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246394

September 19, 2018

By e-filing

Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20024

ENTERED
Office of Proceedings
September 19, 2018
Part of
Public Record

Re: Docket No. AB-1270, *Port of Benton County, WA -- Adverse Discontinuance of Rail Service -- Tri-City Railroad Company, LLC*

Dear Ms. Brown:

Hereby transmitted is a Supplement to Petition To Stay Or Dismiss And Reply In Partial Opposition To Petition For Partial Waiver Of Regulations And For Exemptions for filing with the Board in the above referenced matter.

Very truly yours,



Thomas F. McFarland
Attorney for Tri-City Railroad Company, LLC

TMCF:kl:1818efSTB2

cc: John D. Heffner, Esq., *by e-mail & first-class, U.S. mail*

BEFORE THE
SURFACE TRANSPORTATION BOARD

PORT OF BENTON COUNTY, WA --	)	
ADVERSE DISCONTINUANCE OF RAIL	)	DOCKET NO.
SERVICE -- TRI-CITY RAILROAD	)	AB-1270
COMPANY, LLC	)	

**SUPPLEMENT TO PETITION TO STAY OR DISMISS AND REPLY IN
PARTIAL OPPOSITION TO PETITION FOR PARTIAL
WAIVER OF REGULATIONS AND FOR EXEMPTIONS**

TRI-CITY RAILROAD COMPANY, LLC
10 North Washington Street
Kennewick, WA 99336

Petitioner

THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street, Suite 1666
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Attorney for Petitioner

DATE FILED: September 19, 2018

BEFORE THE
SURFACE TRANSPORTATION BOARD

PORT OF BENTON COUNTY, WA --	)	
ADVERSE DISCONTINUANCE OF RAIL	)	DOCKET NO.
SERVICE -- TRI-CITY RAILROAD	)	AB-1270
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**SUPPLEMENT TO PETITION TO STAY OR DISMISS AND REPLY IN
PARTIAL OPPOSITION TO PETITION FOR PARTIAL
WAIVER OF REGULATIONS AND FOR EXEMPTIONS**

Pursuant to 49 C.F.R. § 1117.1, Tri-City Railroad Company, LLC (TCRY), hereby files this Supplement to the Petition that it filed on September 12, 2018 to Stay or Dismiss and to Reply in Partial Opposition to a Petition filed by the Port of Benton County, Washington (the Port) on August 28, 2018 for Partial Waiver of Regulations and for Exemptions. The Port's Petition is a prelude to an Application that the Port will file for Adverse Discontinuance of TCry's authority to provide rail service over a rail line that TCry leases from the Port.^{1/} The Port's Petition results in commencement of a Board proceeding in Docket No. AB-1270.

At page 4 of its Petition, TCry alleged (1) that the Port has not alleged that the Railroad Lease between TCry and the Port has been terminated in accordance with its terms; and (2) that there is judicial litigation pending between TCry and the Port in which the Port can raise issues regarding TCry's alleged default of provisions of the Railroad Lease, i.e., *US ex rel. Randolph Peterson and Tri-City Railroad Company, LLC v. Port of Benton County, WA, et al.*, USDC, ED Wash., No. 2:17-cv-191-TOR, filed on April 2, 2018 (the Federal Litigation).

^{1/} The Rail line extends between Milepost 18.84 at or near Richland Junction and Milepost 29.73 at or near Horn Rapids Road, a distance of 10.89 miles in Benton County, Washington.

This Supplement is being filed to inform the Board that the Port has now acknowledged the truth of both of those allegations in its Second Amended Answer to the Complaint in the Federal Litigation, i.e.:

Section 3.44 - the Port Defendants admit that no court has declared that the lease has been terminated, but further admits that the Port has declared a default and seeks a declaratory judgment in this action declaring that Tri-City Railroad is in material breach of the lease.

TCRY will respond in due course in opposition to the Port's claim of material breach of the Railroad Lease, thus establishing that the Lease has not been lawfully terminated. The overriding point now is that the continuing validity or invalidity of the Railroad Lease will be decided in the Federal Litigation, the forum in which it lawfully belongs, not before the Board.

The acknowledgments by the Port, which are brought to the Board's attention by means of this Supplement, were not made until the filing of the Port's Second Amended Answer in the Federal Litigation on September 7, 2018. That Second Amended Answer consists of 73 pages, including counterclaims in addition to answers. TCRY extracted the acknowledgments in Section 3.44 quoted above and is bringing them to the attention of the Board with reasonable diligence.

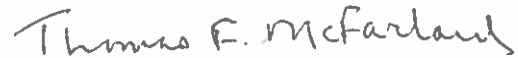
In the above circumstances, TCRY believes that the acknowledgments should be accepted into the record as timely filed in support of TCRY's Petition. However, if leave is required for their untimely filing, good cause exists for granting such leave, i.e., to clearly delineate that a Federal Court is to determine the validity or invalidity of the Railroad Lease, not the Board, and that accordingly the adverse discontinuance proceeding before the Board should

be stayed or dismissed, with reinstatement to the active docket, or with leave to refile, only in the event that the Federal Court determines that the Railroad Lease has been lawfully terminated.

Respectfully submitted,

TRI-CITY RAILROAD COMPANY, LLC
10 North Washington Street
Kennewick, WA 99336

Petitioner



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Attorney for Petitioner

DATE FILED: September 19, 2018

CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2018, I served the foregoing Supplement to Petition To Stay Or Dismiss And Reply In Partial Opposition To Petition For Partial Waiver Of Regulations And For Exemptions by e-mail on John D, Heffner, Esq. at *john.heffner@clarkhillstrasburger.com*, and on Mr. Heffner by first-class, U.S. mail, postage prepaid at 1025 Connecticut Avenue, N.W., Suite 717, Washington, D.C. 20036-4104.



Thomas F. McFarland