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STATE OF VERMONT
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February 17, 2004

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 Dated January 28, 2004."

Thank you.

Sincerely,

ENTERED
Office of Proceedings

FEB 19 2004

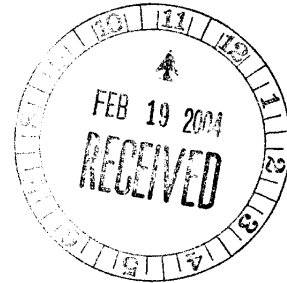
Part of
Public Record

A handwritten signature in cursive script, appearing to read "Rebecca Ellis".

Rebecca Ellis
Assistant Attorney General

Enclosures
cc: Service List

BEFORE THE
SURFACE TRANSPORTATION BOARD



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

**STATE OF VERMONT'S OPPOSITION TO
VERMONT RAILWAY'S SUPPLEMENTAL PETITION
DATED JANUARY 28, 2004**

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Dated: February 17, 2004

BEFORE THE
SURFACE TRANSPORTATION BOARD

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



**STATE OF VERMONT'S OPPOSITION TO
VERMONT RAILWAY'S SUPPLEMENTAL PETITION
DATED JANUARY 28, 2004**

The State of Vermont opposes Vermont Railway's petition for leave to supplement the record and submit further legal memoranda. Vermont Railway has filed three petitions in this docket. In its initial petition to institute declaratory proceedings, dated June 17, 2003, Vermont Railway sought a declaration that Vermont's Act 250, codified at 10 Vt. Stat. Ann. §§ 6001-6108, is preempted by the Interstate Commerce Commission Termination Act (ICCTA). On September 15, 2003, Vermont Railway submitted a supplemental petition for a declaratory order, asking the Board to "determine the extent to which the same preemption applies to certain specific officials of Vermont." VTR 9/15/03 at 9. On January 28, 2004, Vermont Railway filed yet another supplemental petition, asking permission to submit a warranty deed and to submit further legal memoranda in response to the State of Vermont's opposition to Vermont Railway's previous petition.

The State opposes Vermont Railway's January 28, 2004 petition, on the following procedural and substantive grounds: (1) the Board's rules do not allow a "reply to a reply," (2) Vermont Railway's petitions are barred by sovereign immunity, which cannot be overcome by the *Ex Parte Young* doctrine, (3) Vermont Railway's petitions for a

declaratory ruling are not ripe, despite the submission of additional evidence in the form of a warranty deed, and (4) a dismissal or, in the alternative, a stay of these proceedings is appropriate where identical legal issues are before the Second Circuit Court of Appeals.

I. The Surface Transportation Board's rules do not allow for responsive pleadings to replies.

Under the Surface Transportation Board's regulations, "A reply to a reply is not permitted." 49 C.F.R. § 1104.13. Vermont Railway neatly attempts to evade this rule by sending letters to Secretary Vernon Williams, copying the Surface Transportation Board on correspondence to opposing counsel, and by filing replies styled as supplemental petitions. For example, in this docket, Vermont Railway sent or copied letters to Secretary Williams on July 1, 2003, July 8, 2003, July 31, 2003, September 4, 2003, November 13, 2003, and December 18, 2003. Vermont Railway has filed petitions in this docket on June 17, 2003, September 15, 2003, and January 28, 2004. The State of Vermont has attempted, with its limited resources, to respond to Vermont Railway's letters and petitions.

In its latest petition, Vermont Railway claims that it is responding to the State of Vermont's "request for a stay." VTR 1/28/04. In fact, Vermont Railway is responding to the State of Vermont's opposition, dated October 16, 2003, to Vermont Railway's supplemental petition. The State of Vermont opposed the supplemental petition on various grounds, including sovereign immunity (page 4 to 12) and ripeness (page 12-17). In its opposition, the State of Vermont stated:

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 existing and proposed

projects on the Green Mountain Railroad Rockingham site will, no matter what the result, provide guidance not only to all parties of record in that litigation, but to this Board and to Vermont Railway.

