

EXHIBIT J



SHAINES & McEACHERN, PA
Attorneys at Law

RECEIVED AUG 08 2014

August 1, 2014

VIA FEDEX

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

Re: SEA-3, Inc. v. City of Portsmouth, New Hampshire
Emergency Petition for Declaratory Order

FD 35853

Dear Ms. Brown:

Enclosed for filing are an original and ten copies of an Emergency Petition for Declaratory Order dated August 1, 2014, along with 3 compact discs. A check in the amount of \$1,400.00 is also enclosed for the filing fee.

I have also enclosed an extra copy of the Petition and this transmittal letter and request that you please date stamp these items to show receipt of this filing, indicate the assigned docket number, and return them to me in the enclosed self-addressed stamped envelope.

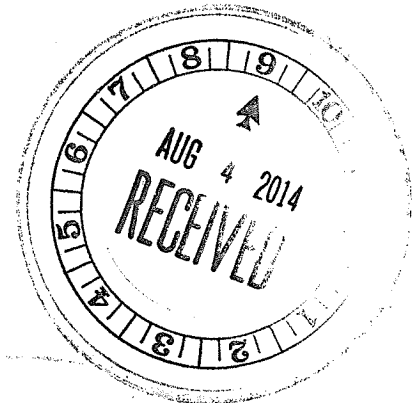
Should you have any questions regarding this filing, please do not hesitate to contact me. Thank you for your assistance in this matter.

Sincerely,

Alec L. McEachern
Attorney for SEA-3, Inc.

Enclosures

cc: SEA-3, Inc.
City of Portsmouth



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SEA-3, Inc. 000001

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. _____

SEA-3, INC.

V.

CITY OF PORTSMOUTH, NEW HAMPSHIRE

**EMERGENCY PETITION
FOR DECLARATORY ORDER**

Communications with respect to this
document should be addressed to:

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SEA-3, Inc.*

SEA-3, Inc. 000002

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. _____

SEA-3, INC.

V.

CITY OF PORTSMOUTH, NEW HAMPSHIRE

EMERGENCY PETITION FOR DECLARATORY ORDER

SEA-3, Inc. ("SEA-3"), petitions for an emergency declaratory order that the City of Portsmouth, New Hampshire's attempts to deny, restrict and/or regulate SEA-3's access to common carrier rail service under state and local law are preempted by the Interstate Commerce Commission Termination Act ("ICCTA") (codified in part at 49 U. S. C. §§ 10101-16106). This action is brought pursuant to 5 U. S. C. § 554 and 49 U. S. C. § 721.

INTRODUCTION

SEA-3 owns and operates a propane storage and distribution terminal (the "Facility") in the Town of Newington, New Hampshire ("Newington") that has been in continuous operation since 1975. The Facility has a storage capacity of 560,000 barrels and is one of only two such facilities in New England and the only one with rail access. SEA-3 receives propane (a/k/a "LPG") at the Facility by ship and rail car, with the majority arriving by ship. The Facility has just 3 rail berths, allowing it to offload 6 rail cars per day. Rail service is provided by a common

carrier over the Newington Branch, a rail line that travels through the City of Portsmouth, New Hampshire (“Portsmouth”) to and from the Facility.

In November 2013, SEA-3 applied to the Newington Planning Board (the “Planning Board”) for site approval to add five additional rail berths and associated offloading equipment at its Facility. This additional capacity will allow SEA-3 to receive the majority of its propane requirements by rail from domestic sources; this is essential if SEA-3 is to continue supplying the New England market because it is no longer economically viable to import foreign propane by ship due to changes in world energy markets.

The issue in this case is whether Portsmouth can deny or obstruct SEA-3’s access to common carrier rail service under local and state law based on its opposition to increased rail traffic. Portsmouth opposed SEA-3’s Planning Board application on the grounds that it would increase rail traffic through Portsmouth, giving no other justification for its opposition.

After seven months of hearings, the Planning Board unanimously approved SEA-3’s application over Portsmouth’s objection, acknowledging that it, the Planning Board, did not have jurisdiction to regulate rail traffic. Portsmouth then appealed the Planning Board’s Decision to the New Hampshire Superior Court and Newington’s Zoning Board of Appeals (“ZBA”), alleging that it will be injured by the increase in rail traffic and asking that the Planning Board’s Decision be overturned or, in the alternative, that a study be required as a condition of approval.

