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Via electronic filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

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November 1, 2018
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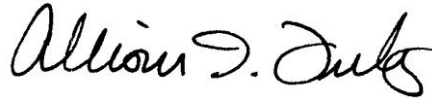
Re: Rulemaking – Limiting Extensions of Trail Use Negotiating Periods, *STB Docket No. EP 749 (Sub-No. 1)*

Dear Ms. Brown:

Enclosed please find for filing in the above-captioned proceeding the comments of the City of Boston, City of Chicago, City of Houston Department of Public Works, City of New York, City of Sacramento, and United States Conference of Mayors.

Please do not hesitate to contact me if you have any questions.

Sincerely,



Allison I. Fultz
Counsel for City of Chicago, Illinois

cc: All Parties of Record

Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. EP 749 (Sub-No. 1)

**RULEMAKING – LIMITING EXTENSIONS OF TRAIL USE NEGOTIATING
PERIODS**

**COMMENTS OF
CITY OF BOSTON,
CITY OF CHICAGO,
CITY OF HOUSTON DEPARTMENT OF PUBLIC WORKS,
CITY OF NEW YORK,
CITY OF SACRAMENTO,
AND
THE UNITED STATES CONFERENCE OF MAYORS**

Communications with respect to this pleading
should be addressed to:

Eugene L. O'Flaherty – Corporation Counsel
City of Boston
City Hall, Room 615
Boston MA, 02201
(617) 635-4034
law@boston.gov

Counsel for the City of Boston

Edward N. Siskel – Corporation Counsel
Jared Policicchio – Supervising Assistant
Corporation Counsel
City of Chicago
121 North LaSalle Street, Suite 600
Chicago, IL 60602
(312) 744-1438
jpolicicchio@cityofchicago.org

Charles A. Spitulnik
Allison I. Fultz
Kaplan Kirsch & Rockwell LLC
1001 Connecticut Avenue, N.W.
Suite 800
Washington, DC 20036
(202) 955-5600
cspitulnik@kaplankirsch.com
afultz@kaplankirsch.com

Counsel for City of Chicago, Illinois

Maureen Crocker – Assistant Director,
Transportation & Drainage Planning
Houston Public Works
(832) 395-3222
Maureen.Crocker@houstontx.gov

Kimberly Conway – Senior Counsel
New York City Mayor’s Office of Federal
Affairs
New York City Law Department (Legal Counsel
Division)
601 New Jersey Ave, NW Suite 410
Washington, DC 20001
(202) 624-5910
kconway@law.nyc.gov

Counsel for the City of New York

Susana Alcala Wood – City Attorney
City of Sacramento
Office of the City Attorney
915 I Street, 4th Floor
Sacramento, CA 95814-2608
(916) 808-5346
SAWood@cityofsacramento.org

Tom Cochran
CEO and Executive Director
The United States Conference of Mayors
1620 I. St., NW
Washington, DC 20006
(202) 861-6728
kmccarty@usmayors.org

Counsel for the City of Sacramento

Dated: November 1, 2018

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. EP 749 (Sub-No. 1)

**RULEMAKING – LIMITING EXTENSIONS OF TRAIL USE NEGOTIATING
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**COMMENTS OF
CITY OF BOSTON,
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AND
THE UNITED STATES CONFERENCE OF MAYORS**

The City of Boston, City of Chicago, City of Houston Department of Public Works, City of New York, City of Sacramento, and the United States Conference of Mayors (USCM) (collectively, the Commenters) submit the following comments in the above-captioned proceeding. On October 2, 2018, this Board instituted a rulemaking proceeding in Docket No. EP 749 (Sub-No. 1) to consider whether to limit the number of extensions of time within which to negotiate a trail use agreement to a total of six (Proposed Rule). The Commenters are large municipalities and USCM, which is the official nonpartisan organization of cities with populations of 30,000 or more. There are more than 1,400 such cities in the country today. Each city is represented in USCM by its chief elected official, the mayor.

The Commenters oppose the imposition of arbitrary constraints on this Board's discretion to grant extensions of time to parties for the negotiation of trail use agreements.

I. A limit on extensions would undermine the aims of the Trails Act and restrict the voluntary negotiation of trail use agreements

Congress instituted the current, and highly successful, railbanking program in 1983 to preserve the national rail system by allowing non-railroad entities to maintain railroad rights-of-way that might otherwise be abandoned, while relieving the abandoning railroad of liability in connection with such rights-of-way. 16 U.S.C. § 1247(d) (Trails Act). An interim trail sponsor must assume significant financial and managerial obligations over a railbanked line.¹ The effort required of either a public or private entity before taking on such obligations may involve some or all of the following:

- Extensive negotiations to secure financing or public funding
- Environmental review and consultation under the National Environmental Policy Act (NEPA) and/or state statutes
- Negotiation of management agreements
- Placement of insurance coverage

If the trail sponsor is a public entity, a trail use agreement with the abandoning railroad may require authorization from another governing or administrative body, including the appropriation of funds. These necessary processes may extend beyond the initial 180 days allotted for trail use negotiations. 49 C.F.R. 1152.29(c)(1) and (d)(1).

