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BEFORE THE  
SURFACE TRANSPORTATION BOARD

PROVIDENCE AND WORCESTER ) Finance Docket No. 35393  
RAILROAD COMPANY, )

**REPLY OF PROVIDENCE AND WORCESTER RAILROAD COMPANY IN  
OPPOSITION TO NATIONAL GRID REQUEST FOR  
PROCEDURAL SCHEDULE AND PROTECTIVE ORDER**

Providence and Worcester Railroad Company ("P&W") hereby submits the following reply in opposition to the request of New England Power Company ("NEP"), d/b/a National Grid (collectively, "National Grid") for the Surface Transportation Board (the "Board") to order discovery, establish an extended procedural schedule, and issue a protective order to govern discovery in this proceeding. Although National Grid avoided labeling these requests as a motion – instead including its requests as a portion of its Reply to P&W's Petition for Declaratory Order – these procedural requests do raise new issues that are not covered by P&W's petition. Consequently, P&W is entitled to submit a reply explaining why no discovery, extended procedural schedule or protective order is necessary or appropriate.<sup>1</sup>

**I. INTRODUCTION**

On July 20, 2010, P&W filed a Petition for Declaratory Order in this proceeding seeking a declaratory order for the narrow purpose of removing a specific legal obstacle – a Massachusetts preclearance statute – to P&W's plans to construct a second track over a portion of its railroad right-of-way. In particular, P&W has requested that the Board

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<sup>1</sup> National Grid's Reply contains numerous factual assertions to which P&W takes exception. However, given the limited scope of this response to National Grid's request for an extended procedural schedule, discovery and a protective order, P&W has refrained from addressing those assertions here. Suffice it to say that P&W disputes the accuracy of National Grid characterizations of certain events. As set forth below, P&W believes that resolution of factual disputes is not necessary for the Board to determine whether the Massachusetts preclearance statute at issue is preempted.

confirm that (1) the Board has exclusive jurisdiction over P&W's use of its railroad right-of-way for rail transportation, and (2) a specific Massachusetts state law requiring P&W to obtain preclearance approval from the Massachusetts Department of Public Utilities ("MDPU") before requiring removal of transmission poles from its right-of-way is preempted pursuant to 49 U.S.C. § 10501(b).

On August 30, 2010, National Grid filed its Reply to P&W's Petition. Although P&W's Petition raises only a narrow legal issue relating to the preemption of the Massachusetts preclearance statute, National Grid's Reply requests that the Board, *inter alia*, establish an extended five-month procedural schedule, including a 60-day discovery period, and enter a protective order. As discussed more fully below, there are no material factual issues presented here, and there is no need for discovery or an extended procedural schedule to address the narrow *legal* issue before the Board. National Grid's efforts to conjure up factual issues where none exist, and to complicate and expand the scope of these proceedings, appear to be designed only to further delay the relocation of the National Grid poles. Such further delay will only serve to frustrate, or even jeopardize, P&W's ability to expand its rail operations over its own railroad right-of-way.

National Grid's request for an extended schedule and discovery – and the further delay it entails – is a matter of considerable importance to P&W. P&W has attempted to work with National Grid cooperatively for a year and a half to remove obstacles to its expansion plans and to obtain the full and unfettered use of its own right-of-way for rail operations. P&W has gone well out of its way to give National Grid sufficient time to effect an orderly removal of its poles from the P&W right-of-way. P&W's forbearance has been rewarded only with resistance to relocation from National Grid, continuing

delays, and ultimately a threat to resort to a state preclearance statute that would further delay or prevent P&W from expanding its operations on its own right-of-way. Since the potential application of the Massachusetts preclearance requirement appears to be a serious impediment to obtaining National Grid's cooperation to move its poles, P&W has sought a declaratory order from the Board on this narrow issue of law in the hopes of obtaining an expeditious resolution to the ongoing dispute with National Grid.

