

**STATE OF NEW HAMPSHIRE**  
**SITE EVALUATION COMMITTEE**

**DOCKET NO. 2015-01**

**SEA-3, INC.'S OBJECTION TO PUBLIC COUNSEL'S MOTION FOR LEAVE TO  
RETAIN SEBAGO TECHNICS AND FOR AN ORDER ON COSTS**

NOW COMES SEA-3, Inc. ("SEA-3"), through its counsel, Shaines & McEachern, P.A., and objects to Public Counsel's Motion for Leave to Retain Sebago Technics and for an Order Directing SEA-3, Inc. to Bear the Costs Thereof ("Motion for Leave") and in support states as follows:

**Introduction**

In his Motion for Leave, Public Counsel seeks an Order requiring SEA-3 to pay for a rail safety study described in the proposal of Sebago Technics ("Sebago") titled, "Revised Proposal for Railroad Safety Consulting associated with a proposed Sea 3, Inc. expansion to handle propane deliveries by rail in Newington, NH," dated July 6, 2015 ("Rail Study Proposal"). As described in the Rail Study Proposal, Sebago proposes to study the safety of Pan Am Railways' facilities and operations along the Newington Branch Rail Line (Newfields to Newington) and its compliance with federal regulations (the "Rail Study").

Public Counsel's Motion for Leave must be denied because: (1) Public Counsel's limited statutory role under RSA 162-H:9 does not authorize him to examine safety issues; (2) the offered justification for the Rail Study – that it is needed to demonstrate that the existing rail safety regulations are inadequate – is belied by the Rail Study Proposal itself, which instead seeks to assess Pan Am's compliance with existing rail safety regulations; and (3) even if the Legislature had authorized Public Counsel to examine safety issues, the Committee is preempted

by federal law from taking any action on the cited federal regulations. Since the Committee could not lawfully act on the study results, it should not burden the applicant with paying for a study that is legally irrelevant.

### **Summary of Rail Study Proposal**

As described in the Scope of Services section of the Rail Study Proposal, Public Counsel seeks to engage Sebago to study the railroad as follows:

- Prepare a description of the rail segments owned by Pan Am Railways (hereinafter “Pan Am”) between Newfields and Newington, NH. (Scope at ¶ 1);
- Inspect existing track facilities within the SEA-3 terminal. (Scope at ¶ 2);
- Review Pan Am’s and SEA-3’s Hazardous Materials Programs and Procedures as they relate to the transportation of product from Newfields to Newington for compliance with the following federal regulations<sup>1</sup>:
  - 49 CFR § 107.601 (Registration of persons who offer or transport Hazardous Materials)
  - 49 CFR Part 172, Subpart C (Requiring description of hazardous material on shipping papers)
  - 49 CFR § 174.24 (Requiring persons who transport hazardous material by rail to require shipping papers)
  - 49 CFR § 173 (Establishing classification standards for Hazardous Materials)
  - 49 CFR Part 172, Subpart D (Establishing Marking Requirements for Transporters of Hazardous Materials)
  - 49 CFR Part 172, Subparts E or F (Establishing Labeling and Placarding Standards for Transporters of Hazardous Materials)
  - 49 CFR Part 173 (Establishing Regulations for the Shipment of Hazardous Materials)
  - 49 CFR Parts 178 (Establishing manufacturing and testing specifications for packaging and containers used to transport Hazardous Materials in commerce), 179 ( Establishing specifications for the manufacturing of tank cars to be marked with a DOT specification), and 180 (Establishing requirements for the maintenance, reconditioning, repair, inspection and testing of packaging)

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<sup>1</sup> While SEA-3, Inc. maintains HazMat programs and procedures for the handling of Hazardous Materials at its Newington facility, it is not engaged in—nor does it control—the rail transportation of product on the Newington Branch Rail Line.

