

February 6, 2019

247073

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

ENTERED
Office of Proceedings
February 6, 2019
Part of
Public Record

Re: Ballard Terminal Railroad Company, L.L.C. – Petition for Declaratory Order,
Finance Docket No. 36261

Dear Ms. Brown:

On January 28, 2019, in the above-referenced docket, the City of Seattle filed its Verified Reply of the City of Seattle, Washington in Opposition to the Petition for Declaratory Order (“Verified Reply”). The City has since discovered three minor errors in its Verified Reply. Accordingly, the City of Seattle submits for filing the enclosed Corrected Verified Reply in which the City has corrected the three minor errors as follows:

- P. 21, n.61, 4th line – “401505” changed to “4–5”;
- P. 25, line 5 – deleted “decided”;
- P. 36, n.93, 4th line – changed “statue” to “regulation.”

The City is not re-filing the associated exhibits (Seattle Exhibits 1 through 9) that were provided on January 28th. Thank you for your attention to this matter.

Respectfully submitted,



Michael McBride
Attorney for the City of Seattle

cc (w/encl.) (via email): Joshua Brower, Esq.
Patrick Schneider, Esq.

**UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD
FINANCE DOCKET NO. 36261**

BALLARD TERMINAL RAILROAD COMPANY, L.L.C.

PETITION FOR DECLARATORY ORDER

**CORRECTED VERIFIED REPLY OF THE CITY OF SEATTLE, WASHINGTON
IN OPPOSITION TO THE PETITION FOR DECLARATORY ORDER**

Michael F. McBride
Van Ness Feldman LLP
1050 Thomas Jefferson Street, NW
Suite 700
Washington, DC 20007-3877
T: (202) 298-1800
E: mfm@vnf.com

Tadas A. Kisieliuss
Dale N. Johnson
Clara Park
Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
T: (206) 623-9372
E: tak@vnf.com; dnj@vnf.com;
cpark@vnf.com

Erin Ferguson
Assistant City Attorney
Seattle City Attorney's Office
701 Fifth Avenue, Suite 2050
Seattle, Washington 98104-7097
T: (206) 684-8615
E: erin.ferguson@seattle.gov

Attorneys for the City of Seattle, Washington

CORRECTED VERIFIED REPLY OF THE CITY OF SEATTLE, WASHINGTON IN OPPOSITION TO THE PETITION FOR DECLARATORY ORDER

I. Summary of Argument

The City of Seattle, Washington (“Seattle” or “the City”), hereby replies to the Petition for Declaratory Order, filed herein on December 12, 2018, by Ballard Terminal Railroad Company, LLC (“Ballard Terminal” or “BTRC”), and urges that the Board dismiss or deny the Petition.

Ballard Terminal’s claims against Seattle are, at their core, a dispute with the City over the implementation of a September 14, 1997, Operating Agreement (“Operating Agreement”) between Ballard Terminal and the City.¹ As explained in further detail below, and as established in longstanding Board precedent, the Board does not resolve contractual disputes and leaves those legal disputes to the state courts.² Given the legal and contractual nature of Ballard Terminal’s claims, the Board should adhere to its long-standing precedent and let a court resolve issues over the implementation of the Operating Agreement.

The Operating Agreement that is at the center of this dispute (and figures prominently in Ballard Terminal’s Petition) is a contract governed by laws of the State of Washington and addresses two specific and important objectives: (1) the preservation of rail service on a railroad known as the “Ballard Line,” which runs in a street right-of-way along NW 45th Street and Shilshole Avenue in the Ballard neighborhood; and (2) the City’s construction of the remaining

¹ As explained in further detail *infra*, the City is the successor-in-interest to the original contracting party, Adventure Trail, a non-operating Internal Revenue Code section 501(c)(3) corporation. The terms of the Operating Agreement reflect the original signatories’ understanding and intent that Adventure Trail would assign its rights and obligations under the contract to the City.

² See, e.g., *Eastside Community Rail, LLC – Acquisition and Operating Exemption – GNP RLY, Inc.*, slip op. at 7–8, STB Finance Docket No. 35692 (served Dec. 13, 2018). See also cases cited at note 67, *infra*.

segment of the Burke-Gilman Trail (“Trail”) in the same vicinity. The Trail is a regional multi-use trail that is 20 miles in length and is continuous with the exception of a 1.4-mile long segment in the Ballard neighborhood of Seattle that is known as the “Missing Link.” The Operating Agreement memorializes the parties’ agreement for achieving both objectives, including, specifically, the City’s right to construct and maintain the Missing Link Trail segment in the vicinity of the Ballard Line. In that Operating Agreement, Ballard Terminal expressly agreed that both the Trail and the rail line could exist within the ROW.³ Moreover, under that Operating Agreement, Ballard Terminal also expressly agreed that, if it were necessary to move the subject rail line within the ROW to accommodate the Trail, Ballard Terminal would do so, at the City’s expense. Ballard Terminal’s claims in its Petition amount to nothing more than an effort to litigate the terms of the Operating Agreement or use the Surface Transportation Board (“STB” or “Board”) to circumvent it entirely.

While Ballard Terminal advances a different interpretation of the material terms of the Operating Agreement, ultimately, that is a matter for a court, not the STB, to resolve. Precisely because the City has been unable to resolve this dispute with Ballard Terminal, on January 17, 2019, the City of Seattle filed a civil Complaint against Ballard Terminal, in King County Superior Court, King County, Washington (Docket No. 19-2-01794-5 SEA) to determine the parties’ respective rights and obligations under the Operating Agreement in effect and binding on the parties. That is the proper forum for resolving this dispute over a contract.

³ Here, the use of the term “right of way” (or “ROW”), in the Operating Agreement, refers to a street right-of-way, within which both the rail line and the Trail would exist. Ballard Terminal’s Petition may leave the reader with the impression that the term was intended to apply primarily to a right-of-way primarily, if not exclusively, for rail use. Accordingly, we will use “Street ROW” where that is the appropriate term, and “railroad ROW” where that may be more appropriate.

Even if Ballard Terminal's Petition raises issues that could potentially be within the Board's purview, the Board should nevertheless follow its precedent and dismiss the Petition without prejudice. That approach would allow the King County Superior Court to adjudicate the case brought by the City before determining whether anything remains to be decided by the Board, to avoid any conflict with the Court's rulings.

Finally, if the Board were to depart from its precedent and institute proceedings to reach the merits, it should nevertheless rule in the City's favor. Ballard Terminal's position is entirely unfounded. The only conceivable issue that could be before the Board under the Board's authority to regulate railroad operations and the Board's governing precedents,⁴ is whether the Trail will interfere with continued railroad operations. Here, the short answer is "no." The City will maintain the required minimum clearance of 8'6"—which is both the clearance required by regulation in the State of Washington and which conforms to industry standards.⁵ Given that the City will maintain necessary clearances to allow Ballard Terminal to continue its rail operations on the line, the Board has no jurisdiction to preempt Seattle's actions, because the Board's only authority, in a declaratory setting such as this, is to determine if there would be any significant interference with a railroad's operations.

⁴ E.g., *CSX Transportation, Inc.—Petition for Declaratory Order*, slip op. at 5–6, STB Finance Docket No. 33388 (Sub-No. 101) (served Aug. 27, 2008) ("*CSX Transportation*") (concluding preemption of the sale Agreement between the parties "is not necessary to allow CSXT to continue its rail operations on the line . . ."); *id.* at 6 ("We can assume that Conrail [the prior owner of the line] would not have entered into an agreement that would substantially interfere with its business. To the contrary, it is apparent that in reaching the Agreement, Conrail determined that the reserved easement would permit it to continue to provide rail service over the rail line traversing the Property.").

⁵ As explained in further detail, below, Ballard Terminal's references in its Petition to 10' clearances are not to a regulatory requirement nor are they based on industry practice. Rather they are based on Ballard Terminal's contested interpretation of the Operating Agreement, which will be adjudicated by the King County Superior Court.

More generally, the Missing Link will not interfere with rail operations because the Street ROW is sufficient to accommodate both.⁶ Indeed the Operating Agreement memorializes Ballard Terminal's understanding and agreement that the Street ROW at issue would allow both railroad operations and the Burke-Gilman multi-use Trail within the Street ROW. The terms expressly contemplated the types of improvements the City proposes, in general and in the vicinity of the three specific aspects of Ballard Terminal's operations highlighted in its Petition: the Western Pioneer Spur; the track along 45th Street NW; and "Not 54th Street." Ballard Terminal agreed to those terms, demonstrating that it believed improvements consistent with those terms would permit it to carry out its railroad operations without interference.⁷

Even without the Operating Agreement, there is no merit to Ballard Terminal's claims of interference. Seattle has retained the services of Mr. Stephen Sullivan of R.L. Banks and Associates, Inc., an independent consulting firm, to review the ROW and determine if the Trail would significantly interfere with Ballard Terminal rail operations, and whether Ballard Terminal can safely continue those operations while the City constructs the Missing Link and it is put into use. Mr. Sullivan, a more-than-40-year veteran of the railroad industry, unqualifiedly concluded that use of the Trail and Ballard Terminal rail operations may safely co-exist within the existing ROW.

⁶ This would be true even if those rail operations were extensive, but, in its Petition, Ballard Terminal failed to inform the Board that it moves only a few railcars per week, in one train, over the rail line at issue. Moreover, it currently only has one shipper—Salmon Bay Sand & Gravel Company, which is owned by Ballard Terminal's primary owner. Seattle Ex. No. 1 (Sullivan Verified Statement at 2). So, the times when the Trail would be in use and the railroad might be moving rail cars will be very infrequent, further demonstrating that the Trail will not interfere with rail operations.