**II. DISCOVERY IS NOT NECESSARY BECAUSE THERE ARE NO FACTUAL ISSUES MATERIAL TO THE LEGAL ISSUE BEFORE THE BOARD**

P&W's Petition presents a single and narrow legal issue – whether M.G.L., c. 164, § 73 is preempted pursuant to 49 U.S.C. § 10501(b) – a purely legal question that raises no factual issues and requires no submission of evidence. The Board has repeatedly held that state permitting or preclearance requirements like M.G.L., c. 164, § 73 are categorically preempted. *See, e.g., Borough of Riverdale – Petition for Declaratory Order*, Docket No. FD 35299, slip op. at 2 (STB served August 5, 2010); *New England Transrail, d/b/a Wilmington & Woburn Terminal Ry. – Construction, Acquisition, and Operation Exemption – Wilmington and Woburn, Mass.*, STB Finance Docket No. 34797, slip op. at 8-9 (STB served July 10, 2007); *CSX Transportation, Inc. – Petition for Declaratory Order*, STB Finance Docket No. 34662, slip op. at 8 (STB served March 14, 2005).<sup>2</sup> Thus, when a permitting or preclearance requirement is at issue, a showing that the requirement unduly burdens or interferes with rail transportation is not required. *See CSX Transportation, Inc. – Petition for Declaratory Order*, STB

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<sup>2</sup> As the Board noted in *CSX Transportation*, “[t]he courts have made clear that state or local permitting or preclearance requirements of any kind that would affect rail operations (including building permits, zoning ordinances, and environmental land use permitting requirements) are preempted.” *See CSX Transportation*, slip op. at 8, citing *City of Auburn v. United States*, 154 F.3d 1025, 1029-31 (9<sup>th</sup> Cir. 1998); *Soo Line R.R. v. City of Minneapolis*, 38, F. Supp. 2d 1096 (D. Minn. 1998); *Norfolk S. Ry. v. City of Austell*, No. 1:97-cv-1018-RLV, 1997 U.S. Dist. LEXIS 17236 (N.D. Ga. 1997).

Finance Docket No. 34662, slip op. at 6 (STB served March 14, 2005) (denying request for discovery because question whether state preclearance or permitting statute is preempted is a purely legal issue). So long as the Board has jurisdiction over the railroad activity subject to the preclearance requirement, preemption is established.<sup>3</sup> As the Board recently noted:

The purpose of the federal preemption – which applies without regard to whether the Board actively regulates the particular rail carrier transportation activity involved – is to prevent a patchwork of local and state regulation from unreasonably interfering with interstate commerce. Thus, when the Board has jurisdiction under § 10501(a), § 10501(b) preempts two broad categories of state regulation: (1) permitting or preclearance requirements (including environmental, zoning and other land use requirements) that by their nature could be used to deny a railroad the right to conduct rail operations or proceed with transportation activities the Board has authorized, and (2) attempts to address transportation matters that are regulated by the Board. Other state actions may be preempted only if, as applied, they would unreasonably burden or interfere with transportation by the rail carrier.

*Borough of Riverdale – Petition for Declaratory Order*, Docket No. FD 35299, slip op. at 2 (STB served August 5, 2010) (footnotes omitted).

There is no question that M.G.L., c. 164, § 73 is a state preclearance requirement that, by its nature, could be used to deny P&W the right to conduct rail operations on its own right-of-way. National Grid concedes as much in its Reply. See National Grid Reply at 2, 7 and 8.<sup>4</sup> Accordingly, no evidentiary showing or findings of fact are necessary to conclude that M.G.L., c. 164, § 73 is preempted by 49 U.S.C. § 10501(b).

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<sup>3</sup> National Grid has not challenged either P&W's status as a rail carrier or that its rail operations on the Gardner Branch are subject to the jurisdiction of the Board pursuant to 49 U.S.C. § 10501(a). Accordingly, there would appear to be no issue regarding the Board's jurisdiction over the rail activities at issue here.

<sup>4</sup> National Grid's Reply flatly states that "M.G.L. c. 164, § 73 requires the consent of the MADPU to the removal or abandonment of any operating electric transmission line that has been lawfully constructed 'within the location of a railroad,' i.e., on railroad property." National Grid Reply at 2.

