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August 28, 2008

BY HAND-DELIVERY

The Honorable Anne K. Quinlan, Esq.
Acting Secretary
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

223443
223444
ENTERED
Office of Proceedings
AUG 28 2008
Part of
Public Record
✓ FO 34936 Sub 1

Re: Finance Docket No 34936, Port of Moses Lake – Authority
To Construct And Acquire – And Columbia Basin Railroad
Company, Inc. – Authority To Operate – Petition For An
Exemption From 49 U.S.C. § 10901 – Moses Lake,
Washington

Dear Acting Secretary Quinlan:

As discussed, enclosed is a check made payable to the Surface Transportation Board in the amount of \$74,900 in payment of the filing fee for the construction and acquisition authority requested by the Port of Moses Lake in the above-referenced Petition for Exemption

We understand that, upon your receipt of this payment, the Board will docket and begin the processing of the Port's request for authority.

Please let me know if you have any questions or if there is anything further we need to do in this regard. Thank you for your assistance.

FILED

AUG 28 2008

Sincerely yours,

Adrian L. Steel, Jr.

Enclosure

**SURFACE
TRANSPORTATION BOARD**

FEE RECEIVED

AUG 28 2008

**SURFACE
TRANSPORTATION BOARD**

cc: Rose-Michele Nardi, Esq.
Kathryn Kusske Floyd, Esq.

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August 14, 2008

BY HAND-DELIVERY

The Honorable Anne K. Quinlan, Esq
Acting Secretary
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001



FO 34936 sub 1

Re: Finance Docket No 34936, Port of Moses Lake – Authority
To Construct And Acquire – And Columbia Basin Railroad
Company, Inc. – Authority To Operate – Petition For An
Exemption From 49 U.S.C. § 10901 – Moses Lake,
Washington

ENTERED
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Dear Acting Secretary Quinlan.

Enclosed for filing in the above-captioned proceeding are the original and ten (10) copies of the Port of Moses Lake and Columbia Basin Railroad Company, Inc.'s Petition for Exemption, and the Port of Moses Lake's Petition for Waiver of Filing Fee. Please note that, with respect to the Petition for Waiver of Filing Fee, expedited action has been requested. Also enclosed is a disk containing the text of the filings in Word format.

I would appreciate it if you would date-stamp the enclosed extra copies and return them to the messenger for our files. Please let me know if you have any questions. Thank you for your assistance.

Sincerely yours,

Adrian L. Steel, Jr.
Adrian L. Steel, Jr.

Enclosures

cc: Chris Gregoire, Governor, State of Washington
Paula J. Hammond, Secretary.
Washington State Department of Transportation
Washington State Transportation Commission
Rose-Michele Nardi, Esq
Kathryn Kusske Floyd, Esq.

223443
223444

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 34936

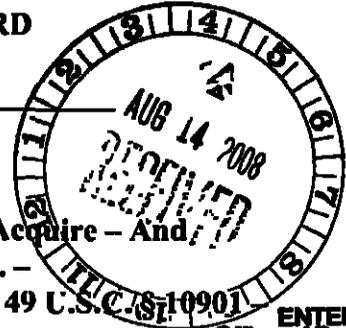
FD 34936 Sub 1

Port of Moses Lake – Authority To Construct And Acquire – And

Columbia Basin Railroad Company, Inc. –

Authority To Operate – Petition For An Exemption From 49 U.S.C. § 10901

Moses Lake, Washington



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Pursuant to 49 U.S.C. § 10502, the Port of Moscs Lake ("Port") and Columbia Basin

Railroad Company, Inc. ("CBRW") (collectively "Petitioners") hereby petition the Surface Transportation Board ("Board") for an exemption from the prior approval requirements of 49 U.S.C. § 10901 for the construction and acquisition by the Port and the operation by CBRW of approximately 11.5 miles of rail line that will (i) allow trains to bypass downtown Moses Lake, and (ii) connect existing CBRW trackage to the east side of the Grant County International Airport. The purpose of the proposed project is to provide rail service to lands designated for industrial development in the northern part of the City of Moses Lake and at the Airport, to enhance opportunities for economic development, and to attract new rail-dependent businesses to those areas.

The exemption would be subject to the completion of environmental review by the Board's Section of Environmental Analysis ("SEA"). The Washington State Department of Transportation ("WSDOT") will serve as a co-lead agency in the environmental review process.

This Petition is supported by the attached Verified Statements of Craig L. Baldwin, Executive Manager of the Port, and Nicholas B. Temple, Jr., President of CBRW.

FILED

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INTRODUCTION

As established below, the goals of the Rail Transportation Policy will be furthered by exempting the proposed project from regulation under Section 10901. The transaction is clearly limited in scope. It involves the straightforward construction, acquisition and operation of approximately 11.5 miles of rail line. Further, regulation is not needed to protect shippers from the abuse of market power. Indeed, as the Board and its predecessor, the Interstate Commerce Commission ("ICC"), have often recognized, the construction of new rail lines enhances competition. Accordingly, under the standards for exemption set forth in Section 10502, this Petition should be granted

BACKGROUND

A. *Petitioners*

The Port of Moses Lake is a municipality of the State of Washington that is chartered for economic development.¹ The Port operates the Grant County International Airport and the Grant County International Airport Industrial Park. The industrial park has over 1,000,000 square feet of building space plus over 1,000 acres of industrial and commercial land Baldwin V.S. at ¶ 2.