- 49 CFR §§ 173.31 (Establishing standards for tank cars used to transport Hazardous Materials) and 174.67 (Establishing rules for tank car unloading)
- 49 CFR § 173.30 (Establishing requirements for the loading and unloading of transport vehicles)
- 49 CFR Part 174 Subparts C (Establishing general handling and loading requirements), E-G, H-K (Establishing requirements for Class 1 (Explosive), Class 2 (Gases), Class 3 (Flammable Liquids), Div. 6.1 (Poisonous) and Class 7 (Radioactive) materials.
- 49 CFR Part 172 Subpart H (Establishing requirements for the training of HazMat employees)
- 49 CFR Part 172, Subpart 1 (Establishing requirements for development and implementation of plans to address security risks related to the transportation of hazardous materials in commerce)
- 49 CFR § 174.9 (Establishing railcar inspection standards for carriers of Hazardous Materials)
- 49 CFR §§ 173.29 (Establishing standards for the transportation of empty HazMat packaging), 173.31 (Establishing standards for the use of tank cars) and 174.67 (Establishing standards for tank car unloading)
- 49 CFR §§ 171.15 (Establishing notice requirements for reporting of HazMat incidents) and 171.16 (Establishing duty to file HazMat incident report).

(Scope at ¶ 3);

- Review the Federal Railroad Administration's Highway Grade Crossing Inventory and visit highway grade crossings to confirm Inventory data and take photos. (Scope at ¶ 4);
- Research USDOT, NRC, FRA, PHMSA and NAR databases for LPG risk assessment. (Scope at ¶ 5);
- Review USEPA's Risk Management Plan Database and USCG's records and analyze potential safety issues. (Scope at ¶ 6); and
- Meet with local emergency response staff to determine their preparedness and document their education and equipment needs. (Scope at ¶ 7).

## Argument

### *A. Public Counsel lacks statutory authority under RSA 162-H:9 to request a safety study.*

Public Counsel cannot request a study that does not further his limited statutory mandate. RSA 162-H:10, V (Public Counsel can only request studies that are in furtherance of his duties). RSA 162-H:9, which delimits Public Counsel's mandate, provides in relevant part:

I. Upon notification that an application for a certificate has been filed with the committee in accordance with RSA 162-H:7, the attorney general shall appoint an assistant attorney general as a counsel for the public. **The counsel shall represent the public in seeking to protect the quality of the environment and in seeking to assure an adequate supply of energy.** The counsel shall be accorded all the rights and privileges, and responsibilities of an attorney representing a party in formal action and shall serve until the decision to issue or deny a certificate is final.

RSA 162-H:9 (emphasis added).

RSA 162-H:9 expressly limits the Public Counsel's role in Committee proceedings to two tasks: protecting the quality of the environment and assuring an adequate supply of energy. Had the Legislature intended for Public Counsel to also represent the public with respect to safety issues, it easily could have included safety within the Public Counsel's mandate, but it chose not to.

The Committee cannot expand the role of Public Counsel into other areas not included in RSA 162-H:9. The Supreme Court has explained:

“Administrative agencies are granted only limited and special subject matter jurisdiction....” Appeal of Amalgamated Transit Union, 144 N.H. 325, 327, 741 A.2d 66 (1999) (quotation and brackets omitted). That jurisdiction “is dependent entirely upon the statutes vesting [the agency] with power and [the agency] cannot confer jurisdiction upon [itself].” Fullerton v. Administrator, 280 Conn. 745, 911 A.2d 736, 742 (2006) (quotation and ellipsis omitted). Furthermore, a tribunal that “exercises a limited and statutory jurisdiction is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation.” Figuroa v. C and S Ball Bearing, 237 Conn. 1, 675 A.2d 845, 847 (1996) (quotation omitted).

In re Campaign for Ratepayer's Rights, 162 N. H. 245, 250 (2011) (delimiting the Site Evaluation Committee's jurisdiction). Here, since the Legislature limited the Public Counsel's involvement to protecting the environment and assuring an adequate energy supply, Public Counsel is therefore without authority to address matters of safety. Based on Public Counsel's lack of statutory authority to represent the public with respect to safety issues, he cannot require a safety study that falls outside his mandate.

***B. Public Counsel's offered justification for the Rail Study is belied by the Rail Study Proposal itself.***

Sebago's Rail Study Proposal belies Public Counsel's claim that the requested rail safety study is "necessary to demonstrate that there are aspects of the proposal and its impacts that will not be adequately covered by existing regulatory programs or oversight." See Motion for Leave at ¶ 5.