In particular, P&W need not demonstrate that M.G.L., c. 164, § 73 unduly burdens or interferes with its rail operations.<sup>5</sup>

Although National Grid asserts that there are “substantial fact questions” relating to whether M.G.L., c. 164, § 73 or the National Grid poles unreasonably interfere with or “regulate” P&W’s operations, none of those purported factual issues are relevant to whether the preclearance requirement of M.G.L., c. 164, § 73 is preempted.<sup>6</sup> Indeed, National Grid appears to identify only two purported issues to support its claim that discovery is required. First, National Grid claims that there may be other obstructions or obstacles to P&W’s plan to build a second track, and that P&W has not demonstrated that it can build a second track on its right-of-way. As a preliminary matter, whether or not there may be other obstacles to P&W’s ability to build a second track is entirely irrelevant to the question before the Board – whether the preclearance requirement of M.G.L., c. 164, § 73 is preempted. Moreover, the 1966 License that National Grid voluntarily entered into provides for termination on 30-days’ notice by either party – it does not require that any reason for termination be stated, much less that P&W prove to

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<sup>5</sup> Of course, it is obvious in this case that M.G.L., c. 164, § 73 does, in fact, interfere with P&W’s ability to conduct rail operations on its own right-of-way. If there was ever any doubt that the Massachusetts statute stands as an impediment to P&W’s ability to use its right-of-way to expand its operations, National Grid’s reply certainly dispels any such doubt. National Grid appears so confident that the Massachusetts DPU will allow it to keep its poles on P&W’s right-of-way, it unabashedly asserts that P&W’s only “feasible” option to expand its rail operations is to cede the use of its existing right-of-way to National Grid, and seek to acquire other land for its expansion through adverse abandonment proceedings. National Grid Reply at 8, n.7. It is not surprising, therefore, that National Grid’s poles remain on the right-of-way a year and a half after P&W first notified National Grid of the need to remove them. Indeed, National Grid appears to believe there is little reason to take serious action to move its poles. Instead, National Grid appears to be primarily interested in trying to persuade P&W and the Board that P&W should look somewhere other than its own right-of-way in order to expand its capacity to handle increased traffic.

<sup>6</sup> The courts and the Board have repeatedly rejected the contention advanced here by National Grid – that Section 10501(b) preemption applies only to attempts by states and localities to impose direct economic regulation of railroads. See *CSX Transportation, Inc. – Petition for Declaratory Order*, STB Finance Docket No. 34662, slip op. at 8 (STB served March 14, 2005).

National Grid's satisfaction that its plans to build a second track on its own right-of-way are practicable.<sup>7</sup>

The second issue that National Grid contends requires discovery is its claim that P&W has not demonstrated that it cannot build the second track without the relocation of the National Grid poles. Again, P&W's track designs are simply not relevant to whether the preclearance requirement of M.G.L., c. 164, § 73 is preempted. Moreover, P&W is not obligated to seek National Grid's approval of its track layout on its own right-of-way, much less to prove that it would be impossible to build a second track without relocation of the National Grid poles.<sup>8</sup>

**III. THE PURPORTED CONFLICT BETWEEN THE BOARD'S JURISDICTION AND OTHER "FEDERAL INTERESTS" DOES NOT RAISE ANY FACTUAL ISSUES REQUIRING DISCOVERY AND AN EXTENDED PROCEDURAL SCHEDULE**

National Grid suggests that there is a conflict between the Board's jurisdiction over rail transportation and a generalized federal interest in reliable electric transmission – an interest purportedly served by M.G.L., c. 164, § 73. National Grid contends that this purported conflict prohibits the preemption of M.G.L., c. 164, § 73 under Section

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<sup>7</sup> Although P&W is under no obligation to prove to National Grid's satisfaction that it will be able to build a second track in order to enforce its rights under the 1966 license, it has in fact shared its preliminary plans with National Grid, and has tried to work toward a resolution that would serve the interests of both parties, including, but not limited to, the extra year of notice it provided to National Grid.

