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FILED ELECTRONICALLY

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, DC 20024

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ENTERED
Office of Proceedings
July 15, 2013
Part of
Public Record

Re: **Finance Docket No. 35731**
Ballard Terminal Railroad Company, L.L.C. -- Acquisition
and Operation Exemption -- Woodinville Subdivision

Docket No. AB-6 (Sub-No. 465X)
BNSF Railway Company -- Abandonment Exemption --
In King County, WA

Dear Ms. Brown:

On July 10, the City of Kirkland, Washington ("Kirkland"), filed a Motion for Expedited Ruling on Ballard Terminal Railroad Company, LLC's ("Ballard's") Motion for Preliminary Injunction. Kirkland's motion rehashes arguments previously presented to the Board in its Reply to Ballard's Motion for Preliminary Injunction, wherein Kirkland purported to suffer substantial harm if a ruling on the injunction is not issued by August 1. Because the Board has heard this argument before, Ballard will not brief the issue. Rather, a brief summary as to why an expedited decision is unnecessary is more appropriate.

Kirkland's assertions regarding harm are exaggerated and constitute mere pretext. As Ballard has made clear, it supports corresponding "rails and trails" uses of the right of way throughout the Woodinville Subdivision.¹ If Kirkland's sole objective were to commence construction of a trail, it could begin doing so tomorrow. However, Kirkland understands that the removal of track on the right of way would deal a severe blow to the restoration of rail service. Ballard would be denied the opportunity to acquire the existing track assets, which it is seeking to do in these proceedings, and would incur a potentially prohibitive expense, estimated to be \$10,000,000, to reinstall rail and crossing materials.

¹ Ballard's Verified Petition for Exemption Pursuant to 49 U.S.C. 10502 at 9; Ballard's Motion for Preliminary Injunction Pursuant to 49 U.S.C. § 721(b)(4) at 6-7.

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By contrast, if Kirkland is prevented from removing and salvaging the track during the 2013 construction season, its purported harm is that it *may* not receive the benefit of the entirety of the track's current salvage value, which is estimated to by A&K Railroad Materials, Inc. ("A&K"), to be \$106,560. For the purposes of clarity, the \$106,560 figure is a credit which has been built into Kirkland's \$473,419 salvage contract with A&K. Thus, if the salvage activities do not occur during the 2013 season, Kirkland does not sustain any contemporaneous economic loss whatsoever.

Moreover, it is entirely speculative as to whether Kirkland will suffer any future loss of contract value if salvage activities commence next spring. Kirkland City Manager Kurt Triplett, in his Verified Statement, merely indicates that the salvage value of track *may* fluctuate between September 2013 and spring 2014. There is no guarantee that the salvage value of track will fluctuate at all (or fluctuate in any significant amount), let alone fluctuate down in a recovering economy. As a consequence, there is no evidence that Kirkland will suffer any harm if the Board does not issue a ruling by August 1. Unless there is some seismic change in the salvage value of track, any fluctuation will not constitute a "substantial" harm to Kirkland.²

The Board's focus with respect to harm must be on the harm inflicted on Ballard. Kirkland can start building its trail now, so it suffers no harm based on lack of use. If Kirkland loses the injunction but later prevails on the merits of the petitions, it will not suffer a substantial economic harm caused by the delay in removing the rails. To the contrary, if Ballard loses the injunction in a decision issued prior to August 1 but later prevails on the merits of the petition, it will enjoy a hollow victory.

In light of the foregoing, Ballard has proposed that the Board await comments and replies on Ballard's petitions before deciding the injunction. As evidenced by the injunction briefs, the critical issue before the Board is Ballard's likelihood of success on the merits. In making the dispositive assessment, the Board can avail itself of all evidence presented on the petitions if it is willing to wait a brief period of time. Essentially, the Board will not need to predict Ballard's likelihood of success, but can evaluate its actual success based on the entirety of the evidence and arguments before it. This proposed course of action is particularly prudent because neither party will suffer any harm in the interim. Therefore, the Board need not, if it so chooses, make a hasty decision on the injunction that could render the decision on the petitions meaningless. For these reasons, Kirkland's motion to expedite should be denied.

Ballard is also compelled to respond to Kirkland's assertion that Ballard is stalling for time. As the Board is well-aware, comments on Ballard's petitions were originally scheduled to be filed on June 18, while replies, including that of Ballard, were set for filing on July 18. After Kirkland filed a frivolous motion to compel, the Board was forced to hold the procedural schedule in these proceedings in abeyance. The motion to compel has been briefed and is

² Kirkland had several bids for the salvage of rail whose overall price was in the same ballpark as A&K's, so there should be no concern that this particular contract cannot be matched. Moreover, Kirkland's focus on the net salvage price of rail is a red herring. By way of explanation, though not all contractors offered a credit for the net salvage value of the rails in excess of \$100,000, other contractors provided bids with contract prices that were tens of thousands of dollars less than the \$473,419 bid supplied by A&K. Thus, a higher net salvage value of track does not necessarily correlate to a lower bid price.

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currently pending decision. Thus, Kirkland has created the situation which has resulted in the delay of comments and replies on Ballard's petitions. In so doing, Ballard was deprived of the opportunity, as contemplated by the Board, to have its comprehensive reply filed by July 18.

Moreover, Kirkland's motion to compel represents an admission by Kirkland that the evidence gathered thus far insufficient. Though Ballard has fulfilled its discovery obligations, it is clear that Kirkland believes that the record in this matter is not complete.³ It is incongruous for Kirkland to push the Board to make a decision on Ballard's likelihood of success on the merits while simultaneously asserting that there is salient information on that matter which it needs to procure.

As Ballard explained in its Motion for Leave to File a Reply to Kirkland, King County, and Sound Transit's replies to the Motion for Preliminary Injunction, the circumstances of these proceedings make it advisable for the Board to decide the injunction once all of the evidence is before the Board.⁴ The Board, when issuing its procedural schedule in this matter, expressly gave Ballard the right to reply to comments, thereby granting Ballard the right to present arguments and evidence to rebut contentions and evidence contained in the comments of opponents to reactivation. Kirkland has simultaneously stalled the petition proceedings and requested the expedition of the injunction proceedings in order to prevent Ballard from comprehensively replying to Kirkland's contentions and evidence. The Board should not reward Kirkland efforts by accepting its contrived argument with respect to harm. It would be prudent and equitable for the Board to consider all arguments, which will be forthcoming shortly, before making its decision on the injunction.

Respectfully submitted,



Thomas C. Paschalis
Attorney for Ballard Terminal Railroad
Company, L.L.C.

TCP

cc: Parties on Certificate of Service (via email)

³ The pending discovery dispute is not the sole reason that discovery remains open in this dispute. Ballard's written discovery requests to its opponents also remain outstanding. Two of Ballard's opponents, King County, Washington ("King County") and Central Puget Sound Transit Authority ("Sound Transit") have requested extensions of time to respond. Ballard has accommodated those requests. For its part, Kirkland has advised that it will begin providing its discovery responses shortly.

⁴ Though it does not wish to further burden the Board, Ballard suggests that the Board also refer to its Motion for Leave to File Reply to King County, Washington, City of Kirkland, Washington, and Puget Sound Regional Transit Authority's Replies to Motion for Preliminary Injunction and Ballard's corresponding Reply (both filed June 24, 2013).

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of July, 2013, a copy of the foregoing **Reply**

Letter was served by electronic mail upon:

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