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September 15, 2017

VIA E-FILING

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

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

Dear Ms. Brown:

The Cities of Fishers and Noblesville, Indiana, and Hamilton County, Indiana (collectively, the “Owners”) write to request, among other things, that the Board impose order on this proceeding to limit or preclude the ongoing filing of reply comments and other filings made, and being made, well out of time. Alternatively, the Owners respectfully request that the Board act promptly on the Owner’s petition for partial revocation (the “Petition”) to obviate the need for agency procedural housekeeping. Additionally, the Owners request that certain filings lately tendered to the Board by the Owners’ opponents be disregarded as having been filed without due consideration for agency rules of procedure.

The Petition has generated several written responses, and many of those seeking to share their views are understandably unfamiliar with the Board’s rules of procedure. It is also apparent, however, that some parties have acquainted themselves with the agency’s rules, but, nevertheless, misconstrue and/or do not comply with them. There appears to be a sense among those opposing the Petition that they may file reply comments at any time and for any reason, notwithstanding the agency’s rules and the fact that the tactic prejudices the Owners.¹ The

¹ See, e.g., various filings of Linda Kraatz (“Kraatz”), who – (1) on August 21, 2017, filed responsive opposition comments and requested a then-unspecified extension of time; (2) filed a clarification of her extension request on September 5, 2017; (3) on September 12, 2017, opposed the Owners’ motion for leave to file a rebuttal; and (4) filed additional substantive arguments in opposition to the Petition on September 13, 2017. Kraatz has taken exception to an element of the Rebuttal dealing with her request for an extension of time. She believes that the Owners have been deceptive in opposing her extension request, because the Rebuttal could be construed to suggest that Kraatz never spoke with counsel for the Owners. To be

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Owners urge the Board either to act promptly on the merits of the Petition, obviating the need for additional control of this docket, or to clarify for the purposes of those participating (and seeking to solicit more filings) whether the Board will accept any further submissions.

As the record reflects, the Owners filed their Petition on August 1, 2017. The exemption rules at 49 C.F.R. § 1121.4 do not specify when filings responsive to the Petition are due, but 49 C.F.R. § 1104.13(a) provides for a 20-day deadline for replies where not otherwise specified in the agency's rules. Those opposed to trails use insist that there is no set deadline for formal filings in this docket, since their statements of opposition are "comments" and not replies to the Petition. Such argument is misplaced in light of 49 C.F.R. § 1121.4(a), which states that public comments are generally not sought in connection with exemption proceedings. And while 49 C.F.R. § 1121.4(c) permits the Board to seek public input when it so chooses, the Board has not solicited such input here. (In fact, such solicitation of public comment at this point would do little at this juncture to illuminate any of the issues within this agency's purview.) The Petition was filed roughly 45 days ago, yet parties continue to file, and the Board continues to accept, reply comments, most of which (although certainly not all) are being served upon the Owners, but not upon other parties of record as 49 C.F.R. § 1104.12 requires.

To be clear, as was indicated in the August 31, 2017 Rebuttal (the "Rebuttal"), the Owners have not demanded, and do not expect, strict enforcement of the agency's procedural rules in this case. Also, the Owners have not requested, and do not ask, that responsive filings made as of the date of the Rebuttal be rejected. But the Owners have reason to believe that those opposed to the Petition, driven by an interest in preserving the subject railroad corridor for the possible restoration of excursion trains over the entire line, continue to solicit written expressions of opposition to be filed with the Board. In so doing, those opposed to the Owners' efforts may be providing rudimentary guidance on how formally to tender responsive filings with the STB (or are filing on another's behalf). The comment-filing campaign that the interim trails use opponents have implemented and the efforts of certain parties to add to the record at this late date when they know better (or should) must have reasonable limits.