CBRW is a Class III short line rail carrier incorporated in Washington and headquartered in Yakima, WA CBRW serves central Washington state via its main line between Connell and Wheeler, WA It connects with BNSF Railway Company ("BNSF") at Connell. Temple V S at ¶ 2.

¹ As explained by Mr. Baldwin, the Port is considered a municipality of the State of Washington, similar in nature to cities, counties, and other municipal subdivisions. Port districts are authorized to be established in various counties of the State for the purposes of industrial improvements and economic development. See Revised Code of Washington 53 04 010 The Port is governed by three elected commissioners who represent the district. The Port is audited annually by the Auditor of the State of Washington, and its employees are covered by the State retirement system. Baldwin V.S at ¶ 2.

B. Description and Purpose of Proposed Project and Planned Operations

In 2005, the Washington State Legislature appropriated \$2,000,000 for the design and construction of the Northern Columbia Basin Railroad Project (“Project”) Baldwin V S at ¶ 5. A primary purpose of the Project is to preserve and improve the short-line rail system serving the Moses Lake area. A further purpose is to make the Moses Lake area more attractive to heavy industries that use rail transportation and ultimately to promote economic development in the region. *Ibid* There are three rail line segments subject to this Petition for Exemption that are part of the Project ²

The first line (Segment 1) would be constructed by the Port and would relocate rail traffic from the existing CBRW line between Wheeler and Parker Horn (a body of water and an arm of Moses Lake) to bypass downtown Moses Lake.³ This would provide a more direct route to the Grant County International Airport, would provide for the possibility of industrial development along Wheeler Road, and would greatly improve safety in downtown Moses Lake by reducing the potential for vehicular and pedestrian conflicts. V.S. Baldwin at ¶ 6. Multiple trains moving through the downtown area are unattractive to potential new businesses. In addition, Vision 2020, a citizen-led economic development group which focuses on revitalizing downtown Moses Lake and its waterfront, has identified the removal of the downtown line and the acquisition of

² The three rail line segments are shown on the map attached as Exhibit A to Mr. Baldwin’s Verified Statement. Segment 1A provides an alternative route to cross Parker Horn farther north, and Segment 2A would serve different portions of land near the Airport. If Segment 2A were to be selected, the total length of the rail lines subject to this Petition would be approximately 12.0 miles.

³ To the extent that CBRW may determine to seek STB approval to abandon the existing CBRW line between Wheeler and Parker Horn, appropriate regulatory review would occur at such time (which would include review of potential environmental and shipper impacts). No shippers will lose rail service as a result of the proposed transaction.

the right-of-way along the lake as being of high importance. Such a project would provide an opportunity for a waterfront park, boardwalk, and a bicycle/pedestrian trail *Ibid*.

The second line (Segment 2) would also be constructed by the Port and would connect the existing CBRW line to the east side of the airport so that industries locating there can receive rail service V.S. Baldwin at ¶ 7. In this regard, the Grant County International Airport Industrial Park provides service to many firms and individuals and has 1,000 acres of low-cost available land in its existing park. There is another major industrial area zoned and available for development to the east of Moses Lake, which is being actively promoted for development. Segment 2 would facilitate the provision of rail service to this potential new industrial park area. *Ibid*

The third line (Segment 3), which is currently owned by CBRW, runs approximately from Parker Horn (near Stratford Road) to or near the Airport. It will be purchased and rehabilitated by the Port. The rehabilitation to be undertaken would consist primarily of replacing rails, ties and other track materials. Baldwin V.S. at ¶ 8. The upgrades would permit the use of newer, larger cars on the line. Upgrades to two signalized grade crossings would be included. The existing alignment and general profile of the line would not be changed. *Ibid*

In sum, the overall goals of the Project are to preserve and enhance freight rail service and to support economic development in the Moses Lake area. The specific objectives are to relocate the existing rail line (which currently runs through downtown Moses Lake) in order to improve safety; to rehabilitate the existing CBRW line, and to construct new trackage to attract new rail-dependent businesses.

CBRW (or its newly-formed affiliate) (the "Operator") will, pursuant to an agreement to be executed with the Port, operate the lines exclusively and will assume and bear the primary

common carrier obligation to provide rail freight service over the lines Baldwin V.S. at ¶ 10; Temple V.S. at ¶ 6 The Operator intends to offer common carrier and contract service to all shippers located at Moses Lake and adjoining areas that access the lines *Ibid.*⁴ In the event CBRW is no longer able or willing for whatever reason to continue operating the lines, the Port would contract with another short-line railroad to operate the lines. Baldwin V.S. at ¶ 10.

The expected traffic over the lines will vary, depending on the success the Operator has in marketing its offerings. Currently, it is anticipated that the Operator will run on average one train of three to six cars each way per day on the lines, with a total of approximately 500 to 1000 rail cars per year. Temple V.S. at ¶7 Actual train sizes and service patterns will, however, depend on the demand for rail service. The traffic will primarily consist of steel, manufactured parts, and specialty chemicals. These cars generally, if not exclusively, will be shipper-owned or leased private rail cars. *Ibid*

D. Environmental Review

Representatives of the Port and CBRW have consulted with SEA and WSDOT on the environmental review process.⁵ The preparation of an Environmental Assessment is ongoing.