This Board has the discretion to approve or deny a request for additional time to negotiate a trail use agreement. *Birt v. STB*, 90 F.3d 580, 588-89 (D.C. Cir. 1996). Extensions of time are not automatic: the request must be supported by evidence of ongoing good faith negotiation by

¹ The STB's regulations governing interim trail use require the interim trail sponsor to "assume full responsibility for: (1) Managing the right-of-way, (2) any legal liability arising out of the transfer or use of the right-of-way (unless the sponsor is immune from liability, in which case it need only indemnify the railroad against any potential liability), and (3) the payment of any and all taxes that may be levied or assessed against the right-of-way. 49 C.F.R. 1152.29(a)(3).

the parties, and any person opposing the request has the right to be heard. Accordingly, the STB has the discretion to balance the interests of stakeholders in any interim trail use proceeding, and does not need to be hindered by the artificial imposition of a cap on the number of extensions it can grant.

Furthermore, the voluntary nature of trail use negotiations is at the heart of the railbanking program. The Board cannot force an unwilling railroad to accept a railbanking proposal (*Chelsea Property Owners – Abandonment – Portion of the Consolidated Rail Corporation’s West 30th Street Secondary Track in New York, NY* – STB Docket No. AB-167 (Sub-No. 1094A) (Service Date June 13, 2005), slip op. at 6 (citing *National Wildlife Federation v. I.C.C.*, 850 F.2d 694, 699-702 (D.C. Cir. 1988))), and the freedom of the parties to negotiate an agreement that best meets the needs of the abandoning railroad and the interim trail sponsor includes the latitude to take the time necessary to reach a satisfactory result. Imposing a time limit in the absence of any evidence that one is needed hinders the parties’ freedom to contract.

II. Imposing a limit on extensions would discourage interim trail use and potentially curtail related benefits

As discussed above, particularly where a public entity is the proposed trail sponsor, securing agreements with stakeholders and funding to fulfill trail use obligations can take significant time. If railroads perceive a risk that in only three years they will be forced to restore to their books an asset laden with maintenance expenses, they may be less likely to participate from the outset in a trail project that would otherwise present them with few if any additional or marginal costs.

The proposed rule also fails to recognize that the presence of a trail frequently increases the value of adjacent and neighboring property.² Allowing negotiations to proceed unhindered to a successful conclusion permits the induced benefits of trail development, such as increased property values, to emerge.

A number of railbanking transactions that have resulted in significant projects would have been hindered by a limitation such as the one the Proposed Rule would institute. Perhaps most recognizably, New York City's High Line was the subject of a complex and protracted negotiation involving multiple parties, and the phase leading up to the consummation of a trail use agreement consumed nearly three and a half years (see docket for *Chelsea Property Owners*, STB Docket No.. AB-167 (Sub-No. 1094A)). According to data collected by the Rails-to-Trails Conservancy, of some 393 successfully railbanked corridors, at least 65 of them, approximately 16.5%, took more than three years of negotiation between the railroad and the CITU/NITU holder to complete.

III. An open-ended negotiation period causes no harm to a putative burdened property owner

Property owners who believe they may have a claim against the federal government under 28 U.S.C. § 1491(a)(1) (Tucker Act) for a taking of a real property interest may assert that claim when the STB issues a Certificate or Notice of Interim Trail Use (CITU or NITU), and need not wait until a trail use agreement is consummated. The U.S. Court of Appeals for the Federal Circuit, which has exclusive jurisdiction over claims under the Tucker Act, has repeatedly affirmed that any taking resulting from the imposition of interim trail use occurs on the date of the NITU or CITU. See *Caldwell v. U.S.*, 391 F.3d 1226, 1234 (Fed. Cir. 2004);

² Headwaters Economics, *Measuring Trails Benefits: Property Value*, Spring 2016, available at: <https://headwaterseconomics.org/wp-content/uploads/trails-library-property-value-overview.pdf>.

Barclay v. U.S., 443 F.3d 1368, 1378 (Fed. Cir. 2006); *Ladd v. U.S.*, 630 F.3d 1015, 1020 (Fed. Cir. 2013). Accordingly, the passage of time following the STB's issuance of a NITU or CITU does not alter a potential claimant's posture, impair its potential right to make a claim, or otherwise prejudice it – unless, of course, the claimant allows the Court of Federal Claims' six year statute of limitations³ to run. In no event would the imposition of a limitation on extensions of time to negotiate a trail use agreement benefit a potential takings claimant.

