

Eastside Community Railway, llc

Rebuilding Connections

23 December 2014

Attn: David Pratt
Assistant Director, Transportation Safety
Washington Utilities and Transportation Commission
1300 E. Evergreen Park Dr. S.W.
Olympia, WA 98504-7250

Re: **TR-143902** Woodinville Railroad Crossings USDOT 091797E and 092050F

Dear David,

This letter on behalf of Ballard Terminal Railroad Company, LLC (BDTL) and Eastside Community Rail, LLC (ECYR) is to express our concern that the city of Woodinville has not been willing to discuss or negotiate construction and ongoing maintenance of these crossings.

According to our signal and crossing maintainer, Bill Wallace of NW Signal, LLC, the proposed 42' crossing arms will be a comparative maintenance nightmare, particularly in the wind. Mr. Wallace maintains Sound Transit crossings and regularly finds problems with 32' crossing arms. He also believes the estimates provided by the city are substantially low. We provided this feedback to Woodinville earlier this year, but never heard back from the city.

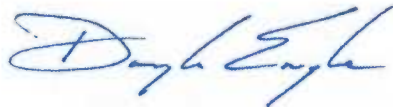
Ernest Wilson of ECYR who oversees the general maintenance of way for this line provided this perspective; "The details of the east crossing do not reflect our earlier comments. They still show 'removing' gates which do not exist, and call for placing asphalt between the rails, not rebuilding the crossing with concrete panels as we require to support increased traffic. Then there is the problem of the necessary re-wiring and controller upgrades to bring the entire crossing system up to current standards."

On BDTL's other lines in Puyallup and Seattle, NW Signal maintains the signals and crossings with both cities reimbursing costs. We are unwilling to take on the increased costs proposed by the city.

Another critical aspect of the city's plans encroach upon the reserved freight easement owned by ECYR. None of our issues have been addressed by the city. Please see the attached letter from Fletcher and Sippel, our Surface Transportation Board attorneys in Chicago.

Thus, we are surprised by this petition as there are many open issues to resolve. It has been our position to meet with the city and resolve these issues with decision makers present, but the city refuses. Therefore, neither BDTL nor ECYR can support the petition. We are open to taking direction from the UTC as to how to proceed, including a hearing.

Respectfully,



Douglas Engle
Managing Director
Eastside Community Rail, LLC

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September 8, 2014

VIA ELECTRONIC AND U.S. MAIL

Greg A. Rubstello, Esq.
Ogden Murphy Wallace, P.L.L.C.
901 5th Avenue, Suite 3500
Seattle, WA 98164

Mr. Tay Yoshitani
Chief Executive Officer
Port of Seattle
2711 Alaskan Way
P.O. Box 1209
Seattle, WA 98111

Re: Proposed Sale of Eastside Rail Corridor

Dear Messrs. Rubstello and Yoshitani:

We have reviewed, on behalf of Eastside Community Rail, LLC (“ECR”), the Real Estate Purchase and Sale Agreement (the “Main Agreement”) and the Ancillary Property Purchase and Sale Agreement (the “Ancillary Agreement”), both dated July 24, 2014, between the Port of Seattle and the City of Woodinville. Those agreements contemplate the conveyance of the physical assets comprising the King County portion of the Eastside rail corridor, on which ECR holds an exclusive and permanent easement for rail freight purposes, from the Port to the City. As structured, however, the transactions purport to unilaterally terminate up to three-fourths of the existing easement, foreclosing rail operations on 72 feet of what is today a 100-foot wide railroad corridor. This dismemberment of ECR’s railroad right-of-way is flatly inconsistent with the permanent ECR freight easement, with the Port’s representations to the Surface Transportation Board (“STB”) in 2008 when it acquired the corridor, and with the so-called “*State of Maine*” principles that govern an owner’s ability to control or restrict rail operations in this situation. ECR objects to the proposed transactions, and will oppose the City’s request for a further *State of Maine* determination from the STB.

When the Port acquired the Eastside rail line from BNSF Railway Company (“BNSF”) in 2008, BNSF specifically excepted and reserved in the conveying quitclaim deed “an exclusive easement for freight rail purposes for Grantor and its successors and assigns.” That easement is now held by ECR. Relying specifically on the easement, the Port in 2008 sought an STB determination that it would not become a rail carrier as a result of acquiring the

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Eastside line, under the holding of *Maine DOT -- Acq. Exempt. -- Maine Central R. Co.*, 8 I.C.C.2d 835 (1991) ("*State of Maine*") and its progeny. It claimed to qualify under *State of Maine* "provided that another entity retains sufficient interest to operate as a rail carrier on the line and has autonomy to conduct common carrier freight operations. Stated somewhat differently, if an acquisition of a rail line is subject to the existing operating interests of a common carrier and the acquiring entity does not have the ability to materially interfere with the carrier's operations, the acquiring company is not a common carrier subject to [STB] jurisdiction." STB Finance Docket No. 35128, Port of Seattle Motion to Dismiss Notice of Exemption, May 28, 2008, at 6-7.

