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ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34364

VERMONT RAILWAY, INC. -- PETITION FOR DECLARATORY ORDER

PETITION FOR LEAVE (1) TO SUPPLEMENT THE RECORD WITH NEW
EVIDENCE, (2) TO RESPOND TO THE STATE OF VERMONT'S
ERRONEOUS RELIANCE ON CERTAIN CASE LAW, AND (3)
TO FILE A REPLY TO THE STATE'S REQUEST FOR A STAY
CONTAINED IN ITS OPPOSITION TO VERMONT
RAILWAY'S SUPPLEMENTAL PETITION
FOR DECLARATORY ORDER

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In this case, Petitioner, Vermont Railway Inc. ("VTR"), seeks a declaratory order delineating the extent to which a state of Vermont environmental permitting statute, known as Act 250, and local zoning ordinances of the Town of Wallingford, Vermont ("Wallingford") are preempted by 49 U.S.C. § 10501(b) with respect to the construction and operation of a bulk salt rail-to-truck transload facility that VTR desires to construct and operate at Wallingford.

VTR sought relief through an initial Petition for Declaratory Order filed on June 17, 2003 ("Initial Petition") and a Supplemental Petition filed on September 15, 2003 ("Supplemental Petition"). The petition, as supplemented, seeks a declaration of preemption with respect to the State, Wallingford, and certain of their named officials who may seek to apply or enforce the laws as to which VTR seeks a ruling from the Board. The State of Vermont ("State" or "Vermont") and Wallingford opposed both the Initial Petition and the Supplemental Petition.

A pleading of the State styled "State of Vermont's Opposition to Vermont Railway's Supplemental Petition for Declaratory Order," ("Supplemental Petition Opposition"), dated October 16, 2003, advances the following three assertions:

- (1) That, because VTR does not hold a recorded deed to the property at Wallingford on which VTR proposes to construct

and operate the rail transload facility, VTR's request for a declaratory order is premature and should be denied;¹

(2) That the Board, on account of *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997) ("*Coeur d'Alene*"), must declare itself without jurisdiction to entertain the requested declaratory order petition regarding the extent to which 49 U.S.C. § 10501(b) preempts named officials of Vermont from applying a state permitting statute to VTR's proposed construction because "a state forum is available to vindicate federal interests";² and

(3) That the Board in any event should stay this proceeding indefinitely pending disposition of a federal district court case³ and the exhaustion of all appeals resulting from that case.⁴

VTR seeks leave to file the reply pleading tendered herewith for the following reasons.

1. At the time VTR filed its Initial Petition, VTR held an option to purchase the property on which the transload project would be located. In its opposition to the Initial Petition ("Initial Petition Opposition"), the State contended that VTR's absence of ownership in the property made the proposed transload project too speculative to be considered by the Board.⁵ On September 15, 2003, VTR filed with the Board its Supplemen-

¹ Supplemental Petition Opposition at 12-13.

² Supplemental Petition Opposition at 6.

³ *Green Mountain Railroad Corporation v. State of Vermont, et al.*, Civil No. 1:01 CV 181, D. Vt., ("*GMRC v. Vermont*").

⁴ Supplemental Petition Opposition at 11-12.

⁵ Initial Petition Opposition, p. 12. The State also argued that the absence of a contract between VTR and a transload customer had a similarly speculative effect on the transaction. *Id.* This argument is emblematic of the State's strained position, which is that VTR's right to seek declaratory relief ripens only if VTR obligates itself contractually to serve a customer through a project that the State maintains it has the

tal Petition disclosing, among other things, that VTR had since paid in full for the property, but that the purchase had not yet been recorded due to title insurance issues. Although the State did not thereafter dispute VTR's beneficial ownership of the tract, the State in its Supplemental Petition Opposition (pp. 12-13) asserted that the absence of a recorded instrument of title in VTR's name stripped the proposed project of legitimacy.

The State has at no time set forth any statute, case, or other form of authority to support its claim that VTR must be the owner of record of the Wallingford tract in order to press its request for the Board to remove uncertainty regarding the use of that tract for railroad purposes. Nevertheless, the State's arguments have now been mooted by the completion of the title transfer process. VTR has received and recorded a deed to the Wallingford property. VTR seeks leave to supplement the record and introduce evidence of VTR's title to the property on which it seeks to construct and operate its rail transload facility.