State of Vermont, 10/16/03 at 12-13. Vermont Railway turns this argument into a full-blown request for a stay and uses it as an excuse to file its January 28, 2004 petition.

Vermont Railway's January 28, 2004 petition is, in fact, an unauthorized "reply to a reply," in which the railroad responds to the legal arguments advanced in the State's October 16, 2003 opposition. In the State's opinion, Vermont Railway has not only stretched the limits of 49 C.F.R. § 1104.13, it has flagrantly exceeded them. Vermont Railway's filings are duplicative and wasteful. By allowing such filings, the Board will only encourage Vermont Railway, and others, to disregard the Board's rules. However, if the Board grants leave for Vermont Railway to file the January 28, 2004 petition, then the State of Vermont files this further response to the arguments raised by Vermont Railway in its January 28, 2004 legal memorandum.

II. The State of Vermont's sovereign immunity bars Vermont Railway's petitions and cannot be overcome by the *Ex Parte Young* doctrine.

On pages 6 through 13 of its January 28, 2004 filing, Vermont Railway contends that its petition to institute declaratory ruling proceedings is not barred by Eleventh Amendment sovereign immunity. The Eleventh Amendment shields states from suit in a federal forum unless Congress specifically abrogates state sovereign immunity. There is no indication that Congress intended to abrogate the states' sovereign immunity when it created the Surface Transportation Board. *See Seminole Tribe of 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)). Thus, Vermont Railway's petition for declaratory

relief is barred by Vermont's sovereign immunity unless the petition falls within the *Ex Parte Young* exception for suits seeking declaratory and injunctive relief against state officers acting in their individual capacities. The *Ex Parte Young* exception does not apply to Vermont Railway's petition because (1) the State of Vermont is the real party in interest and (2) the doctrine does not apply to federal administrative proceedings.

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

Vermont Railway asserts that the availability of a state forum to vindicate federal interests is irrelevant to the *Ex Parte Young* doctrine, despite a clear statement to the contrary in *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997). Vermont Railway argues that the State's interpretation of the *Ex Parte Young* doctrine, which is the same as Justice Kennedy's, is "misguided and inaccurate." VTR, 1/28/04 at 9. Writing the principal opinion in *Coeur d'Alene*, Justice Kennedy explained that the lack of a state forum to vindicate federal rights has special significance in the *Ex Parte Young* analysis:

[T]here are, in general, two instances where *Young* has been applied. The first is where there is *no state forum available* to vindicate federal interests, thereby placing upon Article III courts the special obligation to ensure the supremacy of federal statutory and constitutional law.

521 U.S. at 270-271 (emphasis added). Justice O'Connor, in her concurring opinion, agreed that the absence of a legal remedy in a state forum was relevant to the *Ex Parte Young* analysis, but concluded that the "inadequacy of a legal remedy is a prerequisite for equitable relief in *any* case." 521 U.S. at 292 (O'Connor, J., concurring) (emphasis added). Although Justice O'Connor parted ways from Justice Kennedy and Chief Justice Rehnquist in part II-B of the principal opinion, the two camps agreed that the Coeur

d'Alene tribe could not employ the *Ex Parte Young* doctrine to avoid state sovereignty. Since neither Justice Kennedy nor Justice O'Connor garnered a majority, neither approach is controlling. Under either approach, however, Vermont Railway's petition would be barred.

Following Justice Kennedy, the availability of a state forum would preclude the use of *Ex Parte Young* in this proceeding. Vermont Railway has recourse to a state forum to vindicate its claim that Act 250 is preempted by the ICCTA. Indeed, the Vermont Supreme Court decided a federal preemption claim brought by Vermont Railway several years ago to challenge local zoning regulations under the ICCTA in *In re Vermont Railway*, 769 A.2d 648 (A.2d 2001) (holding that a municipality's permit conditions, which related to the operation of a salt shed, were not preempted by the ICCTA).

