



# SLOVER & LOFTUS LLP

ATTORNEYS AT LAW

244844

December 12, 2017

ENTERED  
Office of Proceedings  
December 12, 2017  
Part of  
Public Record

## **BY E-FILING**

Ms. Cynthia T. Brown  
Chief of Administration  
Surface Transportation Board  
395 E Street, S.W.  
Washington, D.C. 20423-0001

Re: FD 36148, Adrian & Blissfield Rail Road Company –  
Petition For Declaratory Relief

Dear Ms. Brown:

On December 11, 2017, counsel for the Adrian & Blissfield Rail Road Company (“ADBF”) submitted a letter for filing in the referenced proceeding. The letter should not be accepted into the record, as it is not authorized by any Board rule.<sup>1</sup> Moreover, the apparent purpose of the letter is to assert a false claim that counsel for Consumers has advanced conflicting positions in comparable cases, an unwarranted and offensive charge that has no place in this proceeding.

In its November 20, 2017 Reply To Petition for Declaratory Relief in this case, Consumers argued that where parties to an ongoing court proceeding where ICCTA preemption of state or local law is in issue have approached the Board for declaratory relief without a court referral, the Board “typically” has denied the request in deference to the court’s concurrent jurisdiction. *Id.* at 18. Consumers also explained that there are no “extraordinary circumstances presented in this case that would warrant a departure from this policy.” *Id.* at 19. Of particular relevance to ADBF’s counsel’s letter, Consumers also showed that the 2016 decision of the U.S. District Court for the Eastern District of Michigan (*id.*, Attachment No. 1) faithfully identified and applied the correct legal

---

<sup>1</sup> If it is considered a reply to Consumers Energy Company’s (“Consumers”) December 1, 2017 Reply In Opposition To Petition For Leave To File Reply, it is prohibited by 49 C.F.R. Part 1104.13(c). *See also Waterloo Ry. Co. – Adverse Abandonment – Lines of Bangor & Aroostook R.R.*, Docket No. AB-124 (Sub-No. 2) (STB served May 6, 2003) at 3.

standards for the determination of both categorical and “as applied” ICCTA preemption, as set out in established court and agency precedent. *Id.* at 10-17.

The December 7, 2017 Petition For Declaratory Order filed by the City of Sammamish in *Finance Docket No. 36161*<sup>2</sup> (“Petition”), which is a subject of ADBF’s counsel’s letter, likewise acknowledged both the concurrent jurisdiction of courts and the Board over preemption issues,<sup>3</sup> and the Board’s “standard practice” of denying requests for declaratory relief and providing guidance to a court in most cases where the court has not referred the matter to the agency.<sup>4</sup> In contrast to this case, however, the City of Sammamish argued that there were “compelling reasons” for the Board to intervene there,<sup>5</sup> including in particular the failure of the District Court hearing the dispute between the City and Kings County, Washington, to apply – or even discuss – the governing standards or court and Board precedent, and summarily dismissing the City’s challenge to the County’s preemption claims in a footnote to its decision on a requested preliminary injunction.<sup>6</sup>

There are no inconsistencies or conflicts between the legal standards and authorities advanced by Consumers in this case, and by the City of Sammamish in *Finance Docket No. 36161*; only compelling *circumstantial* differences that warrant different outcomes when those governing authorities are applied. ADBF’s Petition For Leave To File Reply should be denied, as should its Petition For Declaratory Relief.

Sincerely,



Kelvin J. Dowd  
An Attorney for  
Consumers Energy Company

KJD:lad  
cc: All parties of record

---

<sup>2</sup> *City of Sammamish, Washington – Petition for Declaratory Order.*

<sup>3</sup> Petition at 1, 18-19.

<sup>4</sup> *Id.* at 36-38. Counsel for ADBF omitted these pages from the “relevant” excerpts attached to his letter.

<sup>5</sup> *Id.* at 18.

<sup>6</sup> *Id.* at 18-19.