DISCUSSION

A. The Proposed Construction, Acquisition, and Operation are Presumptively in the Public Interest

As a result of the liberalization of the “public convenience and necessity” standard by the ICC Termination Act of 1995, the Board has adopted a general presumption that construction projects will be approved. *See Class Exemption for the Construction of Connecting Track Under*

⁴ If the Operator is not CBRW, but a newly-formed affiliate of CBRW, the Operator will file with the Board separate regulatory authority to operate over the lines, if necessary

⁵ By letter dated October 4, 2006, SEA granted the Port’s request for a waiver of the required six-month notice to SEA

49 U.S.C. 10901, 1 S.T.B. 75, 79 (1996); accord *Dakota, Minnesota & Eastern R.R. Corp.*

Construction into the Powder River Basin, Fin. Dkt. No. 33407, at 17 (Dec. 10, 1998).

As the Board has stated:

Finding that a shipper sustained or is likely to sustain injury from an abuse of market power by its present carrier is not a prerequisite for approval of a build-out. On the contrary, in enacting the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, Congress intended to facilitate rail construction by changing the statutory standard from requiring approval if the agency finds that a project is consistent with the public convenience and necessity (PC&N) to requiring approval unless the agency finds the project is inconsistent with the PC&N. Under this new standard, proposed rail construction projects are to be given the benefit of the doubt.

The Burlington Northern and Santa Fe Railway Co. — Construction and Operation Exemption — Seadrift and Kamey, TX, Fin. Dkt. No. 34003, at 4 (June 19, 2001) (citation omitted).

B. *The Proposed Construction, Acquisition, and Operation Meet the § 10502 Exemption Criteria Under § 10901*

Construction, acquisition, and operation of a rail line require prior Board approval pursuant to 49 U.S.C. § 10901. Under 49 U.S.C. § 10502(a), however, the Board must exempt such activity from the prior approval requirements of Section 10901 if it finds that: (1) continued regulation is not necessary to carry out the Rail Transportation Policy of 49 U.S.C. § 10101, and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

The legislative history of the exemption provisions, as well as ICC, Board and court decisions, demonstrate that the Board should apply the exemption provision broadly, and that the construction of the lines and related transactions are the types of transactions for which the exemption provision was designed. See, e.g., *American Trucking Ass'n v. ICC*, 656 F.2d 1115, 1119 (5th Cir. 1981) (the ICC is charged with the responsibility of actively pursuing exemptions for transportation and service that comply with the section's standards); H.R. Rep. No. 96-1430,

at 105 (1980) (the ICC is charged with removing “as many as possible of the Commission’s restrictions . . .”).

As explained in detail below, the proposed rail line construction, acquisition, and operation comply with the Section 10502 exemption criteria and accordingly should be exempted from the requirements of obtaining Board approval under Section 10901.

1. An Exemption Will Promote the Rail Transportation Policy

Regulation of the construction, acquisition, and operation of this approximately 11.5 mile rail line is not necessary to carry out the Rail Transportation Policy expressed in Section 10101. Rather, granting an exemption (as opposed to subjecting the proposed project to burdensome regulation) will promote significant provisions of the Rail Transportation Policy and will not run counter to any of the Rail Transportation Policy’s goals.

First, the granting an exemption is consistent with the mandate of Sections 10101(1), 10101(4), and 10101(5) that the Board ensure the development and continuation of a sound rail transportation system with effective competition and coordination between rail carriers that will allow competition and the demand for service to establish reasonable rates and service terms. Specifically, the lines will provide the area with increased transportation options and enhanced competition. Second, consistent with Sections 10101(2) and 10101(7), an exemption will minimize the need for federal regulatory control over the rail transportation system and reduce regulatory barriers to entry. Specifically, an exemption here will promote these policies by minimizing the time and administrative expense associated with the construction and acquisition of the rail lines as well as commencement of rail operations. Regulatory barriers to new capacity and infrastructure improvements in particular should be minimized where possible in order to promote and maintain stable economic growth in this sector of the economy.

The Board and its predecessor the ICC have repeatedly found that rail construction and operation projects promote the Rail Transportation Policy by allowing for competition and encouraging the provision of more efficient transportation service. *See, e.g., The Burlington Northern and Santa Fe Railway Co – Construction and Operation Exemption – Seadrift and Kamey, TX, supra; Entergy Arkansas and Entergy Rail – Construction and Operation Exemption – White Bluff to Pine Bluff, AR, Fin. Dkt. No. 33782 (May 4, 2000); Missouri Pacific R R. Co. – Construction and Operation Exemption – Harris and Chambers Counties, TX, Fin. Dkt. No. 32571 (June 30, 1995), at 4; Gateway Western Ry Co – Construction Exemption – St. Clair County, IL, Gateway Western Ry Co – Petition Under 49 U.S.C 10901(d), Fin. Dkt. Nos. 32158 and 32158 (Sub-No. 1), at 10 (May 11, 1993) (noting that the Board has “made findings in a series of construction [exemption] cases that the rail transportation policy favors the construction of new rail lines”); accord Burlington Northern R R Co – Construction and Operation Exemption – Macon and Randolph Counties, MO, 9 I.C.C. 2d 1161, 1166-1169 (1993), aff’d sub nom. Missouri Mining, Inc. v. ICC, 33 F.3d 980 (8th Cir. 1994).*