If that were true, Sebago's Rail Study Proposal would define its purpose as identifying deficiencies in the existing federal safety regulations for the Committee to remedy in a full certification proceeding.

Instead, Sebago's Rail Study Proposal proposes to evaluate Pan Am for compliance with a wide range of existing federal safety regulations. The Proposal says nothing about identifying deficiencies in the regulatory scheme itself.

Even if federal preemption, discussed below, did not apply, Pan Am's compliance with the extensive federal regulatory scheme is simply not relevant to the issue before the Committee. The sole issue before this Committee is whether the "Existing state or federal statutes, state or federal agency rules or municipal ordinances provide adequate protection of the objectives of RSA 162-H:1." See RSA 162-H:4, IV. Per RSA 162-H:10, V, studies must be reasonable. Requiring the applicant to pay for an irrelevant study is unreasonable.

Sebago's Rail Study Proposal is not relevant to the issue before the Committee and the Motion for Leave should be denied.

***C. Even if the Legislature had authorized Public Counsel to examine safety issues, the Committee is preempted by federal law from requiring the requested Rail Safety Study.***

Congress passed the Federal Railway Safety Act (the Act) in 1970 to “promote safety in every area of rail operations,” 49 U.S.C. § 20101, and authorized the Secretary of Transportation to make regulations and issue orders “for every area of railroad safety.” 49 U.S.C. § 20103.

Duluth, Winnipeg and Pacific Ry. Co. v. City of Orr, 529 F. 3d 794, 795-796 (2008).

The transportation of hazardous materials by rail renders the provisions of the Hazardous Materials Transportation Act (49 U.S.C. § 5101, *et seq.*) subject to the preemption provisions of the Federal Railway Safety Act (“FRSA”). See CSX Transp., Inc. v. Public Utilities Com'n of Ohio, 901 F.2d 497, 501 (6th Cir.1990) (upholding the district court's decision to apply the FRSA preemption provision to regulations promulgated under HMTA), cert. denied, 498 U.S. 1066, 111 S.Ct. 781, 112 L.Ed.2d 845 (1991)<sup>2</sup>.

Federal preemption under FRSA<sup>3</sup> is governed by 49 U.S.C. § 20106, which provides in relevant part:

**(a) National uniformity of regulation.--**(1) Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.

(2) A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the

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<sup>2</sup> For a discussion of the HMTA's own preemption provision (49 U.S.C. § 5125(b)(1)) see Roth v. Norfalco LLC, 651 F.3d 367, 374-379 (3<sup>rd</sup> Cir. 2011) (holding “We are thus left with a robust preemption provision that leaves little, if any, room for non-federal regulation.”)

<sup>3</sup> While federal preemption of rail safety is governed by 49 U.S.C. § 20106, federal preemption of economic and environmental regulation of railroad operations is governed by the Interstate Commerce Commission Termination Act (“ICCTA”) (49 U.S.C. § 10501(b)). See generally, Tyrell v. Norfolk Southern Ry. Co., 248 F.3d 517 (2001) (describing difference between FRSA and ICCTA preemption). Whereas, ICCTA governs “transportation by rail carrier” (49 U.S.C. § 10501(a)), the HMTA applies uniformly to anyone who is engaged in the interstate movement of hazardous materials. See Roth v. Norfalco LLC, 651 F.3d at 371.

subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order--

(A) is necessary to eliminate or reduce an essentially local safety or security hazard;

(B) is not incompatible with a law, regulation, or order of the United States Government; and

(C) does not unreasonably burden interstate commerce.

Under 49 U.S.C. § 20106, states are preempted from regulating any matter pertaining to railroad safety or railroad security that is the subject of a regulation or order prescribed by the Secretary of Transportation or the Secretary of Homeland Security.

In this case, Sebago's Rail Study Proposal proposes to study compliance with actual federal regulations prescribed by the Secretary of Transportation, which are actively regulated by the Federal Railroad Administration ("FRA"). The subjects of the Rail Study Proposal are expressly preempted.

