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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ADRIAN & BLISSFIELD
RAIL ROAD COMPANY –
PETITION FOR DECLARATORY RELIEF

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Finance Docket No. 36148

**REPLY IN OPPOSITION TO PETITION FOR LEAVE TO INTERVENE
AND INITIAL COMMENTS OF THE
AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION**

Consumers Energy Company (“Consumers”), pursuant to 49 C.F.R. Part 1104.13(a), hereby replies to the December 21, 2017 Petition For Leave To Intervene And Initial Comments of the American Short Line and Regional Railroad Association (“ALLRRA”). As is clear from its pleading, ASLRRA’s intervention would unduly broaden the issues raised in this proceeding, in contravention of 49 C.F.R. § 1112.4(a)(2). ASLRRA’s request therefore should be denied, and its pleading should not be accepted into the record. In support hereof, Consumers states as follows:

1. While ASLRRA claims otherwise,¹ its proffered comments demonstrate that it seeks to broaden the issues at stake in this case, as ASLRRA’s central position is that *any* state law condemnation action that involves a short line right-of-way should be federally preempted under 49 U.S.C. § 10501(b). ASLRRA argues for a broad new

¹ Petition For Leave To Intervene at 3.

policy centered on the size of the railroad party to the action, rather than the actual impact of a condemnation on railroad operations. For example:

- “If the Board does not assert its exclusive jurisdiction...utilities and others with the right of condemnation will be emboldened to use state condemnation proceedings to compromise railroad rights-of-way...”²
- “Small railroads have limited resources to defend against state condemnation actions brought by large public utilities.”³
- “Allowing disputes like the one here to be resolved in state courts rather than at the Board will place small railroads everywhere in a very vulnerable position....”⁴

At issue in the instant proceeding, is (1) whether the Board should initiate a declaratory order proceeding to address whether Consumers’ invocation of its eminent domain rights under a specific Michigan statute to preserve essential utility assets that have coexisted with the railroad for over 20 years is preempted by the ICCTA, when (2) the result of the condemnation proceeding would be a non-interfering easement over a relatively small portion of railroad right-of-way. By seeking to frame the issue around the question whether utilities generally should be able to resort to state eminent domain law in cases involving railroads of a particular size, ASLRRA improperly would expand the scope of the issues presented.⁵ *See Nat’l. R.R. Passenger Corp. & Consol. Rail Corp.*

² *Id.* at 4.

³ *Id.* at 5.

⁴ *Id.*

⁵ ASLRRA also claims that this proceeding involves a “threat that the Board might condone an express taking of the railroad’s unfettered right to conduct rail operations on

– *Application Under § 402(A) of the Rail Passenger Service Act*, Finance Docket No. 32467, 1995 WL 123819 at *3 (ICC served Mar. 24, 1995) (intervention denied when petitioner sought to address “policy issues” and was not directly affected by the outcome of the proceeding).

2. The position that ASLRRRA advocates in this proceeding also runs contrary to well-established law. As Consumers has shown in previous filings, both the courts and the Board consistently have held that easements acquired under state eminent domain law that affect railroad rights-of-way are not categorically preempted under the ICCTA. *See, e.g., Union Pac. R.R. v. Chi. Transit. Auth.*, 647 F.3d 675, 679-80 (7th Cir. 2011); *E. Alabama Ry. LLC – Pet. For Declaratory Order*, Finance Docket No. 35583 (STB served Mar. 9, 2012) at 5; *DesertXpress Enterprises, LLC – Pet. for Declaratory Order*, Finance Docket No. 34914 (STB served June 27, 2007) at 4-5. The only real issue in dispute here – which a Michigan federal court already decided in Consumers’ favor – is whether the specific easement sought by Consumers would unreasonably interfere with the Adrian & Blissfield Rail Road Company’s (“ADBF”) rail operations. ASLRRRA specifically denies any intent to comment on that question,⁶ so its intervention would add nothing to the parties’ previous filings with the Board.

its right of way and turn that control over to a non-railroad....” *Id.* at 4. Nothing remotely approaching such a “threat” is before the Board in this case.

⁶ *Id.* (“The ASLRRRA has no desire to enter the debate about the facts of this action....”).

3. Despite its disclaimer regarding commenting on “the facts of this action,” ASLRRA selectively quotes from the language of Consumers’ proposed easement to suggest that ADBF’s operations might be adversely affected.⁷ Notably absent from ASLRRA’s proposed comments, however, is any reference to another key provision of the easement that Consumers has acknowledged on the record. In particular, the easement requires Consumers to relocate the power lines at issue if in the future they would unavoidably impair ADBF’s rail operations, should the railroad eventually find it necessary to expand its facilities.⁸

4. ASLRRA’s intervention petition fails the test set forth in 49 C.F.R. § 1112.4(a)(2), and its proffered comments are at odds with governing law and ignore dispositive facts. The request to intervene should be denied, and the comments excluded from the record.

⁷ *Id.* at 5-6.

⁸ See Reply Of Consumers Energy Company To Petition For Declaratory Relief at 16, V.S. Parker at 7.

Respectfully submitted,

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Dated: January 10, 2018

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CERTIFICATE OF SERVICE

I hereby certify that this 10th day of January, 2018, I caused a copy of the foregoing Reply in Opposition to Petition For Leave To Intervene and Initial Comments of the American Short Line and Regional Railroad Association to be served by U.S. First Class Mail or by more expeditious means upon the following counsel:

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