⁷ *Cf. CSX Transportation, supra* n.6, slip op. at 5 (noting that the fact that railroad agreed to the sale agreement's terms suggests that the agreement's implementation would not interfere with railroad operations).

The Board should adhere to its longstanding precedent and allow the King County Superior Court to decide this contractual dispute. But even if the Board reaches the merits, the Board should conclude that the Street ROW can accommodate both the Ballard Terminal rail line, and the Burke-Gilman Trail, without interference with Ballard Terminal's rail operations. That being the case, the Board does not have authority to preempt the City's actions in attempting to complete the "Missing Link" for the use of its citizens.

II. Background

A. The Burke-Gilman Trail and the "Missing Link."

The Operating Agreement and railway franchise at the heart of this dispute address two specific and important goals: the City's construction of the so-called "Missing Link" to complete the Burke-Gilman Trail, and the preservation of rail service on the Ballard Line.⁸

The Burke-Gilman Trail is a regional multi-use trail in Seattle that runs east from Golden Gardens Park in the Ballard neighborhood of the City of Seattle and eventually connects to the Sammamish River Trail in the City of Bothell. Even without the completion of the "Missing Link," in a critical part of the Trail not far from downtown Seattle, the Trail is one of Seattle's most heavily used pedestrian and bicycling facilities, and it is used by both recreational users and commuters.⁹

The Trail traces its origins to a Seattle-based railway founded by Thomas Burke, Daniel Gilman, and ten other investors in 1885. Burlington Northern eventually acquired the line but

⁸ As stated in the Petition, the Ballard Line refers to the short-line railroad that Ballard Terminal operates, between milepost 0.09 and the end of the line at milepost 2.70, of a rail line previously owned by The Burlington Northern and Santa Fe Railway Company ("BNSF"). Petition at 8.

⁹ Seattle Ex. No. 3 at 1-1-1-4 (Final Environmental Impact Statement for the Missing Link Project ("FEIS")). The FEIS is a public governmental record available on the City's website, at <https://www.seattle.gov/transportation/projects-and-programs/programs/bike-program/burke-gilman-trail-missing-link-project#projecthistory> (under the "Project History" heading)).

applied to abandon a majority of it in 1971.¹⁰ Seattle's citizens advocated for development of a trail along the old rail line. In 1978, the first 12.1 miles of the abandoned ROW opened as a public trail, and the City named the Trail after the founders of the original railroad.¹¹

Today, the Burke-Gilman Trail runs along a continuous 20-mile route, with the exception of the 1.4-mile-long Missing Link in the Ballard neighborhood. The Missing Link is bounded at one end where the Trail currently ends at 30th Avenue NW, near the Ballard Locks on the west, and at the other end where the Trail begins again at the intersection of 11th Avenue NW and NW 45th Street on the east.¹² While the City has evaluated several alternative routes to complete the Missing Link and complete the Burke-Gilman Trail (as described in further detail, below), its "Preferred Alternative," for which the City has advanced detailed designs for construction, runs primarily on Shilshole Avenue NW, in the vicinity of the Ballard Line. The map below shows the Preferred Alternative in a dotted red line, along with the other alternative routes the City analyzed.¹³

¹⁰ City of Seattle, Seattle Department of Transportation, Burke-Gilman History, <https://www.seattle.gov/transportation/projects-and-programs/programs/bike-program/burke-gilman-trail-missing-link-project/burke-gilman-trail-history> (last visited Jan. 22, 2019).

¹¹ City of Seattle, Seattle Department of Transportation, Burke-Gilman History, <https://www.seattle.gov/transportation/projects-and-programs/programs/bike-program/burke-gilman-trail-missing-link-project/burke-gilman-trail-history> (last visited Jan. 22, 2019).

¹² Seattle Ex. No. 3 at 1-1 (FEIS).

¹³ Seattle Ex. No. 3 at 1-6, Figure 1.2 (FEIS).



Figure 1-2. Proposed Alternatives

Within the Missing Link project area depicted in the above map, the Ballard Line exists entirely within the confines of the City's street ROW and runs through the Ballard industrial neighborhood, which sees traffic from freight trucks and vehicles. A large number of pedestrians and cyclists also currently travel on the City street ROW along Shilshole Avenue to get from one end of the Trail to the other, because it is the most direct route between the Trail's existing end points.¹⁴ Under existing conditions, parking is unregulated, no designated trail facilities exist, and only sporadic sidewalks are available in this area.¹⁵ As a result, cars frequently park on or

¹⁴ Seattle Ex. No. 3 at 1-7 (FEIS).

¹⁵ *Id.*

very near the tracks, and cyclists and pedestrians travel in the vehicle travel lane or the tracks.

Existing conditions are depicted in the following photographs:¹⁶



¹⁶ Seattle Ex. No. 5, Hr'g Exs. R-48, A-25; Seattle Ex. No. 9 (Additional Photos of Ballard Line and Ballard Terminal Operations). As described in further detail below, the parties have litigated the adequacy of the FEIS for the Missing Link project. See Seattle Hearing Examiner File No. W-17-004, *In the Matter of the Appeal of The Ballard Coalition*. Seattle Ex. Nos. 3–7 are records from that proceeding, including FEIS excerpts (Seattle Ex. No. 3), photographs of existing conditions (Seattle Ex. No. 5), and excerpts from transcripts of the parties' witness testimony (Seattle Ex. No. 6).





B. The City Acquired the Ballard Line, and the City and BTRC Negotiated “Parallel” Rail and Trail Operations.

As summarized in the Board’s decision in STB Docket No. AB-544X, in the late 1990s, the City and other interested parties negotiated a plan that addressed the Ballard Line’s future and fulfilled the parties’ various goals—specifically, BNSF’s desire to abandon the unprofitable and embargoed line, the City’s desire to acquire the rail corridor in order to develop the final portions of the Trail, and certain shippers’ desire to preserve rail service.¹⁷ Two shippers formed BTRC with the intention of becoming the Ballard Line’s new operator and, as the Board’s decision summarized, the parties agreed Ballard Terminal would “continue to provide freight rail

¹⁷ Petition, App. D at 2 (*Sea Lion Railroad—Abandonment Exception—In King County, WA*, STB Finance Docket No. AB-544X (served Aug. 11, 1998)). At that time, there were four shippers. *Id.* at 4. Today, the only shipper on the Ballard Line is the owner of Ballard Terminal, the Salmon Bay Sand and Gravel Company. Seattle Ex. No. 1 at 2 (Sullivan Verified Statement).

service over a portion of the corridor while, at the same time, Seattle builds and maintains a parallel trail on a portion of the corridor.”¹⁸

As part of the parties’ plan, Adventure Trails, a Washington nonprofit doing business as Sea Lion Railroad (“Sea Lion”), acquired the Ballard Line from BNSF and became the line’s interim custodian.¹⁹ On September 14, 1997, Ballard Terminal and Sea Lion (as predecessor-in-interest for the City) entered into an Operating Agreement, in anticipation of the City’s future ownership of the corridor and the assignment of the Operating Agreement to the City.²⁰

The Operating Agreement refers to the Ballard Line as “the premises” or “the line” throughout the agreement.²¹ The premises runs from Seaview Avenue NW on the west and along Shilshole Avenue and NW 45th Street, at which point the premises run alongside the Trail’s existing eastern segment.²² The area in dispute (*i.e.*, the area within the Missing Link’s vicinity) is only a portion of the Ballard Line premises, and within the disputed area, the premises are entirely within the City street right-of-way.

The Operating Agreement’s stated purpose was “to preserve the line intact for rail use, trail use, and other compatible public purposes[.]”²³ The agreement recognized the City’s plan “for an extension of the Burke-Gilman Trail in the area between 11th Avenue and the Locks within the [Ballard Line] premises.”²⁴ The Operating Agreement specifically gives the City flexibility for implementation of a trail design within these areas by securing Ballard Terminal’s agreement that, upon request, it would “promptly” relocate its track “to accommodate trail

¹⁸ Petition, App. D, at 2–3.

¹⁹ *Id.* at 3.

²⁰ Petition, App. F at 1–2 (Operating Agreement (Sept. 14, 1997)).

²¹ *Id.* at 1.

²² *Id.* at Ex. D.

²³ *Id.* at 1.

²⁴ *Id.* at 11 (emphasis added).

construction” (at the City’s expense for all labor costs).²⁵ Additionally, Ballard Terminal agreed to “not engage in construction of rail or rail-related facilities which interfere with the trail to be constructed on the premises.”²⁶ In turn, the City agreed to construct the trail facilities “only in accordance with applicable regulations of [Washington Department of Transportation] or [Washington Utilities and Transportation Commission] relating to separation from centerline of rail,” while agreeing “as a matter of convenience” to provide ten feet of clearance between the rail line and the trail “where practical.”²⁷

Notably, the Operating Agreement does not define or restrict the Trail’s location, except in portions of the premises not subject to this dispute. The map that Ballard Terminal reproduces throughout its Petition, taken from Exhibit D to the Operating Agreement, depicts the entirety of the Ballard Line for illustrative purposes, but the actual terms of the Operating Agreement only incorporate and give effect to a limited portion of that map. The single reference to Exhibit D in the Operating Agreement in paragraph 10 states,

Owner and Operator agree that the trail (which, for this paragraph, may include pedestrian-only trail or path facilities, bicycle-only trail or path facilities, or some combination thereof) and railroad shall be constructed within the areas indicated in Exhibit D in all portions of the premises which are *not* in street right of way.²⁸

The underlined clause is critical because it limits Exhibit D’s applicability. The map in Exhibit D does not apply to the entire Ballard Line premises. Instead, the terms of the Operating Agreement only incorporate the portion of the map depicting the rail line where it operates outside the street ROW. That only occurs for the western-most end of the Ballard Line, along Seaview Avenue NW, where portions of the rail line premises are not in the street ROW and

²⁵ *Id.* at 10.