Additionally, in today’s competitive environment, the market adequately determines the value of a potential rail construction project. As a result, there is no need for regulatory oversight to determine if the proposed project is economically sound and meets a transportation need. *See Illinois Central R.R Co. – Construction and Operation Exemption – In East Baton Rouge Parish, LA, Fin. Dkt No. 33877 (May 25, 2001); Missouri Pacific R R. Co – Construction and Operation Exemption – Harris and Chambers Counties, TX, supra, at 4.*

The line construction and acquisition proposal is straightforward and simple. It involves approximately 11.5 miles of new track. Construction, acquisition and operation of the lines raise no concerns which might justify Board scrutiny under Section 10901. As with most projects of

this type, an exemption from regulatory review (excepting environmental review and regulation) will advance a number of goals of the Rail Transportation Policy, including minimizing the need for federal regulatory control, ensuring the development and continuation of a sound rail transportation system, allowing competition and demand for service to establish transportation rates and service terms, and encouraging the efficient management of railroads. None of the goals of the Rail Transportation Policy will be hindered by the granting of this Petition.

In conclusion, formal and potentially protracted Board approval pursuant to Section 10901 is not necessary to carry out the goals of the Rail Transportation Policy. In fact, to require such approval by means other than exemption, with its attendant expense and risk of delay, will undermine the aims of the Rail Transportation Policy

2. *The Transaction is Limited in Scope and Regulation is Not Needed to Protect Shippers from the Abuse of Market Power*

The second test for exemption is stated in the alternative — either the transaction must be of limited scope or the Board must find that regulation of the transaction is not needed to protect shippers from the abuse of market power. Although required to satisfy just one of these alternatives, the proposed project satisfies both.

First, the proposed project is limited in scope. The total length of rail lines to be constructed, acquired, and operated is approximately 11.5 miles. Under Board precedent applying Section 10502(a), rail line of such length is — essentially by definition — limited in scope. See *The Burlington Northern and Santa Fe Railway Co – Construction and Operation Exemption – Seadrift and Kamey, TX, supra* (7.5 miles); *Missouri Pacific R.R. Co. – Construction and Operation Exemption – Harris and Chambers Counties, TX, supra* (10.5 miles); *Burlington Northern R.R. Co – Construction and Operation Exemption – Macon and Randolph Counties, MO, supra* (17 miles), *The Elk River R.R. – Construction and Operation*

Exemption – Clay and Karawha Counties, WV, Fin. Dkt. No. 31989 (May 28, 1992) (30 miles); *PSI R R, Inc. – Construction Exemption – Gibson County, IN*, Fin. Dk. No. 32010 (Feb. 24, 1992) (13 miles); *Southern Electric Generating Co. – Petition for Exemption – Construction of a Rail Line in Shelby County, AL*, Fin Dkt. No. 31498 (Sept. 19, 1989) (7.5 miles); *Louisville & Jefferson County Riverport Auth. and CSX Transp., Inc. – In Jefferson City, KY*, Fin. Dkt. No. 31136 (Dec. 22, 1987) (6.7 miles).

Second, the lines are primarily intended to enhance rail service to shippers, and therefore regulation of the construction, acquisition, and operation is not needed to protect shippers from the abuse of market power. The Project, when completed, will provide shippers located in the Moses Lake area with enhanced rail service and increased competition. See *Ameren Energy Generating Company – Construction and Operation Exemption – In Coffeen and Walshville, IL*, Fin. Dkt. No. 34435, at 4 (“the proposed rail line will provide the area with additional transportation options and enhanced competition”); *Entergy Arkansas and Entergy Rail – Construction and Operation Exemption – White Bluff to Pine Bluff, AR, supra*, at 7 (“the proposed transaction will provide . . . an additional rail transportation option and thus will enable [the shipper] to realize the benefits of increased railroad competition”); *Southern Electric R R Co – Construction and Operation Exemption – West Jefferson, AL, supra*, *Southern Gulf Ry Co – Construction and Operation Exemption – In Calcasteu Parish, LA*, Fin Dkt No 32321, at 4 (Sept. 9, 1993) (construction and operation of a new rail line to serve a utility coal shipper held not to subject shippers to carrier market power abuses).

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Board grant this Petition for Exemption to authorize the Port to construct and acquire and CBRW to operate the

approximately 11.5 miles of rail line subject to this Petition without the need of a full application pursuant to 49 U.S.C. § 10901.



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Attorneys for Columbia Basin
Railroad Company, Inc.

August 14, 2008

Respectfully submitted,



Adrian L. Steel, Jr.
Kathryn Kusske Floyd
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3237

Attorneys for the Port of Moses Lake

:

**Verified Statement
of
Craig L. Baldwin**

1. My name is Craig L. Baldwin. I am Executive Manager of the Port of Moses Lake ("Port"). My office address is 7810 Andrews Street N.E., Suite 200, Moses Lake, Washington 98837.