Conclusion

For the foregoing reasons, the Commenters respectfully request that this Board **not** revise 49 C.F.R. 1152.29 as set forth in the Proposed Rule.

Respectfully submitted,

/s/ Eugene L. O'Flaherty – Corporation
Counsel
City of Boston
City Hall, Room 615
Boston MA, 02201
(617) 635-4034
law@boston.gov

Counsel for the City of Boston



Edward N. Siskel – Corporation Counsel
Jared Policicchio – Supervising Assistant
Corporation Counsel
City of Chicago
121 North LaSalle Street, Suite 600
Chicago, IL 60602
(312) 744-1438
jpolicicchio@cityofchicago.org

Charles A. Spitulnik
Allison I. Fultz
Kaplan Kirsch & Rockwell LLC
1001 Connecticut Avenue, N.W.
Suite 800
Washington, DC 20036
(202) 955-5600
cspitulnik@kaplankirsch.com
afultz@kaplankirsch.com

Counsel for City of Chicago, Illinois

³ 28 U.S.C. § 2501.

/s/ Maureen Crocker – Assistant Director,
Transportation & Drainage Planning
Houston Public Works
(832) 395-3222
Maureen.Crocker@houstontx.gov

/s/ Kimberly Conway – Senior Counsel
New York City Mayor’s Office of Federal
Affairs
New York City Law Department (Legal Counsel
Division)
601 New Jersey Ave, NW Suite 410
Washington, DC 20001
(202) 624-5910
kconway@law.nyc.gov

/s/ Susana Alcala Wood – City Attorney
City of Sacramento
Office of the City Attorney
915 I Street, 4th Floor
Sacramento, CA 95814-2608
(916) 808-5346
SAWood@cityofsacramento.org

/s/ Tom Cochran
CEO and Executive Director
The United States Conference of Mayors
1620 I. St., NW
Washington, DC 20006
(202) 861-6728
kmccarty@usmayors.org

Dated: November 1, 2018

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served a copy of the foregoing
COMMENTS OF THE CITY OF BOSTON, CITY OF CHICAGO, CITY OF
HOUSTON DEPARTMENT OF PUBLIC WORKS, CITY OF NEW YORK, CITY OF
SACRAMENTO, and THE UNITED STATES CONFERENCE OF MAYORS upon the
following parties of record in this proceeding by first-class mail with postage prepaid and
properly addressed:

Pat & Arnie Abramson
3248 CR 1105
Celeste, TX 75423

Charles H. Montange
426 NW 162nd Street
Seattle, WA 98177

Tug Beal
560 Murdock Station Road
Bedford, IN 47421

John Pletcher
13608 Jarvi Dr.
Anchorage, AK 99515

Reid E. Brockway
167 E. Lake Sammamish Sh Ln NE
Sammamish, WA 98074

Debbie Quinn
PO Box 5690
Montgomery, AL 36103-5690

Marc Elster
2030 E. 25th Place
Lawrence, KS 66046

Amy Rauworth
P.O. Box 5690
Montgomery, AL 36103-5690

Andrea C.Ferster
Rails-To-Rails Trails Conservancy
2121 Ward Court, N.W., 5th Fl.
Washington, DC 20037

Jan and Martin Rood
15562 Lakeshore Blvd NE
Lake Forest Park, WA 98155

Joanne Harder
1610 Hardwick Road
New Braintree, MA 01531

Timothy J. Strafford
Association Of American Railroads
425 3rd Street, SW, Suite 1000
Washington, DC 20024

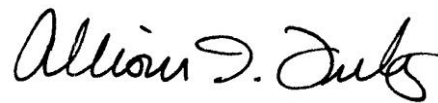
Jerry Kane
PO BOX 7500
Granite City, IL 62040-7500

Gregg Tomani
46 Midway Drive
Orchard Park , NY 14127

Thomas F. McFarland
Thomas F. McFarland, P.C.
208 South Lasalle Street, Suite 1666
Chicago, IL 60604-1228

Doug Wayt
1408 Flynn Ave.
Wheeling, WV 26003

Joe McGovern
Iowa Natural Heritage Foundation
Insurance Exchange Building
505 Fifth Ave., Suite 444
Des Moines, IA 50309

A handwritten signature in black ink, reading "Allison I. Fultz". The signature is written in a cursive, flowing style with a large initial 'A' and a stylized 'F'.

Allison I. Fultz

Dated: November 1, 2018