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October 16, 2003

Secretary
Surface Transportation Board
Washington, DC 20423

By Express Mail

Re: Finance Docket No. 34364
Vermont Railway, Inc.

Dear Secretary:

Enclosed for filing are the original and 10 copies of the State of Vermont's
Opposition to Vermont Railway's Supplemental Petition for Declaratory Order.

Thank you.

Sincerely,

Jeanne Elias
Jeanne Elias
Assistant Attorney General

Enclosures
cc: Service List

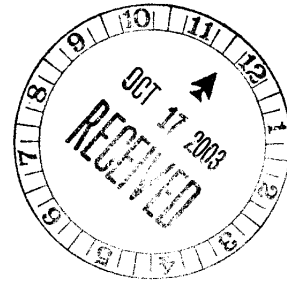
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BEFORE THE
SURFACE TRANSPORTATION BOARD



FINANCE DOCKET NO. 34364
VERMONT RAILWAY, INC. – PETITION FOR DECLARATORY ORDER

**STATE OF VERMONT'S OPPOSITION TO
VERMONT RAILWAY'S SUPPLEMENTAL PETITION
FOR A DECLARATORY ORDER**

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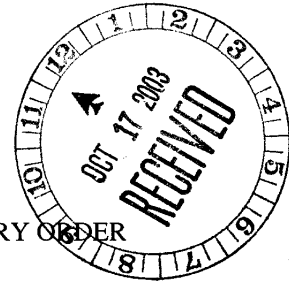
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Dated: October 16, 2003

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34364
VERMONT RAILWAY, INC. – PETITION FOR DECLARATORY ORDER



**STATE OF VERMONT'S OPPOSITION TO
VERMONT RAILWAY'S SUPPLEMENTAL PETITION
FOR A DECLARATORY ORDER**

On June 17, 2003, Vermont Railway, Inc. submitted a petition to institute declaratory order proceedings before the Surface Transportation Board. In that filing, Vermont Railway sought a declaration as to whether Vermont's Act 250, codified at 10 Vt. Stat. Ann. §§ 6001-6108, was preempted by the Interstate Commerce Commission Termination Act (ICCTA). On August 8, 2003, the State of Vermont filed an opposition to Vermont Railway's request to institute declaratory order proceedings, on the grounds that the proceedings were barred by sovereign immunity, that the Federal Court for the District of Vermont has already held that Act 250 is not preempted by the Interstate Commerce Commission Termination Act (ICCTA), that Vermont Railway's proposed project is outside the Surface Transportation Board's ("STB") jurisdiction, and that the controversy is not ripe.

On September 15, 2003, Vermont Railway submitted a supplemental petition for a declaratory order. In addition to its June 17 request, Vermont Railway "now requests the Board also . . . determine the extent to which the same preemption applies to certain specific officials of Vermont . . . through their power to enforce Act 250 The officials with respect to whom such determinations are requested are William H. Sorrell,

Attorney General of Vermont, who is authorized to enforce Act 250 on behalf of the State; Elizabeth McLain, Secretary, Agency of Natural Resources, who also is authorized to enforce certain aspects of Act 250; [and] Patricia Moulton Powden, Chair of the Vermont Environmental Board, likewise authorized to enforce certain aspects of Act 250.”¹ Supplemental Petition at 9-10.

The State of Vermont (“State”) submits this memorandum of law in opposition to Vermont Railway’s Supplemental Petition to institute a Declaratory Order and, by incorporation, reiterates the arguments made in its August 8 filing. In addition to the arguments made in its August 8 filing, the State urges the Surface Transportation Board to deny Vermont Railway’s supplemental request to institute declaratory proceedings because (1) *Ex Parte Young*, 209 U.S. 123 (1908) does not allow suits against named officials where, as here, the state of Vermont is the real party in interest and relief is available in state court, (2) the *Ex Parte Young* exception does not apply to administrative proceedings, and (3) the Board’s opinion, if binding on state officials, would violate due process. The State of Vermont also responds to additional issues raised in Vermont Railway’s Supplemental Petition.