Alternatively, following Justice O'Connor, Vermont's fundamental interest in regulating land use would preclude application of the *Young* exception. Where a suit encroaches upon special state sovereignty interests, the state is the real party in interest and the *Young* doctrine, which "rests on the premise that a suit against a state official . . . is not a suit against the State," 521 U.S. at 296 (O'Connor, J., concurring), cannot be invoked. Thus, for example, Justice O'Connor found that the Coeur d'Alene tribe's declaratory action was barred as a suit against the state because it would "divest the State of *all regulatory power* over submerged lands." *Id.* (emphasis added); *see also* 521 U.S. at 289 ("the Tribe seeks to *eliminate altogether the State's regulatory power* over the submerged lands at issue") (emphasis added). Given the special state sovereignty interests at stake, the Coeur d'Alene tribe was confined to seek a remedy in state court.

Like the tribe's claim in *Coeur d'Alene*, Vermont Railway's petition is an affront to a fundamental state interest. Land use regulation has long been recognized as a core police power of the states. *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 767 (1982), *rehearing denied*, 458 U.S. 1131 (1982) ("regulation of land use is perhaps the quintessential state activity"); *Dolan v. City of Tigard*, 512 U.S. 374, 387-88 (1994) (reduction of traffic congestion a legitimate public purpose); *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980) (zoning regulations designed to protect against ill effects of urbanization long recognized as legitimate). Because Vermont Railway seeks to divest the State of Vermont of a core police power, it is the state that is the real party in interest in this proceeding. Moreover, like the Coeur d'Alene tribe, Vermont Railway could resolve its claims in a state forum. As a result, the *Ex Parte Young* exception does not apply, and Vermont Railway's petition is barred by sovereign immunity.

B. The *Ex Parte Young* doctrine creates an exception for suits in federal court, not for petitions brought in federal administrative proceedings.

By its plain terms, the *Ex Parte Young* fiction only applies to Article III courts, not to federal administrative proceedings. The *Ex Parte Young* doctrine is based on the "importance of having federal *courts* open to enforce and interpret federal rights." *Coeur d'Alene*, 521 U.S. at 293 (O'Connor, J., concurring) (emphasis added). Vermont Railway cites no authority for the proposition that petitioners can avoid sovereign immunity by invoking the *Ex Parte Young* doctrine in federal administrative proceedings.

Furthermore, it is doubtful that the federal courts would allow petitioners to invoke *Ex Parte Young* in administrative proceedings. Our nation is founded on a careful balance of federal and state interests.

States, upon ratification of the Constitution, did not consent to become mere appendages of the Federal Government. Rather, they entered the Union "with their sovereignty intact." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991). An integral component of that "residuary and inviolable sovereignty," The Federalist No. 39, p. 245 (C. Rossiter ed. 1961) (J. Madison), retained by the States is their immunity from private suits. Reflecting the widespread understanding at the time the Constitution was drafted, Alexander Hamilton explained,

"It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State of the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States" *Id.*, No. 81, at 487-488 (emphasis in original).

Federal Maritime Commission v. South Carolina Ports Authority, 122 S. Ct. 1864 (2002).

The *Ex Parte Young* fiction upsets the federal-state balance. The Supreme Court tolerates this upset, but only so far. There are "certain types of cases that formally meet the *Young* requirements of a state official acting inconsistently with federal law but that stretch that case too far and would upset the balance of federal and state interests that it embodies." *Papasan v. Allain*, 478 U.S. 265, 277 (1986) (quoted by *Coeur d'Alene*, 521 U.S. at 277). "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 (Kennedy, J., joined by Rehnquist, C.J., and O'Connor, Scalia, Thomas, JJ. in part II-A of the principal opinion).

Although the Supreme Court tolerates the *Ex Parte Young* fiction when the federal courts have a compelling interest in interpreting federal law, the Court's language

in *Federal Maritime Commission* indicates that it would not tolerate the *Ex Parte Young* doctrine in federal administrative proceedings.

