils down to a clear and simple thought. HCRRA, which has for many years been subject to this Board's jurisdiction, is seeking by the Notice of Exemption in this proceeding to acquire rights to an additional rail line that will complement the rights it possesses with respect to rail operations on an adjacent corridor. HCRRA has never interfered with the ability of TCW or CP to conduct operations on the corridor it has owned since the mid-1990's, and despite TCW's protestations about the potential impacts of construction and operation of the new light rail project, it will not interfere with those operations in the future (bearing in mind that some minimal and non-material disruption will occur during construction, about which TCW and the Metropolitan Council have engaged in lengthy discussions prior to TCW's disruptive filings

here). There is no basis for this Board to delay implementation of the transaction contemplated by this Notice of Exemption, and the relief TCW requests here should be promptly denied.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Charles A. Spitulnik", is written over a horizontal line.

Charles A. Spitulnik

Steven L. Osit

KAPLAN KIRSCH & ROCKWELL LLP

1001 Connecticut Avenue, N.W. Suite 800

Washington, DC 20036

(202) 955-5600

E-mail: [cspitulnik@kaplankirsch.com](mailto:cspitulnik@kaplankirsch.com)

[sosit@kaplankirsch.com](mailto:sosit@kaplankirsch.com)

*Counsel for the Hennepin County Regional  
Railroad Authority*

Dated: May 2, 2018

### **CERTIFICATE OF SERVICE**

I hereby certify that I have this day caused a copy of the foregoing Reply to Twin Cities & Western Railroad Company's Petition to Reject or Stay the Exemption Notice to be served by first class mail, on all parties of record in this proceeding.

\_\_\_\_\_  
Steven L. Osit

A handwritten signature in black ink, appearing to read 'Steven L. Osit', is written over a horizontal line.

Dated: May 2, 2018

## **Attachment 1**

Regional Railroad Authority Board Action Request

18-HCRRRA-0011

March 20, 2018

# HENNEPIN COUNTY

## MINNESOTA

### Regional Railroad Authority Board Action Request 18-HCRRRA-0011

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**Item Description:**

Approve Agmts A165479 and A188711 and related agmts for SWLRT Project

**Resolution:**

BE IT RESOLVED, that the Board of Commissioners of the Hennepin County Regional Railroad Authority authorizes negotiation of a revised property transfer agreement A165479 with the Metropolitan Council in furtherance of the Southwest Light Rail Transit project; authorizes negotiation of freight easements and assumption of a trackage rights agreement associated with the property transfer; authorizes negotiation of a joint and cooperative exercise of powers agreement A188711 with the Metropolitan Council relating to costs and obligations of freight agreements; authorizes the filing and prosecution of documents with the Surface Transportation Board as necessary to seek approval for one or more of the agreements referenced above; authorizes the negotiation of any follow-on agreements or amendments to agreements necessary to implement or in furtherance of the agreements referenced above; and after review and approval by the County Attorney's Office, the Chair be authorized to sign such documents and agreements on behalf of the authority.