INTRODUCTION

As a preliminary matter, the State of Vermont would like to respond to baseless comments made by Vermont Railway in its Supplemental Petition against the State of Vermont. Specifically, Vermont Railway accuses the State of Vermont of attempting “to avoid or delay a determination by the Board regarding the preemptive relationship

¹ Vermont Railway also seeks to determine the extent to which the ICCTA preempts the Town of Wallingford’s zoning ordinances and the ability of the local zoning administrator to enforce those zoning ordinances. The Vermont Attorney General’s Office does not represent local towns or their officials, and does not purport to do so here.

between 49 U.S.C. § 10501 and . . . Vermont's Act 250." Supplemental Petition, at 4. The State finds this charge surprising in light of the dilatory tactics taken by Vermont's Railway's affiliate, Green Mountain Railroad Corporation, in an action brought in federal district court to resolve the same issue concerning preemption of Vermont's Act 250 by the ICCTA.

Green Mountain Railroad filed a complaint in federal district court in June 2001 to determine the extent to which Vermont's Act 250 was preempted by the ICCTA, both facially and as-applied to a salt storage shed and proposed cement silos. Thereafter, Green Mountain Railroad failed to litigate any aspect of its claim. The State of Vermont, in an effort to resolve the question presented, filed a motion to dismiss the complaint in July 2001. On September 26, 2001, the Vermont District Court granted in part and denied in part the State's Motion to Dismiss. Significantly, the district court held that "to the extent the Defendants ask the Court to dismiss Green Mountain's claim that the ICCTA preempts Act 250 under all circumstances, the motion is granted. Act 250 retains viability where its provisions do not unduly interfere with the provisions and purposes of the ICCTA." Ruling on Pending Motions, Paper 21 at 3 (Sept. 26, 2001). "While decisions made under Act 250 necessarily effect commercial expansion, the focus of Act 250 review is on evaluating the impact of proposed construction on the environment, not on regulating commerce." *Id.* at 3.

Green Mountain Railroad thereafter sat on its federal lawsuit. Green Mountain did not ask the court for a status conference, did not file a motion for summary judgment, and did not conduct any discovery, despite the court's ruling that further development of the record was necessary. In March 2002, the State of Vermont sought to move the suit

forward by filing requests to admit and proposing a discovery schedule. In May 2002, the State of Vermont propounded requests to produce and interrogatories. In January 2003, the district court scheduled a trial. At Green Mountain's request, the State of Vermont stipulated to a continuance. In June 2003, the district court again set the matter for trial. In a single week, the State of Vermont conducted eight depositions and filed a motion for summary judgment. After two years of lackadaisical involvement, Green Mountain Railroad filed a cross-motion for summary judgment. These motions are currently pending before the federal district court.

As the State of Vermont argued in its August 8, 2003 filing to the Board, the federal district court has already held that Vermont's Act 250 is not facially preempted by the ICCTA. Vermont Railway now seeks to litigate the identical issue before the Board. Whereas the State of Vermont has diligently sought to resolve the facial and as-applied issues raised by Green Mountain Railroad in federal court, the railroad has failed to pursue its complaint for more than two years. If anyone has attempted to avoid or delay a determination on these issues, it has been the railroad. To argue otherwise is less than honest.

ARGUMENT

I. THE RAILROAD'S ATTEMPT TO AVOID SOVEREIGN IMMUNITY IS UNAVAILING.

Under the Surface Transportation Board's rules, the burden of establishing jurisdiction lies with the petitioner, Vermont Railway. A petition for declaratory relief "should contain (a) a short, plain statement of the grounds upon which the Board's jurisdiction is based; (b) a short plain statement of the claim showing that the petitioner is entitled to relief; and (c) a demand for the relief the petitioner believes is appropriate."

49 C.F.R. § 1117.1. Vermont Railway has failed to meet its burden of establishing jurisdiction.

Vermont Railway apparently acknowledges that its original petition is barred by sovereign immunity because it now attempts, in its supplemental petition, to skirt sovereign immunity by naming specific state officials in its request for relief. Vermont Railway's attempt to alter its petition for declaratory relief, and to name specific state officials in its supplemental petition, should be denied because (1) the *Ex Parte Young* doctrine does not allow suits against named officials where, as here, the state of Vermont is the real party in interest and relief is available in state court, (2) the *Ex Parte Young* doctrine does not apply to administrative proceedings, (3) the Board's opinion, if binding on state officials, would violate due process.

A. The *Ex Parte Young* doctrine does not allow suits against named officials where, as here, the state of Vermont is the real party in interest and relief is available in state court.

Vermont Railway contends that, while its request for relief against the State may be barred, its request for relief against certain named state officials is allowed by the *Ex Parte Young* doctrine. The *Ex Parte Young* exception does not apply to the instant case, where the state is the real party in interest and relief is available in state court.