Under 49 U.S.C. § 20106(a), the Committee has no authority to investigate whether Pan Am is in compliance with federal regulations promulgated by the Secretaries of Transportation or Homeland Security. Each of the federal regulations that Sebago proposes to review for compliance is exclusively enforced by the FRA. The FRA regularly exercises its exclusive authority to ensure the safe operation of railroads.

To maintain compliance with the Track Safety Standards and the Hazardous Materials Regulations, the FRA has the authority to issue civil monetary penalties (49 C.F.R. Part 213 Appendix B; 49 C.F.R. Part 107 Appendix A & 49 C.F.R. Part 209 Appendix A), and it has other

emergency powers such as removing a dangerous segment of railroad track from service (49 C.F.R. § 216.21).<sup>4</sup>

The FRA supplements its safety jurisdiction by permitting state agencies to participate in safety inspections and oversight (49 U.S.C. § 20105, 49 C.F.R. Part 212). NH DOT is a participant in this program, and has inspected the Newington Branch on numerous occasions finding no material safety issues.

Although the Sebago Rail Study Proposal has been offered based solely on safety reasons, any claim that it is needed to regulate the impact of Pan Am's operations on the environment would trigger federal preemption under ICCTA. See generally, Green Mountain R. R. Corp. v. Vermont, 404 F.3d 638, 641-643 (2005) (holding that ICCTA preempted the pre-construction permit requirement of Vermont's environmental land use law because it unduly interfered with the carrier's right to conduct operations and was time consuming).

### **Conclusion**

The proposed Rail Study falls outside Public Counsel's statutory mandate, seeks to address federally preempted issues, and is irrelevant to the sole issue before the Committee, which is whether the currently existing statutes, rules or ordinances provide adequate protection of RSA 162-H:1's objectives. The proposed Rail Study would turn that issue on its head, instead investigating whether Pan Am's railroad is in compliance with already existing statutes, rules and regulations that are beyond this Committee's jurisdiction to enforce. This Committee should not allow Public Counsel to require an unreasonable, expensive study of an irrelevant issue.

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<sup>4</sup> The FRA recently issued an emergency order relating to the transportation of crude oil in the wake of several accidents involving trains handling that commodity (Emergency Order 28), but has not issued any emergency orders relating to the movement of propane by rail, a clear indication that the federal safety regulatory scheme is working.

WHEREFORE, SEA-3, Inc. respectfully requests that the Committee:

- A. Deny Public Counsel's Motion for Leave; and
- B. Grant such other and further relief as may be just.

Respectfully submitted,

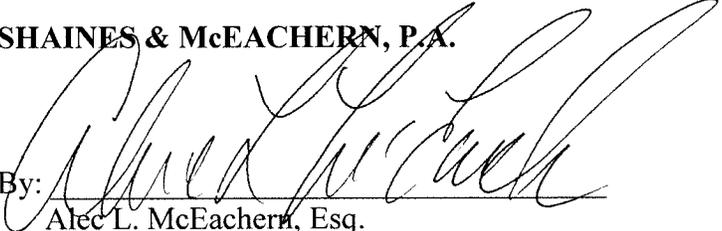
**SEA-3, INC.**

By Its Attorneys,

**SHAINES & McEACHERN, P.A.**

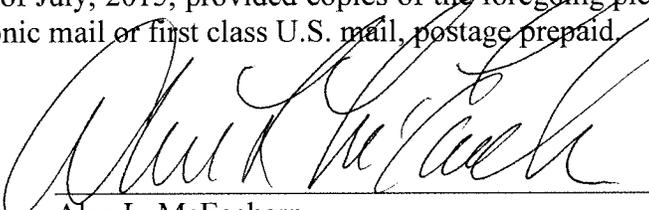
Dated: July 15, 2015

By:

  
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**CERTIFICATE OF SERVICE**

I certify that I have this 15<sup>th</sup> day of July, 2015, provided copies of the foregoing pleading to all parties to the proceeding by electronic mail or first class U.S. mail, postage prepaid.

  
Alec L. McEachern