²⁶ *Id.* (emphasis added).

²⁷ *Id.* at 9.

²⁸ *Id.* at 8 (emphasis added).

where the Trail was long ago constructed. That western-most portion of the Ballard Line is well outside of the vicinity of the rail line premises at issue in this dispute. The map in Exhibit D has no bearing on the location of the Missing Link, where the rail line premises are entirely within the street ROW.

Consistent with the Operating Agreement’s distinction between portions of the premises that are within or outside the City street ROW, Ballard Terminal’s franchise agreement with the City includes a property description that identifies the specific portions of the Ballard Line that are within the City street ROW.²⁹ Because the portions of the Ballard Line that are relevant to this dispute are within the City street ROW, Exhibit D does not apply.³⁰

The City’s grant of a 30-year railway franchise to Ballard Terminal, under Ordinance 118734, was also a part of the parties’ plan. The franchise reiterates and reflects the general principles in the Operating Agreement. In the franchise, the City expressed its “long-held policy” of “support[ing] rail-served businesses,” as well as its intent to “maintain a permanent linear corridor . . . for trail purposes” along the railroad ROW.³¹

The franchise gave Ballard Terminal the right to own and operate the Ballard Line on the City’s property rent-free.³² In turn, the franchise agreement specifically reserved to the City “the

²⁹ Petition, App. G, Attach. A (Ordinance 118734 (Sept. 29, 1997)).

³⁰ Ballard Terminal’s interpretation of Exhibit D is incorrect for other reasons as well. For example, Ballard Terminal argues the Missing Link must be constructed two blocks north of the railroad, on NW Leary Way/Ave., relying on Exhibit D’s pink highlighting of NW Leary Way/Ave., labeled “Planned Bike Lanes.” Petition at 7, 11. But the “Planned Bike Lanes” do not denote the Missing Link. As stated in paragraph 10, at the time of the Operating Agreement, the City had not decided whether the Trail would be pedestrian-only, bicycle-only, or a combination. These arguments and evidence, such as evidence of the original parties’ understanding of the Operating Agreement, are part of the contractual dispute the City has brought before the King County Superior Court.

³¹ Petition, App. G at 1.

³² *Id.* at 2. At the time, the Ballard Line was not generating sufficient revenue to cover costs and service debt; nevertheless, Sea Lion represented to the Board that it believed Ballard

right to construct all public improvements (including trails) . . . across, underneath or above the tracks,” “full and complete right of access to any space occupied by such tracks and to all of said franchise right-of-way,” and the right to remove or relocate tracks, so long as such activities do not interfere with the railroad’s safe operation.³³ Like the Operating Agreement, the franchise did not define or identify a specific route for the Missing Link.³⁴

C. Ballard Terminal Litigated the Environmental Review of the Missing Link Project.

The Petition is not Ballard Terminal’s first challenge to the Missing Link project. On June 2016, the City prepared a Draft Environmental Impact Statement (“DEIS”) for the Missing Link project. Pursuant to the Washington State Environmental Policy Act (“SEPA”), the EIS’s purpose was to provide a detailed study of the existing conditions, probable significant environmental impacts, and project alternatives.³⁵ The DEIS analyzed four potential alternative routes, including the Leary Alternative, a route along NW Leary Way/Ave. (the route that Ballard Terminal claims the City is obligated to follow), as well as the Shilshole South Alternative along the south side of Shilshole Ave NW and NW 54th Street,³⁶ where Ballard Terminal’s tracks are located.³⁷

Terminal would be able to operate the line successfully by virtue of its ability to use the City’s property rent-free. Petition, App. D at 4.

³³ Petition, App. G at 3 (emphasis added).

³⁴ *Id.* The Petition cites Resolution 29474 (attached as Appendix E to the Petition) as support for placing the Trail in NW Leary Way/Ave. However, the Resolution was signed before the franchise ordinance and, unlike the franchise, is not binding law. Further, the Resolution describes the location as a “preferred” location and thus is not binding by its own language.

³⁵ Washington Administrative Code (“WAC”) 197-11-440.

³⁶ Seattle Ex. No. 3 at 1-5 (FEIS).

³⁷ *Id.* at 1-8–1-12.

The City solicited comments on the DEIS and received approximately 4,100 comments.³⁸ Of the comments that expressed a preferred route, 80% preferred the Shilshole South Alternative.³⁹ Based on the comments and on additional transportation analyses, the City developed and analyzed a Preferred Alternative in the FEIS.⁴⁰ The Preferred Alternative is largely similar to the Shilshole South Alternative, and it is the selected route for the Missing Link that Ballard Terminal challenges here.

The FEIS is a nearly 300-page document that extensively analyzed transportation and other impacts associated with each alternative, discussed the applicable transportation regulations and industry standards, and explained why the Preferred Alternative was ultimately selected. Among other considerations, the Preferred Alternative crosses the fewest intersections (which are associated with higher rates of injury-causing collisions⁴¹), improves the level of service at intersections, provides the best sight lines, and has lower freight truck volumes compared to the Leary Alternative.⁴² In contrast, the Leary Alternative has the highest number of intersection crossings of all the alternatives, worsens the level of service at intersections, reduces the sidewalk on one street by up to twelve feet, and has nearly four times the number of areas with sight distance concerns compared to the Preferred Alternative.⁴³

³⁸ *Id.* at 1-3.

³⁹ *Id.* at 1-5.

⁴⁰ *Id.* at 1-5–1-7.

⁴¹ *Id.*, App. B at 4-35–4-36 (Transportation Discipline Report (“TDR”) (May 2017)). The TDR, which was in Appendix B to the FEIS, provided more detailed data and technical information as a supplement to the FEIS.

⁴² *Id.* at ES-12–ES-14; 4-22.

⁴³ *Id.*

The FEIS also discussed the Preferred Alternative’s potential relocation of a portion of Ballard Terminal’s tracks.⁴⁴ The FEIS stated the track relocation would be coordinated with Ballard Terminal “so that impacts on rail operations would be minimized and so that rail operations could continue as before once construction is complete.”⁴⁵

Ballard Terminal and other entities, as members of an association called The Ballard Coalition, challenged the adequacy of the FEIS under SEPA.⁴⁶ After a six-day hearing, commencing November 29, 2018, including testimony about Ballard Terminal’s operations from Ballard Terminal’s general manager James Forgette (its witness herein) and owner Paul Nerdrum, the Seattle Hearing Examiner upheld the FEIS’s adequacy. With respect to potential railroad-related impacts, the Examiner concluded the FEIS “adequately disclosed the potential removal or relocation of railroad tracks,” and that “Appellant did not demonstrate that removal of railroad tracks would have a significant negative impact on the environment, or why coordination of such removal or relocation with rail owners would not mitigate impacts.”⁴⁷

The Ballard Coalition appealed the Examiner’s Findings and Decision to the King County Superior Court. The Superior Court issued its decision on the appeal on December 21, 2018. Although the Court concluded that the FEIS lacked sufficient information regarding the narrow and specific issue of some types of potential economic impacts to businesses, the Court

⁴⁴ *Id.* at 1-31–1-32.

⁴⁵ *Id.* at 7-36.

⁴⁶ Seattle Ex. No. 4 (Corrected Notice of Appeal, Seattle Hearing Examiner File No. W-17-004, *In the Matter of the Appeal of The Ballard Coalition* (June 9, 2017)). The filings in the SEPA proceeding are available on the Seattle Hearing Examiner’s website, at <https://web6.seattle.gov/Examiner/case/W-17-004>.

⁴⁷ Seattle Ex. No. 7 at 17 (Findings and Decision (Jan. 31, 2018)).

affirmed the FEIS's adequacy in all other respects, and specifically concluded that the FEIS's discussion of potential traffic hazards and safety impacts was adequate.⁴⁸

D. Ballard Terminal's Operations: Ballard Terminal Serves One Customer and Currently Operates in Direct Proximity to Vehicles, Pedestrians, and Cyclists.

As the Petition alluded, Ballard Terminal has only one customer—Salmon Bay Sand and Gravel (“Salmon Bay”).⁴⁹ In fact, Salmon Bay has been Ballard Terminal's only customer in the last three years, and in the last five to ten years, Ballard Terminal has had only one other customer.⁵⁰ In 2016, Ballard Terminal received approximately \$37,000 in total revenue and estimated that it hauled 120-130 cars.⁵¹ In 2017, it appears that Ballard Terminal increased its freight revenues to approximately \$67,000, implying that it transported approximately 200-225 railcars in 2017.