Under the Eleventh Amendment, the federal court's power does not extend to suits against nonconsenting states. The U.S. Supreme Court has recognized an exception to Eleventh Amendment immunity for "*certain* suits seeking declaratory and injunctive relief against state officers in their individual capacities." *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 269 (1997) (emphasis added) (citing *Ex Parte Young*, 209 U.S. 123

(1908)). The *Ex Parte Young* exception does not, however, apply to *all* suits seeking declaratory and injunctive relief against state officers in their individual capacities.

To interpret *Young* to permit a federal-court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle, reaffirmed just last Term in *Seminole Tribe*, that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction. The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading. Application of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction.

Coeur d'Alene, 521 U.S. at 270 (holding that *Ex Parte Young* exception did not apply to suit brought against Idaho state officials for declaratory and injunctive relief).

The *Ex Parte Young* doctrine does not apply, for example, where a state forum is available to vindicate federal interests. *Coeur d'Alene*, 521 U.S. at 270. In the instant case, a state forum does exist to vindicate Vermont Railway's preemption argument. Indeed, the Vermont Supreme Court recently entertained a federal preemption claim brought by Vermont Railway to challenge local zoning regulations under the ICCTA in *In re Vermont Railway*, 769 A.2d 648 (Vt. 2001) (holding that municipality's conditions, which related to the operation of a salt shed, were not preempted by the ICCTA). Vermont Railway's challenge to Act 250 jurisdiction over its proposed Wallingford project could, likewise, be raised through administrative proceedings before the Vermont Environmental Board and then by direct appeal to the Vermont Supreme Court. 10 Vt. Stat. Ann. § 6607(c) (outlining procedure for obtaining declaratory ruling from Vermont Environmental Board regarding jurisdiction); *id.* § 6089(c) (providing for direct appeal from Vermont Environmental Board to Vermont Supreme Court).

The Environmental Board's declaratory ruling procedure, with direct appeal to the Vermont Supreme Court, provides an efficient means for obtaining a definitive ruling on federal preemption. Unlike the petitioners in *Ex Parte Young*, Vermont Railway can vindicate its rights in state court without risking the possibility of penalties or prosecution. Thus, here, as in *Coeur d'Alene*, "there is neither warrant nor necessity to adopt the *Young* device to provide an adequate judicial forum for resolving the dispute between the [plaintiff] and the State." 521 U.S. at 274.

The *Coeur d'Alene* Court has already rejected the blanket argument, put forth by Vermont Railway (Supp. Petition at 13-14), that *Ex Parte Young* should be applied whenever a federal question is raised. 521 U.S. at 274. To adopt such an argument would lead to an overly-expansive interpretation of the *Ex Parte Young* doctrine. *Id.* "Interpretation of federal law is the proprietary concern of state, as well as federal, courts. It is the right and duty of the States, within their own judiciaries, to interpret and to follow the Constitution and all laws enacted pursuant to it, subject to a litigant's right of review in this Court in a proper case." *Id.* at 275.²

Finally, there is no indication that Congress intended to abrogate the states' sovereign immunity when it created the Surface Transportation Board. *Seminole Tribe of*

² Vermont Railway misrepresents the holdings in two bankruptcy cases, which Vermont Railway cited for the proposition that sovereign immunity is not barred by a bankruptcy order that does not mandate direct recovery from a state treasury. Supp. Pet. At 6. *In re Hechinger Investment Co. of Delaware, Inc.*, 335 F.3d 243, 250 (3rd Cir. 2003), *overruling* 276 B.R. 43 (D. Del. 2002), specifically declined to address the state's sovereign immunity claim because it ruled in favor of the state on substantive grounds.

Likewise, contrary to Vermont Railway's claim on pages 7-8 of the Supplemental Petition, the Surface Transportation Board did not address state sovereign immunity in *North San Diego County Transit Development Board – Petition for Declaratory Order*, STB Finance Docket No. 34111 (decided August 19, 2002), holding instead that sovereign immunity was not implicated in that case. *Id.* at 5, n.12.