2. If the Board permits VTR to lay the State's invalid land title issue completely to rest, then VTR must also seek leave to address two other matters. The first is the State's utterly erroneous representation that, under *Coeur d'Alene*, VTR is barred from seeking declaratory relief involving named state officials because "a state forum is available to vindicate federal interests." As explained in more detail in VTR's contemporaneously tendered Reply pleading, the State's argument stems from the State's assertion that it is protected by sovereign immunity from participating against its will in a declaratory order proceeding before a federal administrative agency as a result of the Supreme

right to veto or to restrict in ways that may make the project uneconomical. The State's position displays not only an irresponsible regulatory outlook, but would impose impractical and unnecessary economic burdens on VTR.

Court's decision in *Federal Maritime Commission v. South Carolina Port Authority*, 535 U.S. 743 (2002) ("*FMC*").

VTR does not believe that *FMC* is an applicable barrier to the declaratory order sought in this proceeding for a number of reasons explained extensively at pages 4-8 of VTR's Supplemental Petition. Nevertheless, in an effort to allow the Board to reach a determination on the merits without being sidetracked due to the State's sovereign immunity claim, VTR stated in its Supplemental Petition that it desired to expand its declaratory order request by asking the Board to determine the extent to which certain named officials of the State and of Wallingford, charged with administering the statutes giving rise to VTR's request for relief, are preempted by 49 U.S.C. § 10501(b) from applying those statutes against the proposed rail transload facility. See Supplemental Petition, pp. 9- 10. VTR took the position, and still does, that, in *Ex Parte Young*, 209 U.S. 123 (1908) ("*Ex Parte Young*") the Supreme Court determined the sovereign immunity provision of the Eleventh Amendment does not extend to named state officials acting in their individual capacities so long as the relief sought is prospective only and does not involve monetary damages. VTR is seeking only prospective relief that does not involve monetary damages.

In its Supplemental Petition Opposition, the State asserts to the Board that the *Ex Parte Young* exception to sovereign immunity is unavailing. The State asserts unequivocally (p. 6): "The *Ex Parte Young* doctrine does not apply ... where a state forum is available to vindicate federal interests. *Coeur d'Alene*, 521 U.S. at 270."

VTR seeks leave of the Board to demonstrate that the State misstates the holding of *Coeur d'Alene* by relying on a portion of the Supreme Court's opinion to which a ma-

jority of the Justices did not subscribe. Moreover, a broad range of appellate courts have expressly rejected the interpretation advanced by the State. VTR seeks to correct the State's erroneous reliance on Coeur d'Alene to remove the possibility that VTR may be prejudiced should the Board rely on the State's mistaken legal argument.

3. Finally, VTR seeks an opportunity to reply to the State's request for an indefinite stay of these proceedings until such time as the district court renders an opinion in GMRC v. Vermont and all appeals there from are exhausted. On December 15, 2003, the district court entered a dispositive ruling in GMRC v. Vermont, holding that Act 250 is preempted by the Interstate Commerce Commission Termination Act ("ICCTA") to the extent Act 250 is applied as a preclearance permitting process. On January 13, 2004, the State filed a Notice of Appeal to the United States Court of Appeals for the Second Circuit. VTR believes that the record in this proceeding should be supplemented so that the Board has before it both the district court's decision and the State's Notice of Appeal.

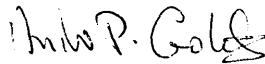
VTR believes that it should be given an opportunity to reply to the State's request for a stay. The stay request was advanced by the State in a reply pleading, rather than as an affirmative proposal to which VTR would be permitted to reply as a matter of right. VTR did not seek an opportunity to reply to Vermont's stay request prior to this time because VTR was awaiting proof that its title to the Wallingford tract had been recorded in order to bring all of VTR's arguments before the Board at a single time. While VTR was awaiting proof of recordation, the district court acted in GMRC v. Vermont.

At this juncture, VTR seeks an opportunity to explain to the Board how VTR would be prejudiced were the Board to grant the State's stay request. VTR, which is awaiting a ruling from the Board before investing substantial amounts of money in the

Wallingford salt transload project, would find its development plans postponed indefinitely, depriving VTR of the ability to earn revenues that VTR believes would be generated by the transload facility. VTR seeks an opportunity to oppose Vermont's stay request to the same extent that VTR could oppose that request as of right had the request been sent forth by the State in an affirmative pleading. The Court's December 15 decision in GMRC v. Vermont accentuates the inappropriateness of the stay request because it is now clearer than before that the State is seeking to enforce a statute in a manner that is preempted and unlawful.

WHEREFORE, pursuant to 49 C.F.R. 1117.1, VTR seeks leave to file the simultaneously tendered Reply to the State's Supplemental Petition Opposition.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing, has, this 28th day of January, 2004,
been served by first-class mail, postage prepaid, on the following persons:

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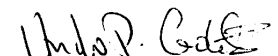
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