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June 27, 2018

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VIA E-FILING

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ENTERED
Office of Proceedings
June 27, 2018
Part of
Public Record

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

This letter responds to the Board's Decision served May 22, 2018 requesting public comments on The Metropolitan Council's ("Council") Petition pertaining to its proposal to acquire the Bass Lake and Kenilworth rail lines and right-of way in Hennepin County, Minnesota ("Corridors") comprising a critical 9.3 mile freight rail gateway used by Archer Daniels Midland Company ("ADM") and many other shippers for shipments through the Twin Cities. For the reasons below, and in its prior letter filed April 24, 2018, ADM respectfully submits that it and other regional railroad shippers are unduly jeopardized by the proposed transaction, and that, as proposed, the transaction appears insufficient to adequately protect common carrier service as required under the *State of Maine* (8 I.C.C.2d 835 (1991)) principles. At a minimum, additional protections and conditions are necessary to protect essential freight rail service.

In its letter filed April 24, 2018, ADM advised that the proposed transaction, together with Hennepin County Regional Rail Authority's ("HCRRA") request in FD 36177 to acquire common carrier obligations for the Corridors raises significant concerns for freight rail shippers. ADM receives, processes, and ships by rail significant volumes of commodities (navy beans) from its Appleton and Olivia processing plants located to the west of the Corridors. **All** of these shipments are transported by the Twin Cities & Western Railroad Company ("TCW") east via the Corridors to connecting Class I railroad carriers. Similarly, **all** traffic for dozens of other shippers moving through the Twin Cities to connecting Class I carriers must traverse the Corridors' lines. Even temporary rail service disruptions of the Corridors could substantially threaten ADM's Appleton and Olivia businesses as well as that of other shippers.

The Project Participants Appear Wholly Unsuitable to Protecting Freight Rail Service

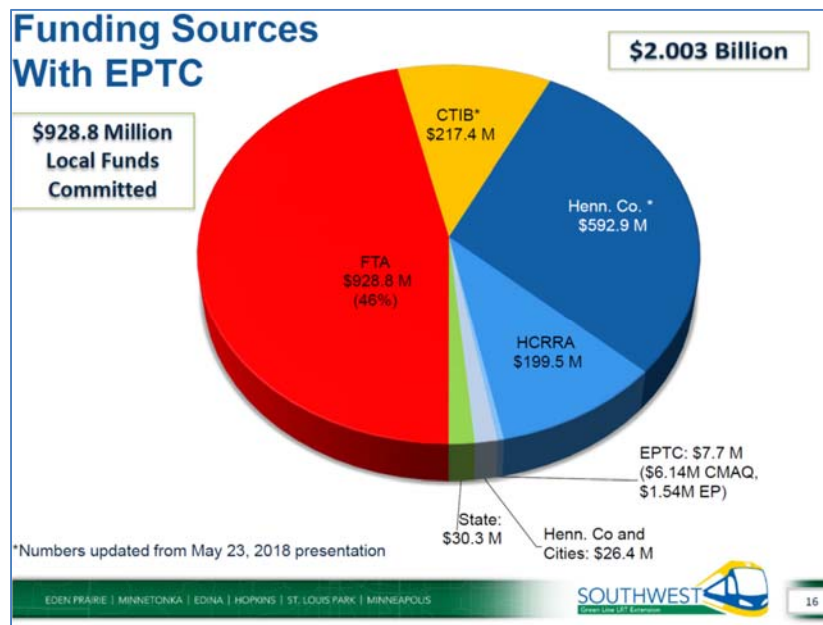
The Council and HCRRA attempt to minimize the critical importance of the Corridors for continuing freight rail service and call "unsubstantiated" the concerns expressed by dozens of shippers and entities over transit and freight rail interference issues resulting from the construction and operation of the \$2 billion Southwest Light Rail Transit Project ("Project"). While HCRRA is not an operating railroad, it asserts in its May 2, 2018 Reply that it is "ready, willing, and able" to assume

full common carrier obligations for the Corridor, including through contracting out service to actual freight railroad operators and maintaining in place TCW's existing trackage rights.