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”). Given the Supreme Court’s unwillingness to subject unconsenting states to the jurisdiction of federal administrative proceedings, it is highly unlikely that the Court would allow parties to invoke the *Ex Parte Young* exception before a federal agency. Vermont Railway’s attempt to invoke the *Ex Parte Young* doctrine in this proceeding should therefore be rejected.

III. Vermont Railway’s petition is not ripe for resolution by this Board, despite the submission of additional evidence regarding land ownership.

On page 4 of its January 28, 2004 filing, Vermont Railway claims that a December 8, 2003 warranty deed, conveying property in Wallingford, Vermont from the Frank W. Whitcomb Construction Corporation to Vermont Railway, makes its petition ripe. This submission does not cure the ripeness problem inherent in Vermont Railway’s petition and should be disregarded. Moreover, the warranty deed raises more questions than it resolves.

First, the warranty deed does not provide details about Vermont Railway’s proposed project on the Wallingford property. As the State of Vermont previously stated: “The description of the project contained in the three-page verified statement of Paul

Craven is far too vague for the State of Vermont to make any determination as to what, if any, aspect of Act 250 might govern the project.” State of Vermont, 8/8/03 at 12. The local Act 250 district environmental commission cannot determine whether a project should be approved, or if it is necessary to impose conditions in order to meet the criteria of Act 250, until the applicant submits a complete application.¹ This Board has opined that certain project conditions are not preempted by the ICCTA. Until the local Act 250 district environmental commission has had an opportunity to evaluate the environmental impacts of Vermont Railway’s proposed project, and has had an opportunity to evaluate the need for conditions, the railroad’s petition for a declaratory ruling is not ripe.

Second, the warranty deed raises more questions than it answers. The seller in this transaction, Frank W. Whitcomb Construction Corp., is – on information and belief – one of Vermont Railway’s major customers. The company provides paving services to municipal and state governments and has, in the past, sold sand and gravel to local municipalities for use in winter maintenance of local roads. Another one of Vermont Railway’s major customers is Cargill Salt, which sells road salt to local municipalities for winter maintenance of local roads. The close connection between these companies leads one to ask whether the sale of the Wallingford property is an attempt by one or more of the parties to evade state regulation over a salt distribution operation. Clearly, the State of Vermont would need to pursue further discovery to flesh out this theory. However, if the transaction is an attempt to avoid otherwise applicable regulation, the State would

¹ The Act 250 application guidelines, and the information sought by the State of Vermont prior to considering an application, can be found online at: <http://www.state.vt.us/envboard/publications.htm>. Once a complete application is received, the local district environmental commission can determine whether the Act 250 criteria are satisfied.

argue that Act 250 is not preempted by the ICCTA. *See Hi Tech Trans, LLC – Petition for Declaratory Order – Hudson County, N.J.*, STB Finance Docket No. 34192 (November 20, 2002) (holding that in-state truck transport of commodities to a rail site was “beyond the rail related activities at the CP transloading facilities” and therefore was not within the Board’s jurisdiction).

Finally, the fact that Vermont Railway did not even own the land until December of 2003, combined with the fact that the State did not know about the proposed project until the filing of the initial petition in June of 2003, makes even more absurd the Railway’s assertion that there was a threat of enforcement by the State of Vermont against the Railway regarding the proposed construction at the Wallingford site. VTR 1/28/04 at 15-18. In addition, as previously mentioned, the specific language that Vermont Railway characterizes as an enforcement threat (contained in a March 2001 letter) is taken out of context. The language is in fact a quotation from a relevant Vermont Supreme Court opinion, and not a statement of the enforcement intentions of the State of Vermont. Absent a threat of enforcement, the matter is not ripe for consideration and action by this board is premature and unwarranted.

IV. Vermont Railway’s petition for a declaratory ruling should be dismissed or, in the alternative, stayed pending the appeal of the Green Mountain Railroad case to the Second Circuit Court of Appeals.