Of particular note are filings of the Indiana Transportation Museum ("ITM"), Save the Nickel Plate, Inc. ("STNKP"), and Brian Landress ("Landress"), all of which the Owners believe that the Board should summarily disregard. On September 11, 2017, ITM, represented by counsel, served the Owners with a copy of a filing dated September 8, 2017. In

clear, Kraatz did speak to the Owners' counsel shortly after the Petition was filed, but the undersigned declined to offer her guidance on how she might go about opposing the Owners. However, Kraatz did not during that discussion mention, nor did she request, an extension of the procedural deadlines. The Owners do not object to the Board's acceptance of her August 21, September 5 and September 12 filings, nor would they object to her offering an assessment of her conversation with the undersigned should she wish to do so.

that filing, which the Board did not post until today, ITM requests leave to file and, in turn, offers (belatedly, it admits) an “*amicus curiae* statement and brief” (the “Brief”) in opposition to the Petition. ITM’s late arrival is unjustified in light of the timely participation of many others, its contention that “due process” warrants acceptance of its filing is meritless,² and, accordingly, ITM’s Brief should not be accepted. Moreover, to the extent that the Board may nevertheless consider ITM’s Brief, the Owners object to ITM’s request (also made by others) for a field hearing. The Owners also object to ITM’s stay request – which ITM disguises as a request for the STB to hold the proceeding in abeyance – because, among other things, ITM fails to address, much less satisfy, the agency’s standards for injunctive relief.³

While other late filings may reflect genuine lack of familiarity with Board procedures, the STNKP and Landress filings of September 11 and 5, 2017, respectively, are abusive of agency processes, and unduly prejudice the Owners. To begin with, both STNKP (which submitted reply comments on August 30) and Landress present their filings as responsive to the substance of the Owners’ Rebuttal, which the Board’s rules do not permit, and yet both do so without requesting agency dispensation to tender sur-rebuttal evidence and argument. STNKP not only filed sur-rebuttal despite acknowledging the procedural restrictions, but it then tenders a disproportionate 11-page (single-spaced) response to the Owners’ roughly 9-page (double-spaced) Rebuttal. The STNKP and Landress filings – both of which reflect an understanding of, and disregard for, STB practice and procedure – should not be accepted.

For all of their approaches to the issues, the filings opposed to the Petition reflect two common themes, neither of which supports this agency overriding the decisions of local leadership. First, those opposing the Petition object to any plan that would remove any of the trackage along a railroad corridor that has seen no freight service in many years, despite plans to preserve the corridor for the possible future restoration of common carrier service. (In fact, most opponents indicate that they hope to have the track preserved for use by ITM or another intrastate passenger excursion operator.) Second, most opponents unfairly disparage the decision makers

² ITM argues that, because it was not served with a copy of the Petition, the Owners have violated ITM’s Constitutional due process rights. However, Board rules governing the filing of the Petition do not require service upon third parties not already participating in the case, and ITM has offered no precedent to support its flimsy due process claim. Given the local profile of this proceeding and the support for ITM consistently expressed in other filings (both timely and untimely), ITM’s claim that it was unaware of this proceeding until August 31, 2017, is dubious at best.

³ See, e.g., Jackson County, Mo. – Acquisition and Operation Exemption – Union Pacific Railroad Company, Docket No. FD 35982 (STB served Feb. 4, 2016), slip op. at 2 (citing Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Va. Petroleum Jobbers Ass’n v. Fed. Power Comm’n, 259 F.2d 921, 925 (D.C. Cir. 1958)).

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who have chosen to pursue rail banking, along with the local decision making process that the Owners previously have shown was fair and in keeping with Indiana law. In short, those opposing the Owners object to local plans to invoke the Board's processes to preserve a railroad corridor because the railroad line is viewed as having historic relevance and/or because the tracks could support a passenger excursion operation. Neither argument, however presented, supports denial of the Petition, as neither consideration falls within the agency's regulatory purview.

For the foregoing reasons, the Owners urge that the Board impose greater control of the docket in this proceeding to ensure the fair and orderly disposition of this proceeding without further prejudice to the Owners. In the alternative, a procedural order imposing control on the docket would be unnecessary if the Board were to act swiftly on the Petition. Moreover, the Board should disregard as prejudicial recent filings by parties such as ITM and STNKP. And, finally, in light of the level of interest in this proceeding and in the subject railroad line generally, if the Board grants the Petition in such a manner that subsequent agency action would be necessary for the Owners to accomplish their interim trails use goals, the Owners respectfully request that, in its grant of the Petition, the agency offer guidance upon how and under what circumstances the public may participate in any downstream proceedings.

Respectfully submitted,



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

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cc: All parties of record