Florida v. Florida, 517 U.S. 44, 55 (1996) (“Congress’ intent to abrogate the States’ immunity from suit must be obvious from ‘a clear legislative statement.’”) (*quoting* *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786 (1991)). Nor is there any indication that Congress was exercising its powers under the Fourteenth Amendment, which is a prerequisite to abrogating state immunity. *Seminole Tribe*, 517 U.S. at 59-60. Thus, Vermont Railway’s petition, which compels the state’s nonconsensual participation in a federal forum, is barred on the grounds of sovereign immunity.

B. The *Ex Parte Young* doctrine does not apply to administrative proceedings.

The United States Supreme Court has never applied the *Ex Parte Young* exception to a federal administrative proceeding, and would be unlikely to apply the doctrine to this proceeding. In *Federal Maritime Commission v. South Carolina Ports Authority*, 122 S. Ct. 1864 (2002) (“*FMC*”), the Court rejected an argument put forth by the federal government that, even if the requested reparations order would violate state sovereign immunity, a cease-and-desist order would not, because it would not threaten the financial integrity of the state. According to the Court, the government’s position reflected a fundamental misunderstanding of sovereign immunity; “the purpose of sovereign immunity is not to protect State treasures . . . but to afford the States the dignity and respect due sovereign entities.” 122 S. Ct. 1864, 1879.

As noted by several commentators, the cruise line’s request for a cease-and-desist order was “analogous to [those] situations in which *Ex Parte Young* has applied.” William Funk, *Supreme Court News*, Admin. & Reg. L. News 8, 25 (Summer 2002). The *FMC* Court did not, however, cite or even mention the *Ex Parte Young* exception to sovereign immunity. Rather than extend the *Ex Parte Young* doctrine to federal

administrative proceedings, the Court suggested that the rationale for sovereign immunity was especially compelling in an agency forum.

Simply put, if the Framers thought it an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts, we cannot imagine that they would have found it acceptable to compel a State to do exactly the same thing before the administrative tribunal of an agency

Federal Maritime Commission, 122 S. Ct. 1864, *see also id.* at 1875 n.11 (“allowing a private party to haul a state in front of such an administrative tribunal [might] constitute[] a greater insult to a State’s dignity than requiring a State to appear in an Article III court”). Vermont Railway’s supplemental petition would, like the original petition, constitute an affront to the state’s sovereignty and, accordingly, both are barred.

C. The Surface Transportation Board’s opinion, if binding on state officials, would violate due process.

Vermont Railway suggests that the State of Vermont’s sovereign immunity is not violated because the state can ignore with impunity any order that issues from the Board’s proceedings. Supp. Petition at 7-8. If Vermont Railway truly believes that the Board’s orders are nugatory, the State wonders why the railroad has bothered to file a petition for declaratory relief.

In any case, the State of Vermont is not so rash as to ignore the Board’s authority. The State furthermore notes that the Board’s declaratory orders have, in some instances, had a preclusive effect on states’ and municipalities’ ability to litigate preemption under the ICCTA in subsequent proceedings. For example, in *Boston and Maine Corp. v. Town of Ayer*, the Town of Ayer was foreclosed from litigating preemption claims in federal district court because it failed to timely challenge a declaratory order issued by the Surface Transportation Board.

Although Ayer contends that the STB's order was merely advisory, it nevertheless has not followed the procedure for review delineated in the statute. Ayer has not formally initiated any type of review proceeding before this court, as is required by 28 U.S.C. 1336(c). Guilford argues that since Ayer has not petitioned this court for review of the STB decision, the decision is now binding, terminating the instant action.

Guilford is correct. . . . the ninety day period has expired, and this court is now bound by the STB decision. This court, therefore, adopts the STB's determination that Ayer's regulations are preempted by the ICCTA.

Boston and Maine Corp. v. Town of Ayer, 191 F.Supp.2d 257 (D. Mass. 2002); see also, *City of Auburn v. United States*, 154 F.3d 1025, 1028 n.4 (9th Cir. 1998), *cert. denied*, 527 U.S. 1022 (1999) (Ninth Circuit had dismissed a previous appeal brought by the City of Auburn "because it [the City] was not a party to the [STB] proceedings below").

A decision that binds state officials without providing them an adequate opportunity to present their case would violate procedural due process. "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970). This Board has held that preemption claims turn on questions of fact. The State of Vermont notes that it, along with the named state officials, is entitled to conduct discovery and present evidence in these proceedings, 49 C.F.R. §§ 1114. Yet the venue of these proceedings presents a formidable obstacle to the development of the State's case.