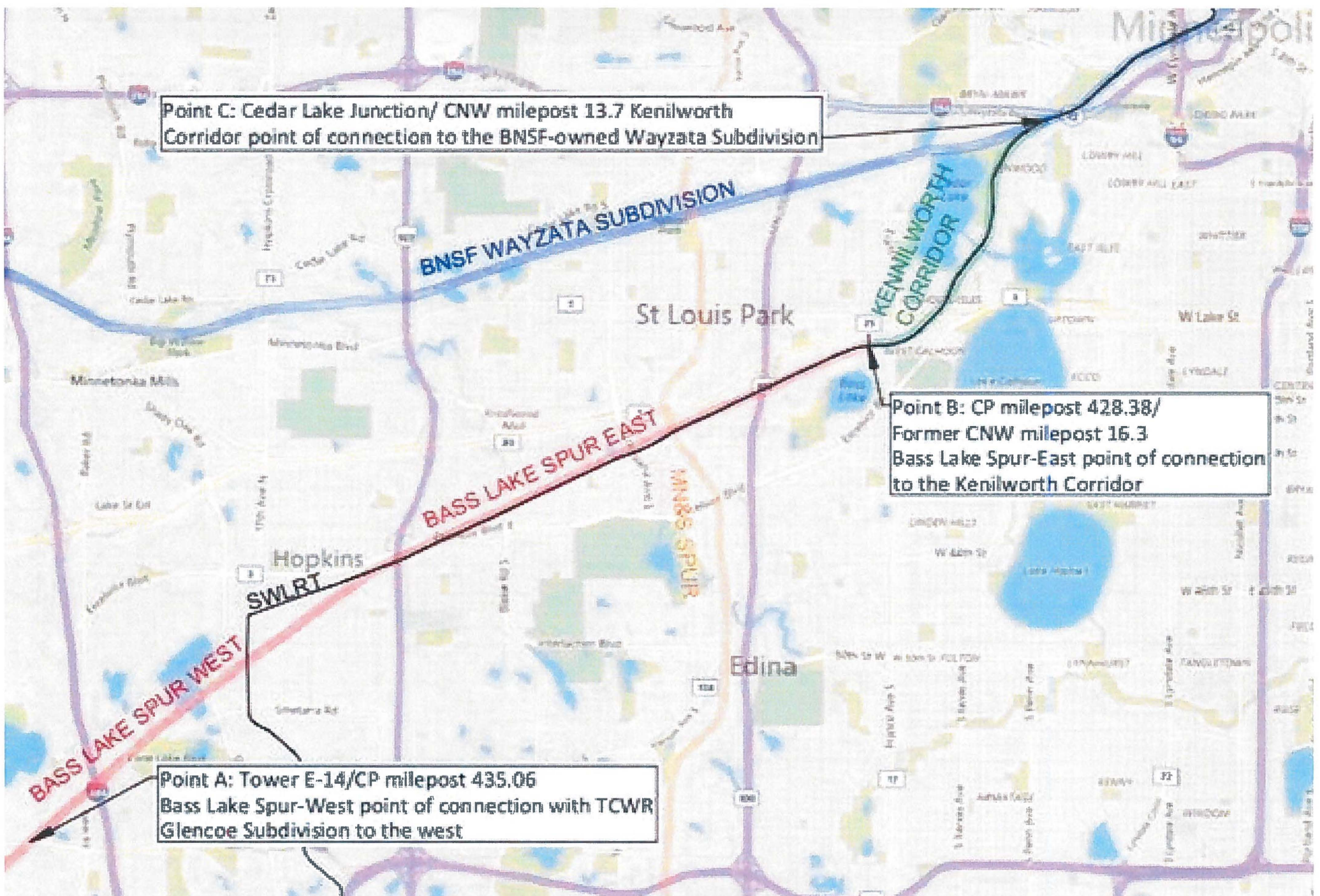
**Background:**

The Southwest Light Rail Transit Project (SWLRT) will be located in part in two freight railroad corridors (Kenilworth and Bass Lake Spur). As part of the project, the Metropolitan Council will be acquiring the Kenilworth Corridor from Hennepin County Regional Railroad Authority (HCRRRA) and the Bass Lake Spur Corridor from Canadian Pacific Railway (CP). HCRRRA will also be transferring to the Metropolitan Council for the project certain land adjacent to the CP Bass Lake Spur Corridor. The project will be constructed on the land described above, with freight tracks and the HCRRRA-owned bicycle/pedestrian trail undergoing certain adjustments to accommodate light rail in those corridors.