Ballard Terminal's current railroad activity is limited to moving approximately four rail cars of bulk materials to Salmon Bay approximately once per week.⁵² The train does not run on a regular schedule; instead, Ballard Terminal sets its own schedule for runs, in coordination with Salmon Bay.⁵³ Ballard Terminal currently operates in the middle of an active vehicle travel lane—NW 45th Street—and Ballard Terminal representatives testified that this placement “hasn't

⁴⁸ Seattle Ex. No. 8 (Order Granting in Part and Denying in Part Ballard Coalition's Challenge to the Adequacy of SDOT's EIS, King County Superior Court Cause No. 18-2-04988-1 (Dec. 21, 2018)).

⁴⁹ Forgette Verified Statement at ¶¶ 6, 7 (referring to Salmon Bay and stating that Ballard Terminal operates “depending on its shipper's needs”) (note use of the singular “shipper's”); *see also*, Petition at 13, 30 (same).

⁵⁰ Seattle Ex. No. 6 at 783–85 (Hr'g Tr., Paul Nerdrum (Nov. 29, 2017)). Paul Nerdrum is the vice president of SBSG and one of the owners of BTRC.

⁵¹ *Id.* at 1837–39 (Hr'g Tr., James Forgette (Dec. 5, 2017)).

⁵² *Id.* at 375–76 (Hr'g Tr., Tim Olstad (Nov. 28, 2017)). Tim Olstad is an SBSG employee.

⁵³ *Id.* at 405.

been a problem” for Ballard Terminal’s operations.⁵⁴ Contrary to Ballard Terminal’s claim that it “actively uses” the Western Pioneer Spur,⁵⁵ Ballard Terminal last used the spur for transloading over five years ago. Otherwise, Ballard Terminal has used the spur for occasional storage of parked railcars.⁵⁶ Moreover, Ballard Terminal’s alleged “improvements” to the Western Pioneer Spur⁵⁷ were made without notice to, or permission from, the City, and to the extent said improvements interfere with the proposed trail, constitute a breach of the Operating Agreement, as to which the City has now filed suit against Ballard Terminal.⁵⁸

E. The Missing Link’s Design Improves upon Existing Conditions and Safely Accommodates Parallel Rail and Trail Operations.

As described in text and depicted in photographs in section II.A and Seattle Ex. No. 9, above, under current conditions, a variety of modes of transportation use the street right-of-way in the vicinity of the Missing Link (truck, passenger vehicle, rail, pedestrian, and bicycle) but there are no dedicated bicycle facilities, parking is unregulated, driveways are undefined, and sidewalks are scarce. As a result, these existing conditions are generally unsafe for vehicles, pedestrians, and cyclists. During the SEPA hearing, the Ballard Coalition’s own transportation engineering expert characterized the existing conditions as “haphazard” and “disorganized.”⁵⁹ One of the Missing Link’s purposes is to improve upon these existing conditions by providing clearly designated travel lanes, trail facilities, and parking locations within the City street right-

⁵⁴ *Id.* at 773 (Hr’g Tr., Paul Nerdrum (Nov. 29, 2017)).

⁵⁵ Forgette Verified Statement at ¶ 15.

⁵⁶ Seattle Ex. No. 6 at 1826–27 (Hr’g Tr., James Forgette (Dec. 5, 2017)). At the hearing, Mr. Forgette testified that Salmon Bay last stored cars sometime in 2016.

⁵⁷ Petition at 20.

⁵⁸ Seattle Ex. No. 2 at ¶¶ 4.40, 4.41, 7.3 (Complaint for Declaratory Judgment, Injunctive Relief, and Breach of Contract, *City of Seattle v. Ballard Terminal Railroad Company*, Case No. 19-2-01794-5-SEA, No. 19-2-01794-5 SEA (“Complaint”)); *see also* Petition, App. F at 10.

⁵⁹ Seattle Ex. No. 6 at 454 (Hr’g Tr., Scott Kuznicki (Nov. 28, 2017)).

of-way, consistent with applicable regulations and industry design standards for vehicles, trails, and railroads.

Importantly, for this dispute, the current Missing Link design fulfills that purpose by allowing for safe, parallel rail and trail operations, as detailed in Mr. Sullivan's accompanying Verified Statement. Mr. Sullivan testifies that, in his professional judgment (based on 43 years' experience in the railroad industry), the required minimum clearance of 8'6" from the center line of the rail tracks to the edge of the Trail will assure that the Trail will not interfere with railroad operations. Moreover, other improvements to the rail line and the Trail (all paid by the City) will ensure that the Trail will not cause safety issues with Ballard Terminal's operations.

Mr. Sullivan has also evaluated the three specific aspects of Ballard Terminal's operations that the Petition identifies: the Western Pioneer Spur; the track along 45th Street NW; and "Not 54th Street." As reflected in his expert report and described in further detail below, the City's planned improvements will not interfere with these three specific aspects of Ballard Terminal's Operations.

F. The City Has Sought to Reach Resolution with Ballard Terminal.

Aware of Ballard Terminal's opposition to the Missing Link project, the City has consistently attempted to reach resolution with Ballard Terminal. Because the Operating Agreement gives the City significant flexibility with the Trail's design and with track relocation, the City sought Ballard Terminal's input into the Missing Link's design. The City specifically invited Ballard Terminal to join the Design Advisory Committee, a committee formed to provide input on the design's development, but Ballard Terminal declined to join the committee. The City also shared design drawings with Ballard Terminal showing 30%, 60%, and 90% design. Ballard Terminal did not comment except on the 90% design. The City also engaged Ballard

Terminal in negotiations and discussions, up to and including the Deputy Mayor and representatives of the Mayor's Office, but all of these discussions were ultimately fruitless.⁶⁰

Moreover, even though the City's planned improvements will not significantly interfere with these three aspects of Ballard Terminal's rail operations, the City has also sought to resolve Ballard Terminal's opposition through advancements and minor revisions to the Missing Link's design.⁶¹ The design revisions call for relocations and adjustments to the Trail and track alignments as allowed by the terms of the Operating Agreement. Although these design alterations have not yet been released to the public because the design process is ongoing, Mr. Sullivan has also examined the alternative designs and has discussed them with the City's engineers. Mr. Sullivan concluded that the alternative designs for the Trail would not significantly interfere with BTRC's operations, because of the configuration of those designs (such as moving the Trail from between the main line and the spur) and because the Trail would be installed in compliance with the minimum-clearance requirement (8'6" from the center line of the rail tracks to the edge of the Trail) in the applicable regulation of the State of Washington (which is consistent with industry standards), and 10' where practical. Therefore, Mr. Sullivan

⁶⁰ Seattle Ex. No. 2 at ¶¶ 4.27–4.32 (Complaint).

⁶¹ The final design of the Missing Link is not yet 100% complete and is still subject to modification. In a few places, depending on the determinations yet to be made about that final design, the rail tracks will likely have to be moved to accommodate the Trail, while allowing rail operations to continue without interference. Seattle Ex. No. 1 at 4–5 (Sullivan Verified Statement). The possibility of such track relocation was contemplated by the parties when entering into the Operating Agreement, and the Operating Agreement expressly preserves Seattle's right, as Owner, to compel Ballard Terminal to relocate its tracks (at the City's expense) to accommodate the Trail. Any disputes under the Operating Agreement about relocating the tracks are matters to be resolved in the litigation in King County Superior Court, not before the STB. It is notable that Ballard Terminal's witness Forgette did not claim in his Verified Statement that Trail construction or relocation activities would interfere with rail operations, presumably because he knows both that such construction would not interfere with Ballard Terminal's limited operations and because Ballard Terminal agreed to such construction and track relocation.

concluded that both the original design and the alternative designs would not significantly interfere with rail operations or prevent Ballard Terminal from fulfilling its common carrier obligations and that there is no basis for the assertions and conclusions of Mr. Forgette, Ballard Terminal's witness to the contrary.⁶²

Notwithstanding the City's efforts to resolve this dispute, Ballard Terminal continues to deny the City's right to construct the Missing Link, as evidenced in its pattern of conduct and in the Petition. On January 17, 2019 the City filed the civil Complaint against Ballard Terminal in King County Superior Court referred to *supra*.⁶³ The Complaint seeks a declaratory order that the City has complied with its obligations under the Operating Agreement and the railway franchise by designing the Missing Link in a manner consistent with the terms of the Operating Agreement, and that Ballard Terminal has breached its contractual obligations by denying the City's right to construct the Missing Link.

G. The City Will Not Construct the Relevant Portions of the Missing Link in April 2019.

Ballard Terminal's Petition mischaracterizes the City's timeline for construction of the Missing Link. The City's website, which the Petition cited, states that the City anticipates starting construction of Phase 1 only in the first quarter of 2019.⁶⁴ The website shows that the City anticipates starting construction of Phase 2 in the third quarter of 2019 at the earliest. As the Petition itself admits, Phase 2 is the "focus" of the Petition because it spans the portions of

⁶² Seattle Ex. 1 at 4–8 (Sullivan Verified Statement).

⁶³ See *supra* note 58.

⁶⁴ City of Seattle, Seattle Department of Transportation, Burke-Gilman Trail Missing Link Project, <https://www.seattle.gov/transportation/projects-and-programs/programs/bike-program/burke-gilman-trail-missing-link-project> (last visited Jan. 22, 2019) (cited in Petition at 7 n.8).

the railroad that Ballard Terminal claims will be impacted.⁶⁵ The Petition does not allege any impacts from Phase 1, which spans between NW 54th St and NW Market St., and thus its construction timeline is not relevant to the Petition.⁶⁶

Moreover, the timeline on the City's website does not reflect the Superior Court's recent decision remanding the FEIS for additional economics analysis. As a result, the design and construction of Phase 2 have been delayed.