However, just because HCRRA states that it is "willing" to protect freight rail service does not mean that it will actually do so. The facts actually show that HCRRA's (and the Council's) sole focus and interest is to advance the Project and to protect light rail transit service from any possible interference by the freight service. This is probably why HCRRA and the Council seek to deny the involvement and agreement of the only rail carrier conducting freight service on the lines – TCW.

The conflict of interest issues raised by the proposed transaction are very real. HCRRA's interests are almost exclusively focused on transit, **not freight**. HCRRA has touted that it helped identify the involved transitway in the early- to mid-1980s and has been purchasing land for the Project in the Minneapolis suburbs for over two decades. Also, for almost a decade, HCRRA has served as the lead public agency for environmental review, steering the Project through the Minnesota Environmental Policy Act and the National Environmental Policy Act requirements. In addition, HCRRA has a substantial financial investment in the Project. HCRRA and the Council have entered into a cooperative funding agreement ("CFA"), as amended, for initial Project engineering and development. Under the CFA, HCRRA has assumed a 20% Project funding share, amounting to **\$67.5 million** in this initial phase alone. (18-HCRRA-0026). In addition, in 2014, HCRRA agreed to fund up to 10 percent of the capital costs of the Project, with HCRRA's total capital cost obligation growing to **\$199.5 million** (14-HCRRA-50, 16-HCRRA-0032, 18-HCRRA-0027). Over one-half of HCRRA's budget in 2018, or \$58.1 million, is devoted to the Project.

Meanwhile, Hennepin County has an enormous stake in the Project and is the lead local Project financier with nearly \$600 million in committed capital cost funding. The members of the HCRRA's Board are comprised of the Hennepin County Board of Commissioners. Hennepin County's, HCRRA's, and the Council's capital cost commitments are reflected in the below presentation:



Metropolitan Council, May 30, 2018 Presentation

HCRRA has not disclosed its substantial stake and involvement in the Project in its filings to the Board to date. Nevertheless, HCRRA's considerable financial commitments in the Project and its focus on transit appear to render HCRRA incapable of adequately protecting freight rail service over the Corridors from possible interference by passenger service. The Council and the HCRRA's longstanding singular transit commitment and Project financial commitments, further coupled with little to no experience operating a freight railway, make obvious the concerns of shippers.

The Proposed Transaction Unduly Compromises Governing *State of Maine* Principles

The Board has asked a series of important questions pertaining to the adequate protection of TCW's freight rail service under the Agency's *State of Maine* precedent. These relate to the effect of HCRRA's prior exemption from common carrier obligations, the arrangements between the Council and HCRRA assigning to HCRRA common carrier responsibilities, and resolution of operational conflicts between passenger and freight rail service. After review of the record and further consultation with counsel, it is clear that the proposed transactions fail to adequately protect continuing freight rail service to regional shippers including ADM.

Both the Council and HCRRA profess that HCRRA will fulfill its common carrier obligations and will fully protect TCW's trackage rights to provide freight service over the corridor both during a lengthy construction period of up to four years, and thereafter after transit service commences. However, such arrangements appear wholly inadequate. TCW has already shown that (1) HCRRA has no obligation to provide common carrier service under a prior STB exemption decision, and (2) the underlying agreements between the Council and HCRRA would allow the Council to unduly interfere in freight operations in violation of *State of Maine* principles, particularly in light of the previously stated conflict of interest concerns. Even putting those issues aside, under its proposed arrangements, the Council seeks to have its partner in the light rail transit Project, HCRRA, assume the unconditional and permanent right to protect common carrier freight rail service.

HCRRA is structured, not as a common carrier railroad or operator of rail service (transit or freight), but rather as a State political subdivision engaged in planning, designing, and implementing light rail transit in Hennepin County. The Council and HCRRA are the Project sponsors and exist to serve local counties in the Twin Cities, not to protect through freight service for shippers in rural South Dakota and rural Minnesota that must connect to Class I railroads and serve national and international customers. As referenced, the Council and HCRRA have devoted themselves for over two decades to developing and implementing the Project's passenger transit service and have committed themselves to hundreds of millions of dollars in Project financing. HCRRA is overseen and controlled by the Board of Hennepin County, which has committed well-over a half-billion dollars to the Project.