When HCRRRA and CP transfer the corridors identified above to the Metropolitan Council for the project, there are certain federal requirements that must be maintained relating to the provision of common carrier freight service in the corridors. HCRRRA and the Metropolitan Council had previously negotiated a property transfer agreement (which was never executed) relieving the HCRRRA of all such responsibilities, assuming that the Twin Cities and Western Railroad Company (TC&W) would assume the responsibilities. However, contemplated agreements with TC&W were not consummated, which caused the structure of the HCRRRA and CP property transfers to be re-evaluated. The new revised agreements now provide that HCRRRA will be responsible for that federal common carrier obligation in the event that a shipper requests service on those lines, and that HCRRRA will have freight easements and trackage rights agreements appropriate to provide such service. However, under the Joint and Cooperative Exercise of Powers Agreement, the Metropolitan Council will assume on HCRRRA's behalf the responsibility for securing a freight carrier if needed; the Metropolitan Council will also assume on HCRRRA's behalf the responsibility for assuring the associated operations, maintenance and capital repair obligations; and the Metropolitan Council will make HCRRRA whole for any financial responsibility or exposure, without Metropolitan Council recourse to Hennepin County to pay for these expenses.

**ATTACHMENTS:**

| Description                                                 | Upload Date | Type            |
|-------------------------------------------------------------|-------------|-----------------|
| <u><a href="#">Kenilworth Property Transfers Plan B</a></u> | 3/14/2018   | Backup Material |



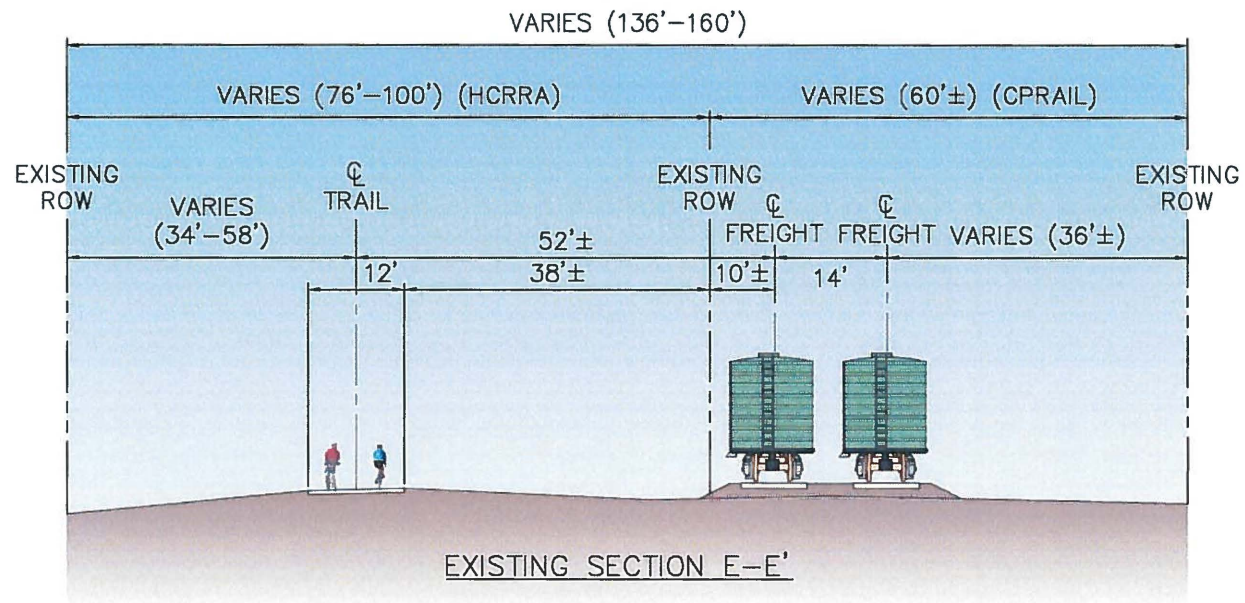
Point C: Cedar Lake Junction/ CNW milepost 13.7 Kenilworth  
Corridor point of connection to the BNSF-owned Wayzata Subdivision

The map shows the Kenilworth Corridor (black line) running from the northwest to the southeast. It connects to the BNSF Wayzata Subdivision (blue line) at Point C in Cedar Lake Junction. The corridor passes through St. Louis Park and Edina. It then branches into the Bass Lake Spur East (red line) and the Bass Lake Spur West (red line). The Bass Lake Spur East connects to the Hopkins SWRT (black line) at Point B. The Bass Lake Spur West connects to the TCWR Glencoe Subdivision at Point A. The map also shows various local streets and landmarks like Lake Hopewell and Lake Edina.