III. Questions Presented

1. Whether the Board should become involved in a matter of contract interpretation involving legal issues arising under the laws of the State of Washington, especially given that a legal action has now been commenced by the City of Seattle against Ballard Terminal in King County Superior Court, to resolve the same issues?

2. If the Board reaches the merits of Ballard Terminal's claims, whether construction of a 1.4-mile segment of an otherwise-completed trail in the City of Seattle, in compliance with the applicable minimum-clearance requirement in Washington State regulations, which is consistent with railroad industry standards for such clearances, would interfere with railroad operations on an adjoining rail line, especially one over which only about 3-4 rail cars (in one train) move per week, to one shipper?

⁶⁵ Petition at 19.

⁶⁶ Ballard Terminal's assertion that the City's construction plans "break[s] its promise to the Division I Court of Appeals" is false and misleading. *Id.* at 36. Ballard Terminal's claim is based on a statement the City made nearly ten years ago, in the context of an appeal of an earlier threshold step in the SEPA process, and thus is not binding or relevant here.

IV. Argument

A. The Board Should Not Institute a Proceeding Because This is a Dispute About the Parties' Rights and Obligations Under Contracts between the Parties; Under the Board's Precedents, Contract Disputes Are to Be Resolved in Court, Not at the Board.

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 to issue a declaratory order to terminate a controversy or to remove uncertainty.⁶⁷ Here, the Board should exercise its discretion not to institute a proceeding, because this is a controversy over a contract in effect between the parties, governed by Washington State law.⁶⁸ Accordingly, the dispute should properly be resolved in court, as the Board's precedents require, rather than by the

⁶⁷ *Santa Cruz County Regional Transportation Comm'n—Petition for Declaratory Order*, slip op. at 2, STB Finance Docket No. 36213 (served Oct. 24, 2018) (citing *Bos. & Me. Corp. v. Town of Ayer*, 330 F.3d 12, 14 n.2 (1st Cir. 2003); *Intercity Transp. Co. v. United States*, 737 F.2d 103 (D.C. Cir. 1984); and *Delegation of Auth.—Declaratory Order Proceedings*, 5 I.C.C.2d 675, 675 (1989)).

⁶⁸ “The Board does not interpret State or local law to determine if a potential trail sponsor is complying with such law.” *City of Fishers, City of Noblesville, & Hamilton County, Ind. Petition for Partial Revocation of Exemption*, slip op. at 10 & n.11, STB Finance Docket No. 36137 (served Dec. 21, 2018) (citation omitted); *Norfolk & Western Railway Co.—Abandonment Exemption—Between Kokomo and Rochester in Howard, Miami and Fulton Counties, IN*, slip op. at 12, STB Docket No. AB No. 290 (Sub-No. 168-X) (served May 4, 2005) (“Given the Board’s limited role under the Trails Act (discussed above), we leave it to individual states to interpret and enforce state and local requirements applicable to any particular trail” (citing *Central Kansas Railway, Limited Liability Company—Abandonment Exemption—In Marion and McPherson Counties, KS*, slip op. at 5, STB Docket No. AB-406 (Sub-No. 6X) (served May 8, 2001) (“*Central Kansas II*”)). In *Central Kansas II*, the Board stated: “But we are not expert at the interpretation of all of these nuisance statutes, which vary from jurisdiction to jurisdiction, and we have found that it would be inappropriate, if not impossible, for us to try to establish in the abstract a standard by which a trail sponsor could demonstrate its fitness to manage and maintain a particular trail. . . . Thus, we agree with the Conservancy that we should leave to authorities of the State of Kansas the responsibility to interpret and enforce any state or local requirements applicable to this particular trail. Should a Kansas court determine that the Conservancy has, indeed, failed to manage the trail in a lawful manner, then we remain available to consider whether the interim trail use authority should be revoked.” *Central Kansas II*, slip op. at 5.

Board. In other words, the Board, cannot resolve any claimed uncertainty⁶⁹ about the Operating Agreement; only a court can.

Ballard Terminal's dispute with Seattle is controlled by the terms of the Operating Agreement. That Operating Agreement is a binding contract. The Board recently determined, in a matter involving Ballard Terminal and (ironically) at Ballard Terminal's urging, not to institute a declaratory proceeding under a Petition filed by Snohomish County, Washington. Rather, the Board determined that the dispute there involved a matter of law and contract, i.e., who owned (and perhaps owns) the property there in dispute and at what times. The Board therefore adhered to its long-standing precedent and determined not to institute a proceeding, but rather to let a court decide the ownership issue, because the Board does not decide matters of contract or legal issues that arise outside the Board's authority under the Interstate Commerce Act.⁷⁰ So too, should it decline to institute a declaratory proceeding here. Instead, the Board should affirm that that the parties should resolve their dispute in court, as the City has already sought to do.⁷¹

It bears repeating that the terms of the Operating Agreement do not support Ballard Terminal's assertions in its Petition. Notably, under Section 10 of the Operating Agreement, Ballard Terminal accepted the right to operate its railroad in the Street ROW, which is owned by the City, with the explicit understanding that the City intended to construct the Burke-Gilman Trail in the same Street ROW. Ballard Terminal agreed to cooperate with the City with respect

⁶⁹ The City of Seattle does not believe there is any uncertainty about the meaning of the provisions of the Operating Agreement discussed herein, including Ballard Terminal's obligations thereunder, but it recognizes that Ballard Terminal may claim otherwise, in King County Superior Court.

⁷⁰ *Eastside Community Rail, LLC – Acquisition and Operating Exemption – GNP RLY, Inc.*, slip op. at 7–8, STB Finance Docket No. 35692 (served Dec. 13, 2018).

⁷¹ Although the City believes there are no issues subject to Board review, if the Board determines otherwise, the City maintains its right to have an evidentiary proceeding before the Board.

to the Burke-Gilman Trail, including that it would move its tracks within the same street ROW – at the City’s expense—if need be to accommodate the Burke-Gilman Trail. Finally, the Operating Agreement does not specify the location of the trail in the vicinity of the Missing Link. Ballard Terminal’s reliance on a map attached to the Operating Agreement is misplaced and ignores the controlling terms of the Agreement itself, which only incorporated the map for a limited purpose that is unrelated to the area under dispute. Ballard Terminal is now trying to turn that Operating Agreement on its head, by arguing that the Owner’s (*i.e.*, the City’s) Trail ought to be moved (as much as two blocks, onto a busy City street) rather than to accommodate the City and its Trail in accordance with Ballard Terminal’s contractual obligations. While Ballard Terminal’s arguments are far-fetched, they present, at best, a dispute over the implementation of the material terms of a contract. The Board has been consistent over the years in letting courts determine the parties’ respective rights and obligations under contracts in effect between the parties, like the Operating Agreement in this case. There is every reason it should do the same here, especially because there is a pending court case between the parties in Superior Court in King County, Washington.

In that case, the City seeks declaratory relief that, under the Operating Agreement, Ballard Terminal (1) accepted its contractually provided ability to operate trains in the City-owned ROW at issue with the understanding that the City intended to complete the Missing Link, and (2) agreed to cooperate with the City during the construction of the Trail, including with respect to any necessary change in the location of the tracks (entirely within the existing Street ROW). The City is confident that the King County Superior Court will enforce its rights (and those of Ballard Terminal) under the Operating Agreement, and will conclude that the City has every right to finish the Burke-Gilman Trail in the same Street ROW as exists the Ballard

Terminal rail line, because Ballard Terminal agreed to the terms described herein in the Operating Agreement. That is the proper forum to resolve this dispute.

Even if Ballard Terminal's Petition raises issues that could potentially be within the Board's purview, the Board should nevertheless follow its precedent and dismiss the Petition without prejudice. That approach would allow the King County Superior Court to adjudicate the case brought by the City before determining whether anything remains to be decided by the Board, to avoid any conflict with the Court's rulings. Alternatively, if the Board departs from its longstanding precedent and does not dismiss this Petition, it should at least hold its proceeding in abeyance while awaiting the Court's ruling.

B. If the Board Reaches the Merits, It Should Conclude That It Lacks Jurisdiction to Preempt the Actions of the City of Seattle in Attempting to Construct the Missing Link, Because the Trail Would Not Prevent or Interfere with Continued Rail Operations by Ballard Terminal.

If the Board reaches the merits, despite the City's contention that the dispute should be resolved by the King County Superior Court, the Board should nevertheless rule in the City's favor on the merits. Ballard Terminal's position is entirely unfounded. The construction and use of the Missing Link will not interfere with Ballard Terminal's Operations.

1. The Issue Is Whether Installation of the Missing Link Should Be Preempted Because It Would Interfere with Railroad Operations.

Under the Board's governing statute and precedents, when a railroad is seeking to preempt State or local action, the question before the Board is whether railroad operations may continue when contract rights are enforced.⁷² The Board can exercise its preemptive authority to intervene if an activity would significantly interfere with railroad operations. This stems from the underlying governing statute. Under the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), 49 U.S.C. § 10501(b), the Board has "exclusive" jurisdiction over

⁷² See, e.g., *CSX Transportation*, *supra* note 4; see also cases cited *supra* note 67.

transportation by railroad in the United States (with certain exceptions not here relevant, such as with respect to “mass transportation provided by a local governmental authority”).⁷³ Under that authority, the Board may determine if certain non-railroad-related activities would interfere with railroad operations. It follows that, if those non-railroad-related activities would not interfere with railroad transportation, the Board lacks jurisdiction, but rather the matter is one for other governmental entities (if any) to regulate.⁷⁴ For example, in *CSX Transportation*, the Board determined that, based on expert testimony, the air rights property interest at issue would not interfere with rail operations because the minimum-clearance requirements would be met. On that basis, the Board denied CSX’s petition for declaratory relief.