2. In my position as Executive Manager, I am responsible for the overall operation of the Port. The Port is considered a municipality of the State of Washington, similar in nature to cities, counties, and other municipal subdivisions. Port districts are authorized to be established in various counties of the State for the purposes of industrial improvements and economic development. See Revised Code of Washington 53.04.010. The Port is governed by three elected commissioners who represent the district. The Port is audited annually by the Auditor of the State of Washington, and its employees are covered by the State retirement system. The Port operates the Grant County International Airport and the Grant County International Airport Industrial Park. The industrial park has over 1,000,000 square feet of building space plus over 1,000 acres of industrial and commercial land.

3. I started my career with the U.S. Navy, serving in the administrative side of a P-3 Squadron (Aviation). Upon discharge from the Navy, I have worked in transportation related employment, aviation and port. I spent 10 years working at the Rogue Valley International Airport in Medford Oregon, and the last 4 years at the Port of Moses Lake, Moses Lake, Washington. I have my Certified Member (C M) through the American Association of Airport Executives. I have an extensive administrative background, and am responsible for the day to day operations of the Port, under the direction of the Board of Commissioners. This responsibility includes the airport, and economic development of the Port industrial park.

4. The purpose of this Verified Statement is to support the Petition for Exemption filed by the Port and Columbia Basin Railroad Company, Inc. ("CBRW") for the construction and acquisition by the Port and operation by CBRW of approximately 11.5 miles of rail line. Specifically, I will address the purpose and need for the rail line, and I will describe each of the three segments of the line. I am submitting this Verified Statement on behalf of the Port as authorized on August 11, 2008, by its Board of Commissioners.

5. In 2005, the Washington State Legislature appropriated \$2,000,000 for the design and construction of the Northern Columbia Basin Railroad Project ("Project"). A primary purpose of the Project is to preserve and improve the short-line rail system serving the Moses Lake area. A further purpose is to make the Moses Lake area more attractive to heavy industries that use rail transportation and ultimately to promote economic development in the region. The three rail lines subject to this Petition for Exemption are an integral part of the Project. A map showing the three rail lines and the existing CBRW line through Moses Lake is attached hereto as Exhibit A.

6. The first line (Segment 1) would be constructed by the Port and would relocate rail traffic from the existing CBRW line between Wheeler and Parker Horn to bypass downtown Moses Lake. This would provide a more direct route to the Grant County International Airport, would provide for the possibility of industrial development along Wheeler Road, and would greatly improve safety in downtown Moses Lake by reducing the potential for vehicular and pedestrian conflicts. Multiple trains moving through the downtown area are unattractive to potential new businesses. In addition, Vision 2020, a citizen-led economic development group which focuses on revitalizing downtown Moses Lake and its waterfront, has identified the removal of the downtown line and the acquisition of the right-of-way along the lake as being of

high importance. Such a project would provide an opportunity for a waterfront park, boardwalk, and a bicycle/pedestrian trail.

7 The second line (Segment 2) would also be constructed by the Port and would connect the existing CBRW line to the east side of the airport so that industries locating there can receive rail service. In this regard, the Grant County International Airport Industrial Park provides service to many firms and individuals and has 1,000 acres of low-cost available land in its existing park. There is another major industrial area zoned and available for development to the east of Moses Lake, which is being actively promoted for development. Segment 2 would facilitate the provision of rail service to this potential new industrial park area.

8. The third line (Segment 3), which is currently owned by CBRW, runs between Parker Horn and the Airport, and will be purchased and rehabilitated by the Port. The rehabilitation to be undertaken would consist primarily of replacing rails, ties and other track materials. The upgrade would permit the use of newer, larger cars. Upgrades to two signalized grade crossings would be included. The existing alignment and general profile of the line would not be changed.

9. In sum, the overall goals of the Project are to preserve and enhance freight rail service and to support economic development in the Moses Lake area. The specific objectives are to relocate the existing rail line (which currently runs through downtown Moses Lake) in order to improve safety while maintaining existing rail business; to rehabilitate the existing CBRW line; and to construct new trackage to attract new rail-dependent businesses

10. CBRW (or its newly-formed affiliate) (the "Operator") will, pursuant to an agreement to be executed with the Port, operate the lines exclusively and will assume and bear the primary common carrier obligation to provide rail freight service over the lines. The

Operator intends to offer common carrier and contract service to all shippers located at Moses Lake and adjoining areas that access the lines. In the event CBRW is no longer able or willing for whatever reason to continue operating the lines, the Port would contract with another short-line railroad to operate the lines.

VERIFICATION

I, Craig L. Baldwin, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on August _____ 12, 2008.

C. L. Baldwin
Craig L. Baldwin

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34936

**PORT OF MOSES LAKE –AUTHORITY TO CONSTRUCT –
AND COLUMBIA BASIN RAILROAD COMPANY, INC. –
AUTHORITY TO OPERATION – PETITION FOR EXEMPTION
FROM 49 USC § 10901 – MOSES LAKE, WASHINGTON**

VERIFIED STATEMENT OF NICHOLAS B. TEMPLE, JR.