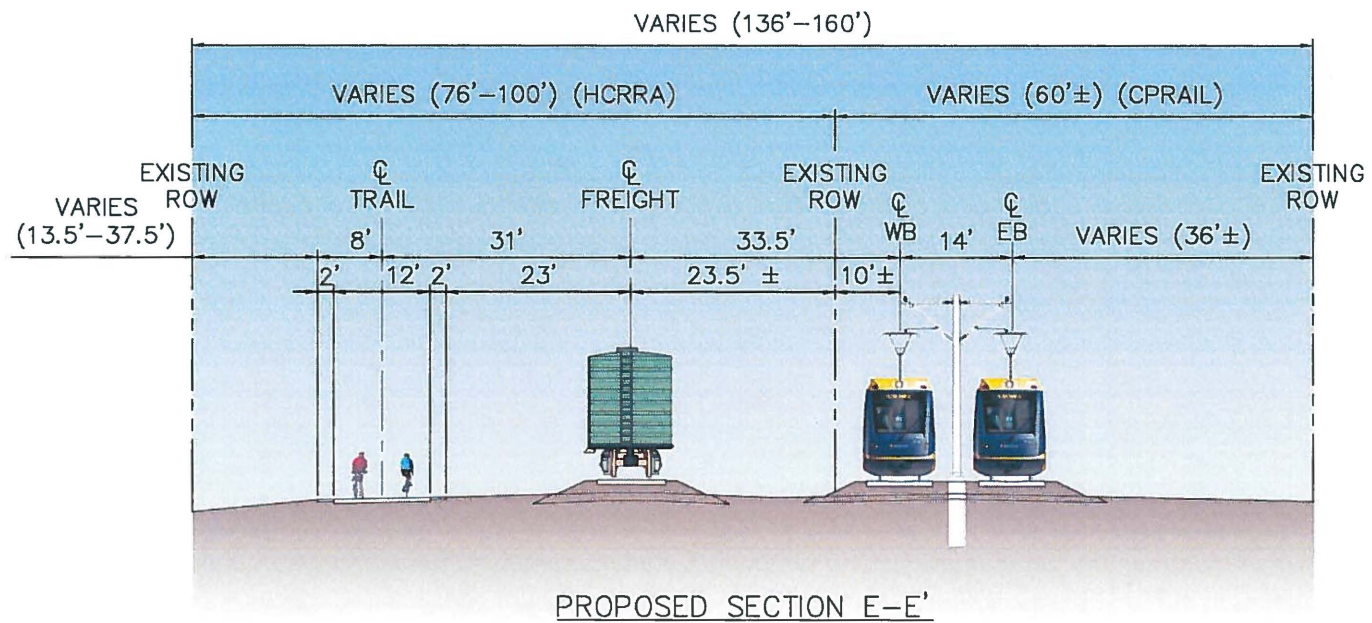
Point B: CP milepost 428.38/  
Former CNW milepost 16.3  
Bass Lake Spur-East point of connection  
to the Kenilworth Corridor

Point A: Tower E-14/CP milepost 435.06  
Bass Lake Spur-West point of connection with TCWR  
Glencoe Subdivision to the west