Therefore, if rail operations may continue, notwithstanding the State or local government’s actions (including proposed construction of a trail or minor relocation of a rail line), the Board lacks jurisdiction to preempt the proposed State or local action.⁷⁵ If there were

⁷³ 49 U.S.C. § 10501(c)(2)(A).

⁷⁴ E.g., *City of Fishers et al.*, *supra* note 67, slip op. at 10 n.11 (“The Board does not interpret state or local law to determine if a potential trail sponsor is complying with such law. *See also Norfolk & W. Ry –Abandonment Ex. – Between Kokomo and Rochester in Howard, Miami, and Fulton Ctys.*, AB 290 (Sub-No. 168X), slip op. at 12 (STB served May 4, 2005) (“[W]e leave it to individual states to interpret and enforce state and local requirements applicable to any particular trail”).

⁷⁵ Ballard Terminal asserts that “Under the ICCTA, only this Board has the authority to permit a local government to require a railroad, like BTRC, to remove, reconfigure, or relocate its rail facilities.” Petition at 16 (citing *Wis. Cent. Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009, 1012-13 (W.D. Wis. 2000)). That assertion is not correct; here, Ballard Terminal has expressly agreed, in Section 10(a)-(e) of the Operating Agreement with the City, to accommodate a trail within the ROW, so long as such is constructed in accordance with State of Washington-required minimum clearances, and relocate (within the existing ROW) its rail lines (at the City’s expense) to accommodate the Burke-Gilman Trail, so long as doing so would not interfere with rail operations.

Moreover, the Board has repeatedly determined that “replacing existing track with substitute track constructed nearby is not within the reach of 49 U.S.C. 10901 and 10903 if there is no effect on: (1) service to shippers; (2) the carrier’s territory or traffic; (3) competition; or (4) the carrier’s revenue or operating expenses,” and that there is “an absence of jurisdiction” if the proposed relocation operates “in the same manner as the existing line, no shippers are involved,

no interference with rail operations, there would be no basis for this Board to become involved, as it has often recognized.⁷⁶

Ballard Terminal's analogy to other cases addressing the Board's preemption authority is also misplaced because it fails to acknowledge critical distinguishing facts.⁷⁷ Ballard Terminal relies on cases addressing the Board's preemptive authority to address "unilateral" actions of local governments to relocate rail lines or condemn railroad facilities that materially impact rail operations and create unsafe operating conditions.⁷⁸ The City of Seattle does not dispute that general proposition, but it is not applicable to the instant dispute.

Most importantly, Ballard Terminal ignores that the City is not acting unilaterally or taking any property. The City already owns the Street Right of Way upon which the railroad operates, and Ballard Terminal has already agreed to changes to the Ballard Terminal's facilities, up to and including relocation of tracks in the Operating Agreement. Hence, this matter and dispute is very different from other "unilateral" efforts to exercise authority over a railroad. Moreover, as explained below, construction and use of the Missing Link will not interfere with Ballard Terminal operations or create unsafe operating conditions.

and no new competitive territory is reached." *The State of Texas – Petition for Declaratory Order Regarding Highway Construction in Tarrant County, TX*, slip op. at 2, STB Finance Docket No. 32589 (served Feb. 7, 1995) (citing *Denver & Rio Grande Western Railroad Co. – Joint Project – Relocation over Burlington Northern Railroad Co.*, 4 I.C.C.2d 95, 97-99 (1987)). Here, the relocation of Ballard Terminal line was agreed to by Ballard Terminal, will not affect service to shippers, territory or traffic, competition, revenues, or operating expenses, the Ballard Line will be operated in essentially the same manner as before, and no new competitive territory would be reached.

⁷⁶ E.g., *CSX Transportation*; see also authorities cited in note 67, *supra*.

⁷⁷ Petition at 16–18 (citing *City of Auburn v. US Gov't*, 154 F.3d 1025, 1031 (9th Cir. 1998), as amended October 20, 1998; *City of Marshfield*, 160 F. Supp. 2d at 1012-13; and *City of Lincoln v. STB*, 414 F.3d 858 (8th Cir. 2005)).

⁷⁸ See Petition at 16, 18.

2. The Trail Will Be at Least 8’6” from the Centerline of the Rail Tracks, Which Is Both the Washington State Regulatory Standard and the Industry Norm.

The Missing Link will not interfere with railroad operations because it will maintain regulatory and industry-standard minimum clearances. Under Board precedent, a project that maintains minimum clearances does not interfere with rail operations.⁷⁹

In this case, because there is no applicable federal minimum-clearance requirement, the applicable minimum-clearance requirement here is 8’6” under the State of Washington’s applicable regulation.⁸⁰ Here, as Mr. Sullivan shows, the Trail would be separated physically from Ballard Terminal’s rail line by at least the required minimum clearance of 8’6” under the State of Washington’s applicable regulation.⁸¹ Both compliance with that minimum-clearance

⁷⁹ See *CSX Transportation*, *supra* note 4, slip op. at 5–8 (concluding that there would be no interference with rail operations from a proposed building over the rail line that would be built with more than the necessary clearances).

⁸⁰ Seattle Ex. No. 1 at 5. (Sullivan Verified Statement).

⁸¹ Ballard Terminal discusses the *City of Lincoln* case at length, describing the clearance that would have been provided there as 7.5 feet, which the Court concluded was inadequate. Petition at 26 (citing *City of Lincoln*, 414 F.3d at 859). Ballard Terminal’s Petition disingenuously then tries to alter the facts in this dispute between the City of Seattle and Ballard Terminal, using words such as “appears” and “approximately” to attempt to fit the facts here to those in the *City of Lincoln* case. Ballard Terminal states: “SDOT’s new configuration is less safe because it does not provide enough space for BTRC to safely operate as the Missing Link appears to be approximately 7.5 feet from the center line of BTRC’s main line track and the new spur.” Petition at 24 (emphasis added). In fact, as Mr. Sullivan, the City’s expert, explains, the minimum clearance for the Burke-Gilman Trail, including the Missing Link, would be 8’ 6” (8.5 feet), which is the minimum clearance requirement imposed by Washington law. See Petition at 34, where Ballard Terminal noted that SDOT intends to maintain a minimum clearance of 8’6” between the Trail and vehicular traffic on City streets. So, Ballard Terminal knows that the minimum-clearance requirement is 8.5 feet, not “approximately 7.5 feet,” and that the SDOT intends to adhere to that clearance requirement. This sort of unsupported allegation, which is contrary to the Operating Agreement and unsupported by any witness or other evidence, is not the sort of allegation on which the Board can rely. Cf. *CSX Transportation*, *supra* note 4, slip op. at 6 n.10 (refusing to give credence to speculative statements not supported by evidence in the record).

requirement, and Mr. Sullivan’s opinion based on his extensive experience in the railroad industry, confirm that the proposed Trail will not interfere with continued rail operations.

Ballard Terminal’s arguments that a wider clearance is required is based on its misinterpretation of the terms of the Operating Agreement. While the dispute over the terms of the contract should be left to the state court, Ballard Terminal’s position is unfounded. Under Section 10(b) of the Operating Agreement the parties agreed that the operative standard would be that the Trail would be constructed in accordance with applicable DOT or WUTC (Washington Utilities Transportation Commission) minimum-clearance requirements.⁸² Because there is no federal (i.e., DOT) minimum-clearance requirement, the contract incorporates the state’s minimum-clearance requirement of 8’6”. Thus maintaining that minimum standard is also consistent with the general separation requirements found in the contract.

Section 10(b) of the Operating Agreement documents the City’s intention “as a matter of convenience” to provide 10’ separation “where practical.” But, “where practical” is not a minimum requirement; it is aspirational only. Similarly, the documentation of an intention to provide 10’ “as a matter of convenience” is not a binding contractual obligation, but has been maintained for much of the Trail.

Finally, even if the Board (or, more properly, a reviewing court) were to infer a binding contractual commitment to maintain 10’ of separation, the Contract includes tools by which the City can provide that amount of separation. Specifically, Section 10(e) of the Operating

⁸² Footnote 2 of the Operating Agreement states: “The parties concur that the applicable regulations include WAC 480-060-050. [WAC 480-060-050 is the regulation that includes the minimum-clearance requirement of 8’6” described by Mr. Sullivan.] As a matter of convenience, Owner intends to provide a ten-foot separation where practical.” (emphasis added). The use of the words “desired” and “where practical” in Section 10(b) clearly indicate that a 10’ clearance was not agreed to nor was it required, notwithstanding Petitioner’s arguments to the contrary.

Agreement provides that the Parties agreed that the Operator (Ballard Terminal) would cooperate in relocating its rail line to accommodate a new Trail segment: “Owner shall have the right to require Operator to relocate its track in order to accommodate trail construction in accordance with this agreement” Plainly, that allows the City to require Ballard Terminal (at the City’s expense) to relocate the tracks to accommodate the new trail construction. Ballard Terminal’s argument to the contrary is frivolous, in light of the clear language of Section 10(e). Similarly, the City could change the location of the Trail, as needed. These, however, are issues related to the interpretation of a contract to be resolved in King County Superior Court, and not by this Board, precisely because the project maintains minimum clearances to meet regulatory requirements and industry standards.