<sup>8</sup> National Grid agreed under the terms of the 1966 License to vacate the P&W right-of-way on 30-days' notice, and thus has no right to remain on P&W's right-of-way. Nonetheless, National Grid's position appears to proceed from the premise that it need not remove its poles from P&W right-of-way unless and until P&W proves to National Grid's satisfaction that P&W's expansion would be impossible unless the poles are moved, and perhaps not even then. Indeed, National Grid makes clear that it believes that the MDPU could determine that the public interest and convenience in maintaining the National Grid poles on P&W's right-of-way outweighs P&W's interest in building a second track. See National Grid Reply at 11 ("[w]here there is a conflict between a railroad and a gas or electric utility over the continuation of use of utility infrastructure lawfully constructed within the railroad right-of-way, the statute [M.G.L., c. 164, § 73] grants the MADPU the authority to decide what is best for the public interest and convenience in terms of assuring that utility service is not interrupted as a result of the failure of the railroad and the utility to reach an agreement for continued occupation").

10501(b). However, National Grid's strained attempt to create a conflicting federal issue in order to avoid preemption of M.G.L., c. 164, § 73 falls of its own weight.

First and foremost, the very idea that this dispute involves a conflict of federal interests is simply a red herring. There is an extremely clear and strong federal policy under ICCTA to protect railroads from state and local regulation of rail transportation, a policy that is embodied in the broad preemption of state and local regulation under Section 10501(b).<sup>9</sup> In contrast, there is *no* federal policy mandating the use of railroad right-of-ways for electric transmission lines, particularly when doing so interferes with rail operations. To the extent that there is any generalized federal interest in the reliability of the transmission of electricity, that interest does not conflict with the Board's jurisdiction or preemption under ICCTA. Indeed, National Grid can itself easily accommodate any federal interest in the transmission of electricity by simply moving the transmission poles off of the P&W right-of-way – as it voluntarily agreed to do in the 1966 License. It is telling that National Grid does not deny that it can move its poles to adjoining property, and similarly fails to mention that it can acquire the right to do so, if necessary, through eminent domain. *See* M.G.L., c. 164, § 72.

Moreover, the idea that M.G.L., c. 164, § 73 is intended to, or actually does, serve some generalized federal interest in reliable transmission of electricity is extremely dubious. National Grid points to no federal statute or regulation delegating any federal authority to Massachusetts. Indeed, while National Grid's argument is based on the purported FERC oversight of voluntary regional industry standard-making organizations,

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<sup>9</sup> As the Board has noted, "[e]very court that has examined the statutory language has concluded that the preemptive effect of Section 10501(b) is broad and sweeping, and it blocks actions by states or localities that would impinge on the Board's jurisdiction or a railroad's ability to conduct its rail operations." *CSX Transportation, Inc. – Petition for Declaratory Order*, STB Finance Docket No. 34662 (STB served March 14, 2005).

it does not even suggest that there is any relationship between any voluntary regional industry standards and M.G.L., c. 164, § 73. Indeed, there is nothing to suggest that M.G.L., c. 164, § 73 is designed to address anything other than the parochial interests of the transmission of electricity within Massachusetts.

Finally, National Grid has not even attempted to explain how the purported existence of a federal interest in electric transmission requires discovery or an extended schedule in this matter. Whether a cognizable conflicting federal interest exists or not is a purely legal question that requires no discovery or evidentiary proceedings. Similarly, whether the existence of such a conflicting federal interest bars the application of Section 10501(b), or whether MDPU is the proper agency to reconcile any conflicting federal interests, are also legal determinations that require no discovery in this proceeding.

#### **IV. CONCLUSION**

As shown more fully above, there is no need for discovery, an extended procedural schedule or a protective order in this proceeding. The narrow issue presented by P&W's Petition – whether the Massachusetts preclearance statute is preempted under Section 10501(b) – is a purely legal question, and the Board's precedent on the issue is clear. Accordingly, P&W respectfully requests that National Grid's request for discovery, an extended procedural schedule and a protective order be denied.

Respectfully submitted,



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DATE: September 7, 2010

**CERTIFICATE OF SERVICE**

I do hereby certify that I have delivered a true and correct copy of the foregoing document to the following addressees at the addresses stated by depositing same in the United States mail, first class postage prepaid, or by email transmission, this 7<sup>th</sup> day of September 2010:

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