II. THE VERMONT FEDERAL DISTRICT COURT HAS ALREADY RULED THAT VERMONT'S ACT 250 IS NOT FACIALLY PREEMPTED BY THE ICCTA, THUS OBVIATING THE NEED FOR DECLARATORY RULING PROCEEDINGS BEFORE THE SURFACE TRANSPORTATION BOARD.

At pages 11 through 16 of its Supplemental Petition, Vermont Railway attempts to explain why this Board should institute declaratory ruling proceedings despite concurrent proceedings before the Vermont Federal District Court to decide the same issue. Where the Vermont Federal District Court has already ruled that Vermont's Act 250 is not facially preempted by the ICCTA, it is unnecessary and unwise for this Board to institute proceedings to consider the identical issue. As previously stated, the Vermont District Court has considered the arguments of Vermont Railway's affiliate, the Green Mountain Railroad Corporation, concerning the preemptive effect of the ICCTA on Vermont's Act 250 and has ruled that Act 250 is not preempted under all circumstances. In making that ruling the Court reviewed the language of Act 250 and was provided with detailed explanations from both the State and Green Mountain Railroad about the Act 250 process.

In its petitions before this Board, Vermont Railway has duplicated the preemption argument made by Green Mountain Railroad before the Vermont District Court. To ask the Surface Transportation Board to rule on the identical issue runs the very real risk of creating inconsistent rulings. This will result in confusion and will inevitably cause delay, which as the Vermont Railway tirelessly points out, will be extremely deleterious to its operations. The risk of inconsistent rulings on this important issue warrants forbearance by this Board

At the very least, the Surface Transportation Board should stay these proceedings until the Vermont District Court rules on Green Mountain Railroad's as-applied claims. The Federal Court's analysis and determination of the preemptive effect of the ICCTA on Vermont's Act 250 as applied to the existing and proposed projects on the Green

Mountain Railroad Rockingham site will, no matter the result, provide guidance not only to all parties of record in that litigation, but to this Board and to Vermont Railway. The Surface Transportation Board has often repeated its well-founded conclusion that preemption determinations are to be made upon careful application of the law to the facts, not by the Board, but by the courts, which are preeminently suited to make such decisions. Should a party to the District Court matter choose to appeal the ruling and have a right to do so, such an appeal will give all parties, as well as all other affected entities, the legal certainty sought. Were this board to institute declaratory ruling proceedings would again run the risk of inconsistent rulings, and further delay judicial finality on the preemption determinations at issue.

III. THE MATTERS BEFORE THE SURFACE TRANSPORTATION BOARD ARE NOT YET RIPE FOR RESOLUTION.

At pages 16 through 25 of its Supplemental Petition, Vermont Railway argues that its petition for a declaratory ruling is ripe despite the fact that (1) Vermont Railway does not own the land on which the proposed project would be located, (2) Vermont Railway has not sought an Act 250 permit for its proposed project, and (3) Vermont Railway has not established a credible threat of enforcement by state authorities. As these facts make clear, the matter before the Board is not yet ripe.

A. The evidence submitted makes clear that Vermont Railway does not yet own the land on which its proposed project would be located.

Vermont Railway has submitted numerous exhibits to support its claim that it owns the 39-acre tract in Wallingford, Vermont on which it proposes to construct a building and other structures that it claims will be associated with a salt shed operation. Instead however, these documents support the State's contention that Vermont Railway

does not yet own this land. The railway concedes that there are unresolved title insurance issues and that neither the option contracts nor the deed have been recorded. Supp. Petition at 16; Ex. 5 at 2. Furthermore, the Exhibit is entitled: *Affidavit of Lisa W. Cota, Defendants' Motion for Judgment on the Pleadings-Defendants' Motion for Summary Judgment*. If not a typographical error, this title might lead one to surmise that the Railway, as buyer, is a Defendant in ongoing litigation concerning the transaction. Assuming though that the title is in error, the ineluctable fact remains that the Railway does not hold record title to the property in Wallingford. The Railway's failure to provide proof of ownership, combined with information that at best there remain unresolved title insurance issues on the property, creates a circumstance so tenuous that it would be premature for this Board to institute proceedings to determine the preemptive effect of the ICCTA on Vermont's Act 250 as it relates to a proposed project on this land.

B. Vermont Railway's failure to request a Jurisdictional Opinion as to the applicability of Vermont's Act 250, or to submit a permit application demonstrates that the Railway, and not the Act 250 process, has caused delay and created uncertainty with regard to this proposed project.