The Port went on to explain that "BNSF will retain the exclusive right to provide or permit rail freight service on the Subject Line," that the railroad "will have general maintenance responsibilities on the Subject Line and the right to construct improvements to the Subject Line," and that "consistent with the Freight Easement," the Operations and Maintenance Agreement to be signed by the parties "provides that the [railroad] shall have exclusive authority to manage, direct and control all freight rail activities on the Subject Line." Port of Seattle Motion to Dismiss at 7-8.

The STB granted the relief sought the Port. In doing so, it explained that:

[I]t appears that nothing in the draft quitclaim deeds or the O&M Agreement -- the only documents submitted to us -- gives the Port the ability to interfere unduly with the transferee's ability to carry out the common carrier obligation. . . . The Port does not indicate, nor does the draft quitclaim deed suggest, that the exclusive freight easement retained by BNSF is anything other than permanent.

The Port of Seattle -- Acquisition Exemption -- Certain Assets of BNSF Railway Company, Finance Docket No. 35128 (STB served October 27, 2008) at 4. The STB found that, under the O&M Agreement, the railroad "will have sufficient power over the operation and maintenance of the Line to avoid any undue interference by the Port."

The STB indicated, however, that "it will hold the parties to their assurances to refrain from interfering materially with the [railroad's] right and obligation to provide rail freight service." And it warned that "any modification to the O&M Agreement, or any subsequent agreement, that expands the Port's power or control over the Line in a way that would hamper the third-party operator's ability to fulfill the common carrier obligation would trigger the need for the Port to obtain acquisition authority from the Board at that time." *Port of Seattle* at 5.

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ECR's rail freight easement on the Eastside corridor is permanent. The apparent belief of the Port and the City that they may contractually agree among themselves to eliminate wide and long swaths of that easement has no legitimate basis. The idea that such drastic and harmful action is authorized by Section 12.12 of the O&M Agreement -- a provision not even mentioned in the Port's pleadings at the STB or in the STB's decision, and which itself makes no reference to the permanent easement -- is equally unsupportable. The Port obtained a *State of Maine* determination from the STB by relying on what is now ECR's exclusive, permanent rail freight easement and the Port's inability to interfere with ECR's exercise of that easement. That determination cannot and does not tolerate the unilateral dismemberment of the very same easement.

The Port and the City seem to believe that they are free to dispose of railroad right-of-way not presently occupied by a railroad track. But as the STB has explained:

Many railroad lines have a wider ROW than might appear to be used, but that does not mean that all of the property is not needed for rail operations. [E]xtra width on the sides of the track allows room to maintain or upgrade the track, to provide access to the line, to serve as a safety buffer, and to ensure that sufficient space is left available for more track and other rail facilities to be added, as needed, as rail traffic changes and grows, among other uses. Thus, it cannot be said that property at the edge of a railroad's ROW is "not needed for railroad transportation" just because tracks or facilities are not physically located there now. *See Midland Valley R.R. v. Jarvis*, 29 F.2d 539, 541 (8th Cir. 1928).

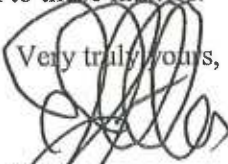
City of Creede, CO -- Petition for Declaratory Order, Finance Docket No. 34376 (STB served May 3, 2005) at 6. ECR, through its operator Ballard Terminal Railroad Company, is an operating railroad, and has current and future service plans under which the railroad right-of-way subject to its exclusive, permanent freight easement will be needed for the conduct of rail operations. ECR did not consent to the wholesale partitioning of its right-of-way, and indeed was not even consulted. The Port and the City do not have the ability to dictate what part of ECR's right-of-way remains available for railroad purposes and what part may be disposed of.

Section 10 of both the Main Agreement and the Ancillary Agreement indicate that the City will be seeking an STB decision or determination before proceeding with the proposed transactions. ECR intends to oppose such request for relief, and requests to be included on the service list for all pleadings filed by the City or the Port in such proceeding.

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Thank you for your attention to these matters.

Very truly yours,

Thomas J. Litwiler

TJL:tl

cc: Mr. Richard A. Leahy, Woodinville City Manager
Mr. Douglas Engle, ECR
Vicki E. Orrico, Esq.
Thomas C. Paschalis, Esq.