## Corridor Limits

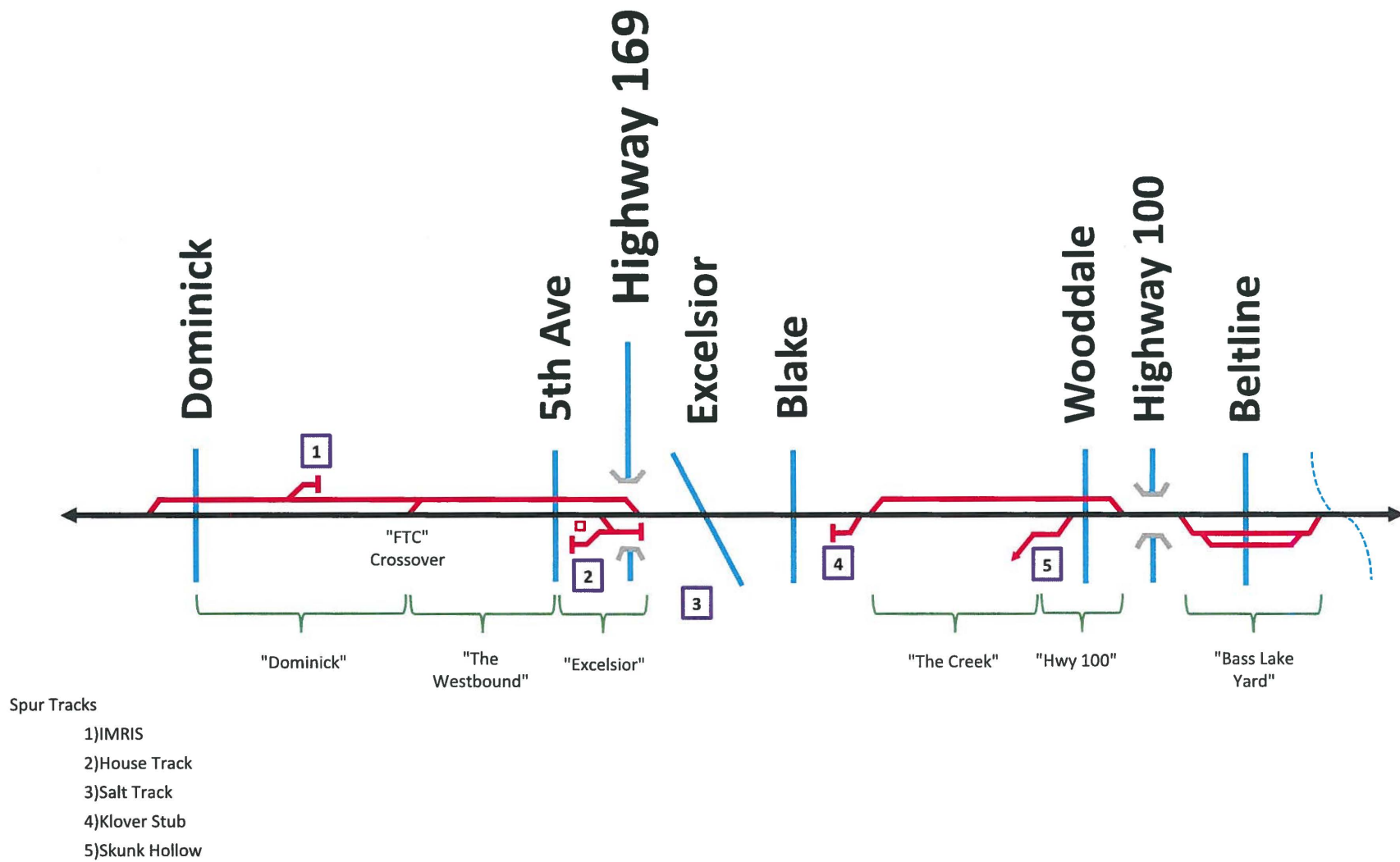


Existing

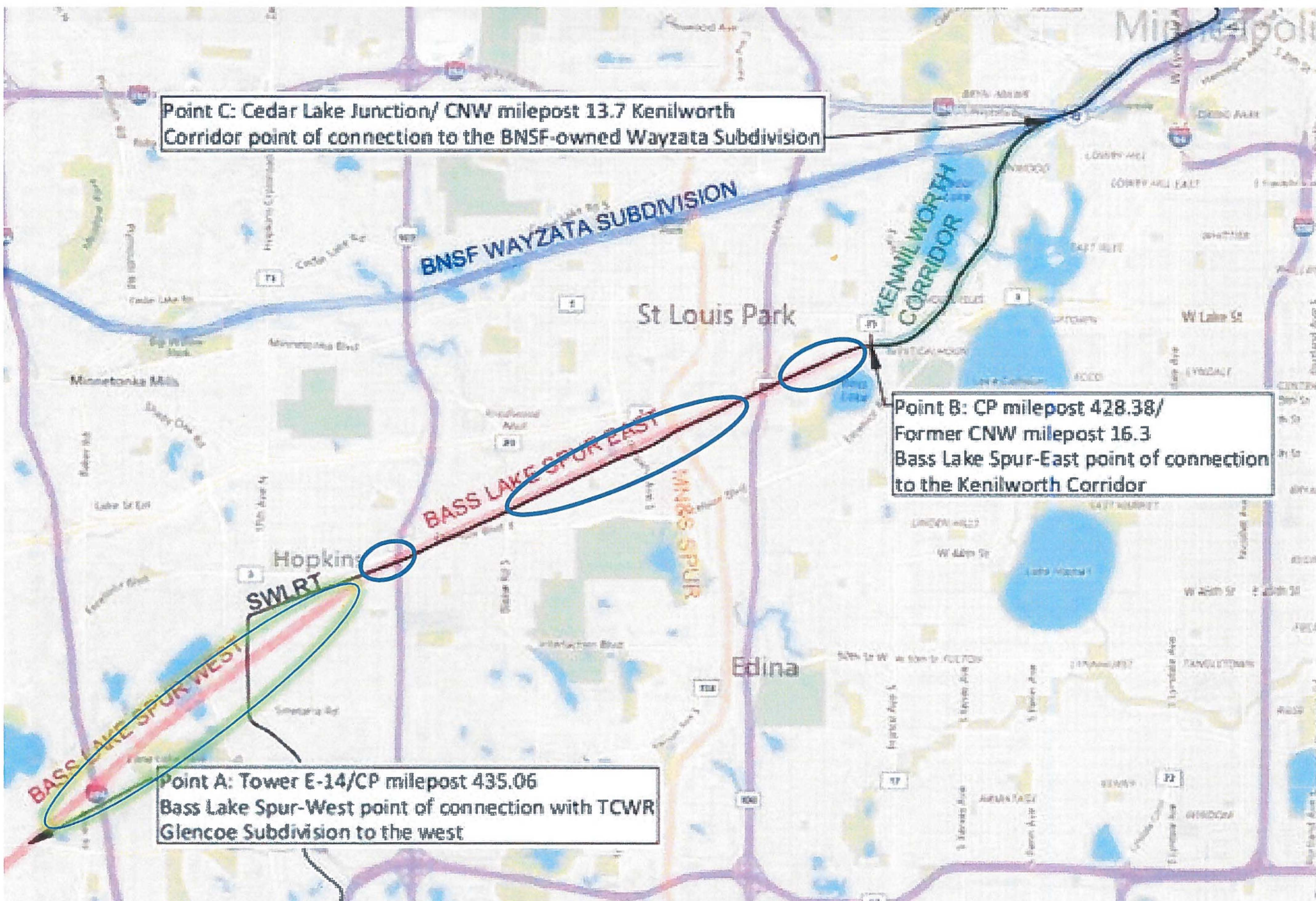


Proposed

# X-sections



# Siding Trackage



Sidings retained



Sidings Removed



| <b><u>Responsibility</u></b> | <b><u>Current</u></b> | <b><u>Original Proposal</u></b> | <b><u>New Proposal</u></b> |
|------------------------------|-----------------------|---------------------------------|----------------------------|
| <b>Common Carrier</b>        |                       |                                 |                            |
| Kenilworth                   | HCRRA                 | TCW                             | HCCRA (Met Council)        |
| Bass Lake Spur               | CP                    | TCW                             | HCRRA (Met Council)        |
| <b>Ownership</b>             |                       |                                 |                            |
| Kenilworth                   | HCRRA                 | Met Council                     | Met Council                |
| Bass lake Spur               | CP                    | Met Council                     | Met Council                |
| <b>Bike Trail Ownership</b>  | HCRRA                 | HCRRA                           | HCRRA                      |