1. My name is Nicholas B. Temple, Jr. I am president of Columbia Basin Railroad Company, Inc. (“CBRW”), and its affiliate, Central Washington Railroad Company (“CWA”). Both CBRW and CWA are class III rail carriers. I have been the president of CBRW since it began rail operations in 1996. I have been president of CWA since it began rail operations in December of 2004.
2. In late 2007, CBRW received authority from the Surface Transportation Board to acquire from BNSF Railway Company (“BNSF”) and BNSF Acquisition, Inc. (together, the “BNSF Parties”) approximately 74 route miles of rail lines located in central Washington State. Prior to this purchase, CBRW had been the exclusive operator, as a lessee, over substantially identical rail lines. The main line CBRW acquired from the BNSF Parties runs from Connell to Wheeler, WA. The other rail lines CBRW acquired from the BNSF Parties run approximately: (1) from Basset Junction, WA to Schrag, WA; (2) from Moses Lake, WA to Sieler, WA; and (3) from Sieler, WA to

Wheeler, WA. CBRW also operates, via trackage rights from BNSF, over the rail line that extends approximately from Othello, WA to Warden, WA. In addition, CBRW, under the name of Portland Vancouver Junction Railroad, leases and operates a non-connecting rail line in Clark County, WA.

3. CBRW traffic over the rail system CBRW acquired from BNSF in 2007 (the "Subject Rail System") is interchanged with BNSF at Connell, WA. CBRW and CWA do not interchange traffic with each other.

4. Currently, the traffic moving over the Subject Rail System consists primarily of agricultural products, such as grain, sugar beets and fresh and frozen potatoes, but CBRW also handles other commodities, such as fertilizers, chemicals and paper products.

5. The general purpose of the transactions contemplated in the Petition are to preserve, improve and expand CBRW's rail service to the Moses Lake area

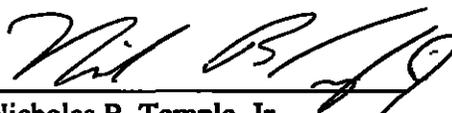
6. CBRW (or its newly-formed affiliate) (the "Operator") and the Port of Moses Lake intend to enter into an operating agreement, whereby the Operator will offer common carrier and contract services to industries that have access to Segments 1, 2 and 3. It is CBRW's understanding that the Operator will be the exclusive operator of Segments 1, 2 and 3, and that the Operator will have the primary common carrier obligation to provide rail freight service over these lines.

7. Although future traffic levels over Segment 3 and the yet-to-be-constructed Segments 1 and 2 are difficult to predict, CBRW anticipates that the Operator will move 500 to 1,000 cars annually over the rehabilitated Segment 3. The vast majority of this increase in rail freight traffic over Segment 3 will terminate on or originate from

the yet-to-be-constructed Segment 2 CBRW also anticipates that these carloads will consist primarily of steel, manufactured parts and specialty chemicals, and that the Operator will run an average of one train of three to six cars daily, each way, over Segments 1, 2 and 3. These cars generally, if not exclusively, will be shipper-owned or leased private rail cars.

VERIFICATION

I, Nicholas B. Temple, Jr., declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief. Further, I certify that I am qualified and authorized to cause this Verified Statement to be filed.


Nicholas B. Temple, Jr.

Dated: 8-8-08

CERTIFICATE OF SERVICE

I do hereby certify that copies of Port of Moses Lake – Authority To Construct And Acquire – And Columbia Basin Railroad Company, Inc. – Authority To Operate – Petition For An Exemption From 49 U.S.C. § 10901 – Moses Lake, Washington, are being served on the following by First-Class Mail, postage prepaid:

**Governor Chris Gregoire
Office of the Governor
PO Box 40002
Olympia, WA 98504-0002**

**Paula J. Hammond
Secretary, Washington State Department
of Transportation
Transportation Building
310 Maple Park Avenue, SE
PO Box 47300
Olympia, WA 98504-7300**

**Washington State Transportation Commission
PO Box 47308
Olympia, WA 98504-7308**



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 34936

Petition For Waiver of Filing Fee

Expedited Action Requested

The Port of Moses Lake ("Port") and Columbia Basin Railroad Company, Inc. ("CBRW") are filing concurrently herewith in this proceeding a Petition for Exemption from 49 U.S.C. § 10901 for the construction and acquisition by the Port and operation by CBRW of approximately 11.5 miles of rail line that will (i) allow trains to bypass downtown Moses Lake, and (ii) connect existing CBRW trackage to the east side of the Grant County International Airport. The Port submits this Petition pursuant to 49 C.F.R. § 1002.2(e)(1) for waiver of the filing fee set forth in 49 C.F.R. § 1002.2(f) for the filing of a petition for exemption under 49 U.S.C. § 10502 involving construction of a rail line.

In support of this Petition, the Port states as follows:

1. The Port is the lead petitioner in this proceeding and is considered a municipality of the State of Washington, similar in nature to cities, counties, and other municipal subdivisions. See Verified Statement of Craig L. Baldwin, Executive Manager of the Port, attached to the Petition for Exemption, at ¶ 2. As reflected in the attached copy of Revised Code of Washington 53.04.010, port districts are authorized to be established in various counties of the State for the purposes of industrial improvements and economic development. The Port is governed by three

elected commissioners who represent the district. The Port is audited annually by the Auditor of the State of Washington, and its employees are covered by the State retirement system.