Moreover, Ballard Terminal has tried to pull the wool over the Board’s eyes, with pictures and a story that imply that there are regular, ongoing rail operations along the line, creating a regular and serious safety or operational problem for the railroad if the Trail is completed in the ROW. What Ballard Terminal did not tell the Board is that it has only one shipper – its owner, Salmon Bay Sand & Gravel Company⁸³ – for which Ballard Terminal moves about 4 rail cars/week, in one train. That is the entirety of the rail operations, except for parking rail cars, along the lines at issue. (And a parked rail car is not a threat to safety of the Trail users.)

So, the picture Ballard Terminal tried to paint in the Petition for Declaratory Order, of an active rail line that would be disrupted by a Trail alongside, is misleading. In any event, the

⁸³ Forgette Verified Statement at ¶¶ 6, 7 (referring to Salmon Bay and “its shipper’s” needs); Petition at ¶¶ 13, 30 (referring in both places to Ballard Terminal “shipper’s needs”—*i.e.*, in the singular).

Trail will be built with the required Washington-State separation from the rail line, to ensure safety.⁸⁴ That is all that is required of Seattle in order to complete the Trail.

Similarly, Ballard Terminal's arguments in its Petition for a different location for the Trail two blocks away are irrelevant. The merits of one route for the Trail, or another, are not for this Board to determine. Nevertheless, Ballard Terminal's position is incorrect. The City, as part of the required SEPA process of considering alternatives, considered the possibility of moving the Missing Link portion of the Trail to Leary Street, some two blocks away, where Ballard Terminal would prefer the trail to be located. The City determined that superimposing the Trail onto an active City Street would be less safe than constructing the Trail in the ROW. That is a judgment that this Board should respect and the relevant facts and circumstances are not before the Board.

3. The City's Planned Improvements at "Not 54th Street" Will Not Interfere with Rail Operations.

Contrary to Ballard Terminal's claims, the City's plans to pave a roadway over which the rail line travels in the City-owned section of "Not 54th Street" between 24th and 26th Streets adjacent to Ballard Terminal track will not interfere with Ballard Terminal's rail operations. As a preliminary matter, it bears repeating that Ballard Terminal has already agreed to allow the City make precisely this type of roadway improvement in the proximity of its rail operations.⁸⁵ The Operating Agreement sets the parameters (to which Ballard Terminal agreed) of the types of activity and improvements that are acceptable in the vicinity of its operations and will therefore

⁸⁴ *E.g., City of Fishers et al., supra* note 67, slip op. at 10 n.11 ("The Board does not interpret state or local law to determine if a potential trail sponsor is complying with such law.") (citation omitted).

⁸⁵ Petition App. F at 10 (stating that the City "shall have the right to require Operator to relocate its track in order to accommodate trail construction," and "Operator shall promptly move its track at [the City's] written request").

do not interfere with its rail operations.⁸⁶ Ballard Terminal's effort to invoke the Board's jurisdiction is an illegal attempt to circumvent the terms of a contract.

More generally, even in the absence of the Operating Agreement, the improvement of "Not 54th" will not interfere with rail operations, based on common industry standards and the opinion of the City's rail safety expert. Industrial rail operations are common throughout North America and occur in major urban settings just like those on Ballard Terminal. The interface of streets and railroad is the common nexus of providing rail service to warehousing, distribution, and manufacturing districts in cities such as Seattle. Rail operations in industrial settings routinely occur within, across, and adjacent to city streets. In fact, Ballard Terminal encounters all these industrial rail operating conditions in the performance of its service obligations today. The method of Ballard Terminal's operation will not change as a result of the City's improvements to "Not 54th" Street ROW planned by the City. The method of operation is prescribed by the Code of Federal Regulations ("C.F.R.") and applies to common carriers such as Ballard Terminal. Ballard Terminal will continue to operate over Federal Railroad Administration (FRA) Class 1 regulated track not exceeding 10 MPH (49 C.F.R. § 213.9), ensuring leading movement point protection, ability to stop within ½ range of vision short of train, obstruction, switch improperly lined, or broken rail (Restricted Speed 49 C.F.R. 236.812). As such, the planned improvements by the City of Seattle to "Not 54th" will not prevent Ballard Terminal from performing its common carrier service obligations.⁸⁷

⁸⁶ *CSX Transportation*, *supra* note 4, slip op. at 5 (noting that railroad's consent to agreement suggests that the agreement's implementation would not interfere with railroad operations).

⁸⁷ Seattle Ex. 1 at 3–4 (Sullivan Verified Statement).

4. The City's Planned Improvements near the Western Pioneer Spur Will Not Interfere with Rail Operations.

Contrary to Ballard Terminal's arguments, the planned improvements will not interfere with Ballard Terminal's uses and current operational practices on the Western Pioneer Spur, adjacent to Shilshole Avenue, NW.

First, Ballard Terminal disingenuously asserts that the City's plans to relocate track in that vicinity would be "without BTRC's permission or agreement." Ballard Terminal agreed in the Operating Agreement to allow the City to relocate tracks to accommodate the Trail.⁸⁸ Any suggestion to the contrary is patently false. Ballard Terminal agreed to those terms, demonstrating that it believed those terms would permit it to carry out its railroad operations without interference.

Moreover, Mr. Forgette's opinion is based exclusively on 90% engineering designs and conceptual drawings. Mr. Forgette's conclusion is premature, because the City has yet to adopt a final plan for the Missing Link, particularly related to the Western Pioneer Spur.⁸⁹ Mr. Forgette's conclusion is also incorrect. As Mr. Sullivan testifies, he has reviewed all of the City's designs and concluded that the designs "did not present any condition that would make rail operations unsafe nor interfere with BTRC's transload services on the Western Pioneer Spur."⁹⁰

Further, as set forth in the Operating Agreement (*see especially* Section 10), the City has committed to ensuring that the Trail design will allow Ballard Terminal the ability to provide service to all its present and prospective customers. Mr. Sullivan testifies that the Operating

⁸⁸ Petition App. F at 10 ("Operator shall promptly move its track at [the City's] written request").

⁸⁹ Seattle Ex. No. 1 at 4–5 (Sullivan Verified Statement).

⁹⁰ *Id.*

Agreement provides a process for resolving either party's operational concerns, and BTRC's consent to the Operating Agreement's terms demonstrates its belief that these terms would allow BTRC to carry out its railroad operations without interference.⁹¹ In Mr. Sullivan's experience in the railroad industry, operational concerns that may arise are commonly resolvable through processes like the one provided in the Operating Agreement.⁹²

Here, under the Operating Agreement, the final design for the Burke-Gilman trail will include side clearances between the edge of the trail and the center line of Ballard Terminal's tracks of no less than 8'6", as prescribed by Washington Administrative Code,⁹³ and where practical, 10' of side clearance between the trail and the center line of Ballard Terminal's tracks.⁹⁴ Therefore, as a result of the City's determination to maintain at least the required minimum clearance of 8'6", and because the Operating Agreement provides tools for resolving operational concerns, the Trail will, by definition, not interfere with Ballard Terminal's performance of its common carrier obligations associated with the Western Pioneer Spur.⁹⁵

5. The City's Planned Improvements Near NW 45th Street Will Not Interfere with Rail Operations.

Ballard Terminal's assertions regarding the planned improvements to NW 45th Street also fail. In that vicinity, Ballard Terminal will operate within the reconfigured Street ROW, but that does not create an unsafe condition or otherwise interfere with rail operations. As with all of Ballard Terminal's other specific allegations, the improvements on NW 45th St are expressly

⁹¹ *Id.*

⁹² *Id.*

⁹³ See WAC 480-60-050(1) ("General rule. Side clearances must be at least 8 feet 6 inches unless one of the provisions below applies. If exceptions in subsections (2) through (5) or (7) of this section apply, full side clearance of 8 feet 6 inches shall be provided on the opposite side of the track from the platform."). This regulation applies to all railroads operating in the State of Washington.

⁹⁴ Petition, App. F at 8–9 (Section 10(b)).

⁹⁵ Seattle Ex. No. 1 at 5 (Sullivan Verified Statement).

contemplated in the Operating Agreement. Because Ballard Terminal agreed to those terms, it has agreed that those terms would permit it to carry out its railroad operations without interference.

More generally, even in the absence of the Operating Agreement, there is no interference and no unsafe conditions. As Mr. Sullivan testifies, the type of operation Mr. Forgette has identified for NW 45th Street is a common method of operation for railroads in industrial areas of urban settings such as Seattle and is consistent with Ballard Terminal's operations. Rail operations in industrial settings routinely occur within, across, and adjacent to city streets. Ballard Terminal encounters all these industrial rail operating conditions in the performance of its common carrier service obligation today. The method of Ballard Terminal's overall operation will not change as a result of the improvements to NW 45th Street planned by the City. Ballard Terminal will continue to operate over FRA Class 1 regulated track not exceeding 10 MPH (49 C.F.R § 213.9), ensuring leading movement point protection, ability to stop within half range of vision short of train, obstruction, switch improperly lined, or broken rail (Restricted Speed 49 C.F.R § 236.812).