Even if there were enhanced assurances between the Council and HCRRA that the interests and rights of light rail transit may not materially interfere with those of freight rail, such a **bi-lateral** agreement solely between the Project sponsors will do little, if anything, to protect the broader

public interest at issue here, and ensure that third party freight rail service will be adequately protected.¹

The parties' Joint and Cooperative Exercise of Powers Agreement places on HCRRA, a non-common carrier (and possibly the Council) with the protection of essential freight rail common carrier responsibilities. With all due respect, that is requesting the proverbial fox to guard the hen house. In the absence of additional protections, in the event of conflict with freight railroad service, both during the construction period, and once transit service commences, HCRRA and the Council have obvious self-interest and financial reasons (as reflected above) to favor light rail transit over freight rail service. Only TCW, as the longstanding, independent common carrier operating through the Corridor has a demonstrated commitment to freight rail service. And only TCW is in a position to negotiate meaningful protective conditions on construction, relocation, and maintenance terms and conditions so as to limit the impact of the Project and transit operations on TCW's shippers.

Additionally, this is not a typical *State of Maine* transaction involving a freight rail corridor with little or no demand for service. Instead, the proposed transaction involves an active, busy freight rail transportation corridor averaging four trains and 160 loaded carloads per day. This necessitates enhanced Board scrutiny and adequate assurances that the entity professing to assume the common carrier obligation can and will vigorously uphold that obligation and not be structurally organized and financially incentivized to favor passenger service over freight rail service when conflicts arise.

For these reasons, and those set forth in its letter filed April 24, 2018, ADM respectfully submits that the transactions as proposed by the Council and HCRRA do not adequately preserve and protect freight rail service from any potential transit interference. Without significant additional protections, freight rail service may and likely will be relegated a secondary role behind light rail transit service. Enhanced review and oversight is necessary to fully protect the shipping public, and additional protections are required to ensure that common carrier freight service to ADM's Appleton and Olivia processing facilities and other regional shippers is adequately protected.

ADM would much prefer that the **independent** rail carrier TCW assume all common carrier obligations over the Corridors. At a minimum, ADM respectfully submits that a permanent construction and operation agreement is required to adequately protect freight rail service and preserve TCW's access to the Corridors' infrastructure and sidetracks. If the parties cannot resolve such matters during the upcoming scheduled STB-sponsored mediation, ADM respectfully requests that the Board adopt such appropriate protective conditions as a requirement for transaction

¹ *Hartwell First United Methodist Church – Adverse Abandonment & Discontinuance – The Great Walton R.R. in Hart County, GA*, AB 1242 (STB served Jan. 31, 2018) at 7 (“in *State of Maine* cases . . . the Board has required terms protecting freight service from interference *by the passenger service*”) (emphasis in original).

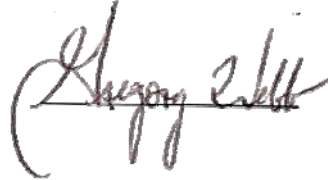
Ms. Cynthia T. Brown

June 27, 2018

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approval. These actions are appropriate and necessary to ensure a reasonable balance between the needs of shippers and the needs of the travelling public.

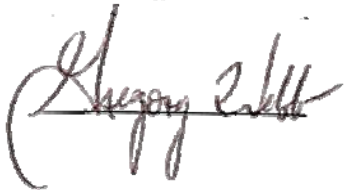
Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Shengyi Zhai", written over a horizontal line.

cc: All Parties of Record

I hereby certify that I have caused to be served a copy of these comments via prepaid first class mail on all parties of record in this proceeding.

Dated this 27th day of June, 2018

A handwritten signature in dark ink, appearing to read "Shengyi Zhai", written over a horizontal line.