2. As a state or local government entity, the Port is entitled under 49 C.F.R. § 1002.2(e)(1) to a waiver of the filing fee required for this Petition for Exemption. *See Norfolk Southern Railway Co – Adverse Abandonment – St. Joseph County, IN*, STB Docket No. AB-290 (Sub-No. 286) (served Oct. 25, 2006), at 3. Section 1002.2(e)(1) provides in relevant part that “[f]iling fees are waived for an application or other proceeding which is filed by a federal government agency, or a state or local government entity.”

3. In implementing and carrying out the proposed project, the Port will not act in a proprietary capacity as a carrier or shipper, and it will not be acting in the same capacity as a privately-owned transportation entity. Rather, the Port is filing the Petition for Exemption on behalf of the general public to ensure and enhance rail service to the Moses Lake area in furtherance of the duties and obligations imposed upon it by the State of Washington. The Board’s decision in *Regulations Governing Fees for Services Performed in Connection with Licensing and Related Services – Policy Statement*, STB Ex Parte No. 542 (Sub-No. 6) (served Dec. 6, 2000) (“*Policy Statement*”), confirms that in such circumstances a waiver of fees should be granted. In *Policy Statement*, the Board indicated that (consistent with the ICC’s original intent in *Regulations Governing Fees for Services*, 1 I.C.C.2d 60 (1984) (“*Fees for Services*”)) it would assess fees to any entity “that owns or proposes to own a carrier, or that is a shipper, and comes before the Board in that capacity.” Decision at 4.¹ The Port does not own or propose to

¹ The language in *Fees for Services* upon which the Board relied reads: “When a State-owned transportation entity acts in the same capacity as a privately owned transportation entity, it should be treated as such.” *Fees for Services*, at 71. The Port is clearly not a “transportation entity” in the sense used by the ICC in that language and will in no event act as “a privately owned transportation entity”.

own a carrier nor is it a shipper. *Policy Statement* further indicates that a fee waiver will be “available to a state or local government entity that is not acting in the capacity of a carrier or shipper.” *Ibid* The Port will not act in that capacity. As set forth in the Petition for Exemption, CBRW or its newly-formed affiliate will bear the primary common carrier obligation and provide rail freight service on the line. In the event CBRW is no longer able or willing for whatever reason to continue operating the lines, the Port would contract with another short-line railroad to operate the lines. Baldwin V.S. ¶ 10.

4. The fact that the Port will have a residual common carrier obligation as the owner of the rail lines does not justify the denial of the Port’s fee waiver request. Under *Fees for Services* and *Policy Statement*, the mere ownership of rail lines standing alone does not disqualify a state or local government entity from being granted a fee waiver. It is only a state or local government entity that “owns or proposes to own a carrier [or “transportation entity”], or that is a shipper, and comes before the Board in that capacity” that will be denied a waiver. *Policy Statement*, at 4. Otherwise, as *Fees for Services* recognized, a fee waiver should be granted because the benefits of the participation of a state or local government entity “flow to the general public in that locality.” *Fees for Services*, at 89.

5. The Board’s decision granting the appeal of the denial of a fee waiver request in *Pemiscot County Port Authority – Construction of a Line of Railroad in Pemiscot County, MO*, Fin. Dkt. No. 34117 (served March 25, 2002) (“*Pemiscot*”), does not support the denial of a fee waiver here. In its decision, the Board overturned a decision by the Secretary which had denied Pemiscot’s fee waiver request on the ground that Pemiscot was “seeking to construct and operate (through a third party operator) a line of railroad”. *Pemiscot*, at 2. The Board held that Pemiscot had failed to show that the Secretary’s denial of the waiver was clearly erroneous and noted that

the Secretary's decision closely followed the guidelines laid out in *Policy Statement*. Nevertheless, because a party in a different case had been granted a fee waiver after the issuance of *Policy Statement* under similar circumstances, the Board determined to grant Pemiscot's appeal and waive the filing fee. To the extent the Board's decision in *Pemiscot* can be read to be inconsistent with the grant of a fee waiver here, the Port respectfully submits that *Pemiscot* misread *Fees for Services* and *Policy Statement*. It is clear from *Fees for Services* (as well as *Policy Statement*) that it is only "when a governmental agency owns or subsidizes some transportation entity and comes before the [Board] in that capacity, [that] it should be required to pay the entire fee that would otherwise be applicable " *Fees for Services*, at 71. As discussed, the Port is not and does not own, nor does it subsidize, a transportation entity or carrier, and it has not petitioned for operating authority for itself. Nothing in *Fees for Services* or *Policy Statement* supports the conclusion that the ownership of a rail line by itself (and any residual common carrier obligation) meets the standards for denial of a waiver to a state or local government entity acting expressly in the public interest.²

6. Finally, in the event the Board determines that a fee waiver should not be granted under Section 1002.2(e)(1), the Port alternatively requests a waiver under Section 1002.2(e)(2) which provides that in extraordinary situations the Board can waive or reduce fees. Here, the best interest of the public would be served by a waiver since the Port is not, and will not act, as a privately-owned transportation entity and will not operate over the lines, but rather the Port is acting on behalf of the general public in the Moses Lake area in order to ensure the preservation