On page 19 of its January 28, 2004 filing, Vermont Railway asks this Board to institute declaratory ruling proceedings to determine whether Act 250 is preempted by the ICCTA, despite an appeal to the Second Circuit Court of Appeals in *Green Mountain*

Railroad Corp. v. State of Vermont et al. to decide identical legal issues.² “To ask the Surface Transportation Board to rule on the identical issues 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.” State of Vermont, 10/16/03 at 11.

Vermont Railway opposes a stay because of the supposed delay it will cause. VTR 1/28/04 at 19. In response, the State of Vermont has offered to enter into an agreement that would allow the railroad to move forward with an Act 250 permit application while preserving its legal challenges. *See* State of Vermont 8/8/03 at 2 & Ex. 1; *see also* Letter from Jeanne Elias to Andrew Goldstein, 11/18/03 (“The State of Vermont would be happy to discuss an arrangement with Vermont Railway similar to that reached with its sister corporation Green Mountain Railroad Corporation. A copy of that agreement is attached.”). Vermont Railway has declined to discuss this proposed interim solution with the State.

In any case, the supposed delays in this case are due to Vermont Railway’s own inaction. During the three years that it took Vermont Railway to obtain title to the

² Vermont Railway has asked this Board to determine whether Act 250 is preempted by the ICCTA and, by implication, whether specific permit conditions that would apply to the Wallingford project are preempted by the ICCTA. The former issue has been raised by Green Mountain Railroad Corporation in its federal court complaint. The latter issue is not ripe because the local Act 250 district environmental commission cannot evaluate the need for conditions until Vermont Railway submits a complete Act 250 permit application for the Wallingford project, which it has not done. *See Joint Petition for Declaratory Order – Boston and Maine Corporation and Town of Ayer, MA*, STB Finance Docket No. 33971 at *11 (April 30, 2001) (holding 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”).

Wallingford, Vermont property, the railroad did not seek a jurisdictional opinion to determine the applicability of Act 250 to the salt transload project, did not apply for an Act 250 permit, did not share its construction plans with the community or local or state regulatory agencies, and did not make any effort to determine what reasonable conditions should govern operation of any proposed project in order to allay legitimate environmental or other concerns. That Vermont Railway only recently acquired title to the property underscores the fact that the supposed delays in the project are attributable to Vermont Railway and are not a result of Act 250.

Moreover, Vermont Railway has failed to establish that its need for an Act 250 permit is imminent. Is the Wallingford project financially feasible? Does Vermont Railway have customers for road salt? Does Vermont Railway have a salt supplier? Has Vermont Railway even endeavored to answer these questions?

Lastly, Vermont Railway suggests that a stay would be problematic because it “seeks a declaratory order with respect to not merely Act 250, but also regarding Wallingford’s zoning ordinances.” VTR 1/28/04 at 19. Even if one could eliminate the outstanding ripeness issues, and one cannot, for they are equally as relevant to a preemption determination concerning Wallingford ordinances as they are to such a determination regarding Act 250, the fact that Vermont Railway’s petition requests preemption determination regarding two completely different municipal and state law schemes is a problem of the railroad’s own creation. Separate filings at the outset could have avoided this circumstance, and bifurcation could easily resolve it at the current time.

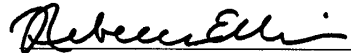
CONCLUSION

WHEREFORE, the State of Vermont respectfully requests that the Surface Transportation Board dismiss Vermont Railway's petition to institute declaratory ruling proceedings or, in the alternative, defer its decision whether to institute proceedings until the Second Circuit Court of Appeals has ruled on identical issues that were raised by Vermont Railway's affiliate in *Green Mountain Railroad Corp. v. State of Vermont*.

Dated: February 17, 2004

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 Dated January 28, 2004" has, this 17th day of February, 2004, been served by first-class mail, postage prepaid, on the following persons:

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