## Shifting of Responsibilities

## **Attachment 2**

Letter from Chair of the Metropolitan Council to TCW

March 8, 2018

THIS SETTLEMENT COMMUNICATION IS NOT AN ADMISSION OF LIABILITY OR RESPONSIBILITY AND IS NOT  
ADMISSABLE IN ANY DISPUTE PER APPLICABLE RULES AND LAWS

March 8, 2018

Mr. Mark Wegner, President & CEO  
Twin Cities & Western Railroad Company  
2925 12<sup>th</sup> Street E  
Glencoe, MN 55336

Dear Mr. Wegner:

As you are aware, the Metropolitan Council (Council) has been working to find a solution that will advance the Southwest Light Rail Transit Project (Project) while preserving the freight rail network that is a critical element of delivering goods from, into and within Minnesota. We appreciate Twin Cities & Western's (TC&W) time and partnership in this process.

We also appreciate that TC&W and the Council successfully reached an agreement on the key business terms that we brought to the Council's governing body for approval on August 16, 2017. That agreement included a \$16.1 million payment by the Council. Shortly after the Council acted, TC&W introduced new and additional conditions, including new indemnification and tax provisions, that were unacceptable because of our fiduciary responsibility to the public.

In light of TC&W's new conditions, we felt we had no other choice but to pursue another path forward; therefore, the Council has determined that our mutual interests are best advanced by acquiring the freight rail properties in the Kenilworth Corridor and Bass Lake Spur subject to your existing Trackage Rights Agreements (TRAs). Under this approach, we have carefully crafted a transaction that will allow TC&W to continue operating and serving its shippers under the TRAs it has today. Following Council approval, the Council intends to petition the Surface Transportation Board to acquire the rights-of-way, subject to the existing TRAs.

Unfortunately, we were not able to finalize an agreement, but I believe TC&W will benefit from the Project improvements. The Project will provide rail improvements that will enhance the safe operations within the corridor. These improvements include:

- New rail, ballast and ties;
- New signals and gates at roadway crossings;
- New bridge structures and retaining walls, freight equipment defect detection; and
- A more efficient connection to Canadian Pacific's MN&S line in St. Louis Park.

In addition, the Project intends to follow the construction specifications and protocols TC&W and the Project Office have discussed and collaboratively developed in great detail, to the extent consistent with the TRAs and applicable safety protocols. This includes construction phasing and work windows that allow TC&W to operate its overhead service during construction.

THIS SETTLEMENT COMMUNICATION IS NOT AN ADMISSION OF LIABILITY OR RESPONSIBILITY AND IS NOT  
ADMISSABLE IN ANY DISPUTE PER APPLICABLE RULES AND LAWS

Further, TC&W will have the statutory co-location liability protections that you requested as provided by the legislature in 2017.

The Council strongly believes that our alternative path fully protects TC&W's legitimate rights, and accordingly, the plan can and will be implemented without further consideration to TC&W. However, in the event you have a different view, to avoid delay and uncertainty the Council has included a proposed settlement agreement for your consideration. The proposal will be presented to the Council's Transportation and Management committees on March 12 and March 14, 2018, and to the full Council on March 21, 2018. Pending Council approval, this offer is good until the close of business on April 18, 2018.

Other than these intentions, the Council withdraws any other offers made during previous discussions.

Sincerely,

A handwritten signature in blue ink, appearing to read "Alene Tchourumoff". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Alene Tchourumoff, Chair  
Metropolitan Council