² Indeed, were the Board to deny the Port's fee waiver request, it would effectively establish a precedent that under no circumstances could a state or local government agency or entity construct a new rail line without have to pay the substantial fee set forth in the Board's regulations. Such a precedent would clearly exceed the scope of the Commission's intent in *Fees for Services*.

of the local rail system and to foster economic and industrial development. Indeed, the State of Washington has determined, through the Port, that reliable and efficient rail service is critical to Moses Lake's ability to attract new businesses and improve the local economy. If the Port is required to pay the required substantial fee in the amount of \$74,900, the funds available for the proposed project will be materially reduced, the Port will suffer an undue hardship, and the public interest, as determined by the State of Washington and the Port, will be disserved.³

Accordingly, based on the above, the Port respectfully requests that this Petition for Waiver of Filing Fee be granted. In addition, the Port further requests that the Board expeditiously consider this Petition for Waiver of Filing Fee so that the processing by the Board of the Petition for Exemption can promptly commence. As noted in the Petition for Exemption, the preparation of an Environmental Assessment is ongoing, and the expeditious resolution of the fee waiver request will serve the public interest by enabling the Board's consideration of the Petition for Exemption to commence.

Respectfully submitted,



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Attorneys for the Port of Moses Lake

August 14, 2008

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CERTIFICATE OF SERVICE

I do hereby certify that copies of the foregoing Petition For Waiver of Filing Fee, are being served on the following by First-Class Mail, postage prepaid:

Governor Chris Gregoire
Office of the Governor
PO Box 40002
Olympia, WA 98504-0002

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Secretary, Washington State Department
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Transportation Building
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Office of the Governor
PO Box 40002
Olympia, WA 98504-0002

Paula J. Hammond
Secretary, Washington State Department
of Transportation
Transportation Building
310 Maple Park Avenue, SE
PO Box 47300
Olympia, WA 98504-7300

Washington State Transportation Commission
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Olympia, WA 98504-7308

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A handwritten signature in black ink, appearing to read "Mark H. Sidman", is written over a horizontal line.

RCW 53.04.010**Port districts authorized — Purposes — Powers — Public hearing.**

(1) Port districts are hereby authorized to be established in the various counties of the state for the purposes of acquisition, construction, maintenance, operation, development and regulation within the district of harbor improvements, rail or motor vehicle transfer and terminal facilities, water transfer and terminal facilities, air transfer and terminal facilities, or any combination of such transfer and terminal facilities, and other commercial transportation, transfer, handling, storage and terminal facilities, and industrial improvements

(2) Powers of a port district that is located in a county that has a contiguous border with another state, and a population between fifty and seventy thousand, shall be exercised within the district, except as otherwise provided by statute or pursuant to an interlocal cooperation agreement with another public agency as defined in chapter 39 34 RCW. In addition to other requirements of chapter 39 34 RCW, such an interlocal cooperation agreement may involve the exercise of a port district's powers for a port district that is located in a county that has contiguous borders with another state, and a population between fifty and seventy thousand, outside the boundaries of the state of Washington in whole or in part only if found, by resolution of the port district commission exercising such authority, to be reasonably necessary for the effective exercise of the port district's statutory powers and for the benefit of the inhabitants of the district and the state of Washington. The resolution may be adopted only after a public hearing of which notice has been published in a newspaper of general circulation within the district at least ten days in advance

[1999 c 306 § 2, 1963 c 147 § 1, 1911 c 92 § 1, RRS § 9688]

Notes:

Purpose — 1999 c 306: "Article VIII, section 8 of the Washington state Constitution authorizes the use of public funds by port districts in such manner as the legislature may prescribe for industrial development or trade promotion. The legislature recognizes a growing need for a Washington port district that is located in a county that has a contiguous border with another state, and a population between fifty and seventy thousand, to participate with other public agencies of this state and an adjoining state to attract, encourage, and develop industry and promote trade on both sides of their borders, for the economic benefit to the state of Washington. RCW 53 08 240 authorizes agreements between two or more port districts for the exercise of powers both within and outside their districts, and further authorizes contracts by port districts with other governmental entities. The interlocal cooperation act, chapter 39 34 RCW, also authorizes joint agreements and contracts between port districts and other state and local public agencies including political subdivisions of other states. However, there is uncertainty as to whether or not a port district that is located in a county that has a contiguous border with another state, and a population between fifty and seventy thousand, may exercise industrial development or trade promotion powers outside the district or state boundaries except jointly with another Washington port district

The purpose of this act is to define and clarify the authority of a Washington port district that is located in a county that has a contiguous border with another state, and a population between fifty and seventy thousand, to exercise those powers jointly or in cooperation with other public agencies when found to be necessary and beneficial to the people of this state " [1999 c 306 § 1]

Construction — 1911 c 92: "This act shall not be construed to repeal, amend or modify any law heretofore enacted providing a method of harbor improvement, regulation or control in this state, but shall be held to be an additional and concurrent method providing for such purpose " [1911 c 92 § 14]

Establishment of harbor lines: State Constitution Art 15 § 1 (Amendment 15).