Vermont Railway argues that the Surface Transportation Board should institute declaratory order proceedings in order to terminate uncertainty in this matter. Vermont Railway alleges that the uncertainty regarding their Wallingford project arises from delays that it argues are inherent in the Act 250 process. Supp. Petition at 24. However, it is the actions of the Railway – not Act 250 -- that have caused all delay thus far. The Railway has not made even the slightest attempt to use either the formal or informal means available to assess whether and how Act 250 would apply to the project, or what conditions might be proposed. When the State of Vermont offers one such informal

means in its response to the initial petition, the Railway retorts that the State has never made such an offer. Supp. Petition at 24. Counsel for Vermont Railway knew that the State had made such an offer to Green Mountain Railroad in the pending matter concerning the Rockingham site. The State did not know of the Wallingford project until the petition was filed. When prior to the time of filing the petition would the State have had an occasion to offer Vermont Railway a means to resolve potential preemption conflicts? Why is the State's offer to pursue a cooperative course of resolving outstanding issues not taken seriously?

Much ado is made by the Railway of its' August 27, 2003 letter to certain local entities in the Wallingford area about the Railway's plans for its salt shed project. It is notable that no similar letter was sent to the State of Vermont or the District Environmental Coordinator for Act 250 to engage the State in any informal dialogue about the project.

That the Railway has been engaged in attempting to purchase the Wallingford property for over two and a half years is indisputable based on the documents submitted. At no time during those 30 months, did the Railway make any effort to communicate with the State about a proposed project on the site. Vermont Railway has allowed two and a half years to elapse before even bringing its plans to the attention of the local and state authorities whose responsibility it is to review them. If Vermont Railway was truly interested in obtaining an Act 250 permit in a timely fashion, it could have been working informally with the State during this time to gather and prepare the information necessary to obtain an Act 250 permit. Vermont Railway has made no such efforts. The institution of declaratory ruling proceedings will not terminate uncertainty in this matter because

Vermont Railway has not yet applied for, let alone been denied, a permit under Vermont's Act 250 land use law.

Finally, Vermont Railway asserts that Act 250 is a pre-construction permitting scheme and that such a conclusion marks the end of any inquiry and warrants a finding of preemption. This is incorrect. Instead, such a conclusion demonstrates that further facts are needed in order to determine if preemption applies given the specific manner in which Vermont's Act 250 will impact this particular project. A state or local law is not preempted merely because it has an impact on railroad operations or affects interstate commerce. The law must be found to *unduly* burden operations or *unreasonably* interfere with interstate commerce.

The existing Act 250 process is uniquely and ideally suited to enable parties to identify what specific conditions the State of Vermont would propose for a particular project, thus providing the critical information necessary to make a preemption determination. Not all such conditions would automatically be preempted. Some might be reasonable measures that should be imposed on a project. Only the filing of an Act 250 application will provide sufficient information for the State to formulate proposed conditions for the project. Whether the conditions would be objectionable to an applicant cannot be known until those conditions are articulated. Then and only then would a court be able to assess whether any specific condition constitutes an undue impact upon railroad operations or an unreasonable interference with interstate commerce.

That a set of known conditions is a necessary antecedent in making a preemption determination is readily apparent from the Board's previous rulings. In Joint Petition for Declaratory Order – Boston and Maine Corporation and Town of Ayer, MA, S.T.B.

Finance Docket 33971 (April 30, 2001) this Board held that “not all state and local regulation that affects railroads is preempted” and found that some of the conditions proposed by the local planning board “might be reasonable measures in and of themselves” and went on to offer “some general observations regarding the kinds of restrictions that might be reasonable in individual circumstances.” *Id.* at 11. The Board also emphasized that just because the conditions proposed by a local authority were “initially imposed as part of an impermissible permit does not mean that every one of them is preempted. *Id.* at 11 n.31.

Before making any determination about the preemptive effect of the ICCTA on Act 250 as it might apply to the proposed Wallingford salt shed project, the Act 250 process should be used to develop a set of specific conditions for the project. The conditions, once identified and objected to, can then be reviewed by the appropriate court, to see if they constitute an undue burden on railroad operations or an unreasonable interference with interstate commerce.

C. There is no threat of enforcement by the State of Vermont against Vermont Railway for its proposed salt shed project in Wallingford, Vermont.