Also, as Mr. Sullivan explains, the final design of the Burke-Gilman Trail will provide for side clearances between the Trail and the center line of Ballard Terminal's tracks of no less than 8'6" as prescribed by WAC Code 480-60-050 and where practical, ten feet (10') of side clearance between the Trail and the center line of Ballard Terminal tracks along NW 45th Street. With regard to improvements and changes to Ballard Terminal tracks and facilities, the Operating Agreement clearly provides that all changes, including relocations and new

construction of track, facilities and crossings, will comply with federal and State of Washington Codes.⁹⁶

Further, the Operating Agreement reflects the parties' commitment to rely on FRA, Washington DOT, and WUTC applicable rules and regulations to resolve any disputes about such construction. Improvements, upgrades, and new construction of crossings, whether pedestrian or vehicular, will conform to 23 C.F.R. Part 655 subpart F,⁹⁷ under the oversight and authority of DOT and WUTC. Federal regulations also dictate how common carrier railroads, such as Ballard Terminal, are required to operate over public crossings. Those rules and regulations appear in 49 C.F.R. Part 222⁹⁸ and 49 C.F.R. Part 218.99⁹⁹ and are subject to FRA oversight to ensure compliance. As with "Not 54th Street" and the Western Pioneer Spur, the planned changes and improvements by the City of Seattle to the NW 45th Street right-of-way will not interfere with Ballard Terminal's rail operations.¹⁰⁰

In sum, after reviewing the project designs and Ballard Terminal's claims, Mr. Sullivan has concluded that based on the City's compliance with the minimum clearance requirements, and "because none of the proposed improvements would change the governing operating rules or method of operation from the way BTRC operates today in a congested urban-industrial environment subject to various federal regulations and oversight," the Trail's completion "will

⁹⁶ Seattle Ex. No. 1 at 6 (Sullivan Verified Statement); Petition App. F at 8–9.

⁹⁷ Compliance with U.S. Department of Transportation–Federal Highway Works Administration Manual of Uniform Traffic Control Devices (MUTDC).

⁹⁸ Regulations applying to leading or pulling movements of trains over pedestrian and highway crossings at grade.

⁹⁹ Regulations applying to shoving movements of trains over pedestrian and highway crossings at grade.

¹⁰⁰ Seattle Ex. No. 1 at 3–4 (Sullivan Verified Statement).

allow BTRC to continue to operate efficiently and safely.”¹⁰¹ Thus, even if the Board reaches the merits, Ballard Terminal’s claims of interference are unfounded, and preemption is not warranted.

C. Ballard Terminal Has Refused All Efforts by the City to Resolve This Dispute Amicably.

Various disputes involving the completion of the Burke-Gilman Trail have been ongoing for over 30 years. As recounted by Ballard Terminal, the environmental reviews of the Burke-Gilman Trail required rounds of court litigation and administrative litigation. But those reviews are now essentially completed (except for one limited issue now under consideration on remand). As described above, because of the remand of the one remaining issue, the City’s design and construction of Phase 2 of its project (the Phase that is the subject of Ballard Terminal’s Petition) have been delayed. After resolution of that final issue on remand and on completion of its pending court case, the City will be in a position to effectuate its longstanding proposal to complete the “Missing Link” segment of the existing Burke-Gilman Trail.

The City over the years has sought, on several occasions, to meet with opponents of the trail, including Ballard Terminal, to discern the reasons for its opposition to the Burke-Gilman Trail, and consider options that may be agreeable to all parties.

Ballard Terminal has refused any resolution that would accommodate the Trail along Shilshole Avenue. Instead, it filed the instant Petition, clearly indicating its desire to litigate this matter, just as it has (through a coalition) for several years challenged in administrative and court proceedings the City’s determinations about the Trail’s routing and approval.

It appears that Ballard Terminal has no interest in an amicable resolution of this dispute. That being the case, the City reluctantly has concluded that there is no point in requesting that

¹⁰¹ *Id.* at 2.

the STB refer this matter to STB mediation. Rather, the City believes the only way to resolve this matter is through the civil action it commenced recently in King County Superior Court.

In its Petition,¹⁰² Ballard Terminal requested a prompt resolution of this dispute, *i.e.*, within 60 days of its proposed “rebuttal” filing. As the City has separately shown in its December 18, 2018, letter herein requesting an extension of time, there is no right on the part of Ballard Terminal to file rebuttal testimony or other evidence. That being the case, the City would not be opposed to the same schedule proposed by Ballard Terminal, according to which the Board would resolve the dispute by April 2019 or at the earliest possible time thereafter, because the very filing of Ballard Terminal’s Petition has caused SDOT to delay completion of the final design of the Trail.¹⁰³

V. Conclusion

The Board should not institute a declaratory proceeding, but rather should conclude that this dispute is about Ballard Terminal’s contractual obligations to the City of Seattle, and therefore dismiss the Petition (without prejudice to re-filing later, if appropriate).

The City has filed suit in King County Superior Court (Case No. 19-2-01794-5-SEA) against Ballard Terminal to compel Ballard Terminal to abide by its obligations to the City under the Operating Agreement that is in effect with respect to the rail lines Ballard Terminal operates that are in dispute herein. Under the Board’s consistent precedents, disputes with respect to the parties’ rights and obligations under contract are to be resolved in court, not at the Board, and

¹⁰² Petition at 36.

¹⁰³ We do recognize the disruption that the recent governmental shutdown has caused, but trust that the Board could deny Ballard Terminal’s request to institute a declaratory proceeding relatively promptly, once it understands that Seattle will not construct the Trail with a clearance less than that required by law—8’6”—and that resolution of the dispute is clearly governed by contract (the Operating Agreement).

disputes about trail proponents' rights under State and local law are not to be resolved by the Board.

If the Board nevertheless reaches the merits, it should conclude that the right-of-way in question can accommodate both the Burke-Gilman Trail and Ballard Terminal's rail line, and that the Trail will not interfere with continued rail operations on that rail line. That being the case, if the Board should reach the merits, it should deny the Petition, because the only authority the Board has in matters such as this is if the action at issue would interfere with continued rail operations, and here, there would be no such interference.

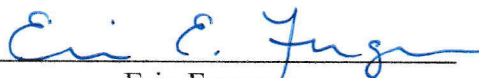
Respectfully submitted this 5th day of February, 2019.



Michael F. McBride
Van Ness Feldman LLP
1050 Thomas Jefferson Street, NW
Suite 700
Washington, DC 20007-3877
T: (202) 298-1800
E: mfm@vnf.com



Tadas A. Kisielius
Dale N. Johnson
Clara Park
Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
T: (206) 623-9372
E: tak@vnf.com; dnj@vnf.com;
cpark@vnf.com



Erin Ferguson
Assistant City Attorney
Seattle City Attorney's Office
701 Fifth Avenue, Suite 2050
Seattle, Washington 98104-7097
T: (206) 684-8615
E: erin.ferguson@seattle.com

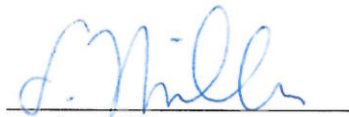
Attorneys for the City of Seattle, Washington

EXHIBITS

- | | | |
|-------------------|---|--|
| Seattle Ex. No. 1 | - | Verified Statement of Stephen Sullivan, R.L. Banks and Associates, Inc. |
| Seattle Ex. No. 2 | - | Complaint for Declaratory Judgment, Injunctive Relief, and Breach of Contract, Superior Court in the State of Washington, King County Superior Court, Cause No. 19-2-01794-5 SEA |
| Seattle Ex. No. 3 | - | Excerpts from the FEIS, May 25, 2017 |
| Seattle Ex. No. 4 | - | Corrected Notice of Appeal filed 6/9/17 Seattle Hearing Examiner File No. W-17-004 |
| Seattle Ex. No. 5 | - | Seattle Hearing Examiner Exhibits W-17-004, The Ballard Coalition. Six-day hearing commenced: 11/29/17 |
| Seattle Ex. No. 6 | - | Excerpts from Hearing Transcripts, Seattle Hearing Examiner File No. W-17-004 |
| Seattle Ex. No. 7 | - | Findings and Decision dated 01/31/18 – Seattle Hearing Examiner File No. W-17-004 |
| Seattle Ex. No. 8 | - | Order Granting in Part and Denying in Part Ballard Coalition’s Challenge to the Adequacy of SDOT’s EIS dated December 21, 2018, KCSC Cause No. 18-2-04988-1 |
| Seattle Ex. No. 9 | - | Additional Photos of Ballard Line and Ballard Terminal Operations |

VERIFICATION

Louisa Miller, being duly sworn, states that she is over 18 years of age; that she is an employee of the City of Seattle, Washington; that she is Project Manager for the Burke-Gilman Trail Project; that she is familiar with the factual assertions made in the foregoing Reply of the City of Seattle; and that such assertions are true as stated.


Louisa Miller

Subscribed and sworn to before me, this 5th day of February, 2019:



Notary Public

My Commission expires 8-15, 2020.



CERTIFICATE OF SERVICE

I, Amanda C. Kleiss, paralegal with Van Ness Feldman LLP, certify that I have this day served copies of document upon all parties of record in this proceeding, by legal messenger and email.

Joshua C. Allen Brower
Brower Law PS
506 2nd Avenue, Suite 1400
Seattle, WA 98104
E: josh@browerlawps.com

Patrick J. Schneider
Foster Pepper PLLC
1111 Third Avenue, Suite 3000
Seattle, WA 98101-3292
E: pat.schneider@foster.com

Executed this 5th day of February, 2019.



Amanda C. Kleiss