Finally, Vermont Railway asserts that this matter is ripe because the proposed project will be subject to an enforcement action by the State of Vermont. Supp. Petition at 22. Vermont Railway cites a letter dated March 13, 2001, and addressed to Green Mountain Railroad Corporation. Vermont Railway has offered this letter as proof that the State of Vermont has communicated an intention to take enforcement against Vermont Railway for the Wallingford project. Supp. Petition at 22. This suggestion is as disingenuous as it is preposterous. The letter in question, VTR Exhibit 4, is also taken

out of context. The letter was written to Green Mountain Railroad Corporation, who owned a facility in Rockingham, Vermont, with an existing Act 250 permit, and who had applied for and received a permit amendment to build a salt shed, then requested an amendment to that permit which was never finalized to build a different salt shed, and then built the salt shed anyway. Furthermore, the letter's reference to a salt shed is part of a sentence interpreting a Vermont Supreme Court opinion about a salt shed project in Burlington, Vermont. Again, to construe this March 2001 letter as a threat of enforcement regarding *proposed construction by a different entity in a different location under different circumstances at a different time* is patently absurd. There is no threat of State enforcement regarding the proposed Wallingford salt shed project and thus the matter is not ripe for consideration by this Board.

IV. SHOULD THE BOARD ELECT TO INSTITUTE DECLARATORY ORDER PROCEEDINGS IT SHOULD ADOPT A PROCEDURAL SCHEDULE FAIR TO ALL PARTIES AND CONSISTENT WITH BOARD RULES.

In the event that this Board decides to initiate declaratory order proceedings on this matter, the procedural schedule proposed by the State of Vermont is fair and consistent with Board rules and should be adopted. Vermont Railway, at page 26 of its Supplemental Petition, suggests that if this Board institutes Declaratory Order proceedings, the procedural order to be followed should be one of two proposals it makes, each of which gives a clear advantage to the Railway at the expense of fairness to all interested and affected parties. While such suggestions are consistent with an adversarial process, they are unfair and inconsistent with the rules of the Board. Vermont Railway is the moving party in this matter. The Railway is asking this Board to act and only the Railway knows what it will ask the Board to do and on what basis. It is patently

unfair and illogical to suggest that interested or affected parties should file opening statements simultaneously with the Railway. The State of Vermont does not know with any specificity what ruling the Railway will seek from this Board, or the legal and factual basis upon which it will ground its request. The accepted, appropriate and logical procedure is for the Railroad to make its opening statement, and then to allow parties to respond, after they have had an opportunity to determine if they even have an interest, or a legal or factual basis to oppose the requested order.

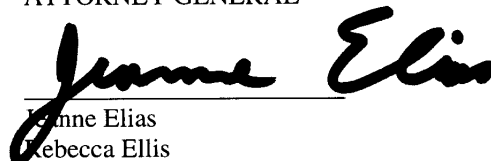
Similarly, and consistent with the rules of the Board, it is appropriate to allow each responsive party a reply to any filing of the moving party. Given that the Railway wants to initiate proceedings, and wishes to change the status quo, it is appropriate and fair to grant interested parties an opportunity to respond to any subsequent filing of the Railway. The procedural schedule set forth on page 17 of the State's Opposition to the Initial Petition is fair, consistent with Board Rules, and is also consistent with the Federal Rules of Civil Procedure, which place the burden of going forward on the moving party, and permit any non moving party an appropriate opportunity to respond to any filing by the moving party.

Wherefore the State of Vermont respectfully requests that Vermont Railway
Inc.'s petition to institute declaratory ruling proceedings be denied.

Dated: October 16, 2003, at Montpelier, Vermont.

STATE OF VERMONT
WILLIAM H. SORRELL
ATTORNEY GENERAL

By:


Jeanne Elias
Rebecca Ellis
Assistant Attorneys General

CERTIFICATE OF SERVICE

I certify that a copy of the State of Vermont's Opposition to Vermont Railway, Inc.'s Supplemental Petition has, this 16th day of October, 2003, been served by first-class mail, postage prepaid, on the following persons:

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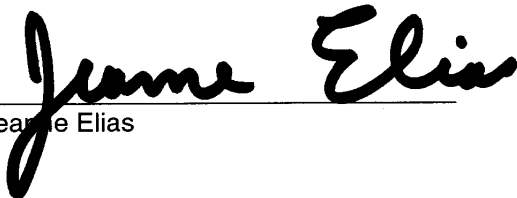
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