SEA-3 seeks a declaratory order that Portsmouth’s requested remedies are preempted by federal law. SEA-3 seeks this ruling on an emergency basis because Portsmouth’s pending ZBA appeal is due to be heard on August 25, 2014, and could result in the denial of SEA-3’s federally conferred right to common carrier service. Any delay or denial of service is likely to result in hardship for the nearly 250,000 New England households that heat with propane, as indicated by

a Declaration of Emergency issued by the State of New Hampshire on December 27, 2013, which specifically cited the absence of propane at SEA-3's Facility as a cause of the emergency.

STATEMENT OF FACTS

The Parties.

SEA-3 is a Texas corporation with an address of 1111 Bagby, Suite 2510, Houston, Texas 77002. SEA-3 is the owner of real estate located at 190 Shattuck Way, Newington, NH 03801.

Portsmouth is a municipal corporation under the laws of the State of New Hampshire having an address of 1 Junkins Avenue, Portsmouth, New Hampshire 03801.

The Facility.

SEA-3 has owned and operated the Facility at 190 Shattuck Way in Newington since 1975. The Facility contains two primary refrigerated storage tanks having a total storage capacity of 560,000 barrels. The only other propane storage facility of similar capacity in New England is the TEPPCO Terminal in Providence, Rhode Island, which lacks rail access.

Historically, SEA-3's Facility has received and distributed approximately 174 Million gallons (4,142,857 barrels) of LPG per year to the New England market, supplying approximately forty percent (40%) of New England's propane needs. The majority of this product has come from international sources via 12-13 ship deliveries per year, with a smaller amount of domestic propane arriving by rail over the Newington Branch.

The Newington Branch is the only rail line serving the Facility and it is owned by the Boston and Maine Corporation and Springfield Terminal Railway Company, d/b/a Pan Am

Railways ("Pan Am"). Pan Am is a class II rail carrier subject to the jurisdiction of the Surface Transportation Board.

SEA-3 stores propane in its primary storage tanks for sale to local New England distributors, who send their trucks to the Facility for loading at the Facility's truck loading rack.

Due to recent market changes, propane from international sources has become too expensive to be sold in the United States. As a result, New England now relies on domestic propane to meet its needs, which must be transported to New England by rail or truck.

The Facility currently contains 3 rail berths. Each berth has the capacity to offload 2 rail cars simultaneously for a total offload capacity of six cars per day. This rail capacity is insufficient to meet current market demands.

The Newington Planning Board.

On November 5, 2013, SEA-3 applied to the Planning Board for site plan approval to increase its rail capacity by constructing five new rail unloading berths along with associated equipment that will allow it to receive and store the propane in its refrigerated storage tanks. Each new berth will offload 2 cars at a time, giving the Facility a total offload capacity of 16 rail cars per day. With this increased capacity, the Facility could receive up to 164 Million gallons of propane per year by rail at maximum utilization.

With its increased rail capacity, SEA-3 will continue to supply the New England market and will also be able to export 1-2 ships of excess propane during the summer months, when local demand drops and the tanks would otherwise reach capacity unless product is sold.

SEA-3's planned improvements will not change the Facility's truck loading rack or its primary storage capacity. If anything, the Facility's truck traffic will decrease as average annual volume will decrease and a portion of that reduced volume will now be exported by ship during

the summer months. Ship traffic to SEA-3's Facility will also decrease from 12-13 ships per year to 1-2.

Following its receipt of SEA-3's application, the Planning Board notified the other municipalities located on the Newington Branch (Portsmouth, Greenland, Stratham and Newfields) pursuant to N.H.R.S.A. § 36:54, which provides for notice to potentially affected communities.

Portsmouth's initial response to the Notice was to advise the Planning Board of its concern regarding the potential impacts of increased rail operations upon Portsmouth in a letter stating:

The potential impacts of this project on the City of Portsmouth relate to the possible storage of rail cars at the rail yard adjacent to North Mill Pond and the increased frequency of rail transport through the City and in particular through the downtown area.

The Portsmouth rail yard abuts the dense McDonough Street neighborhood and faces the Creek and Christian Shore neighborhoods across North Mill Pond. In past years, nighttime idling of locomotives in the yard was a significant problem due to the noise impacts on these neighborhoods. The City is strongly opposed to any change in railroad operations that would include nighttime idling in the rail yard. In addition, the City is opposed to storage of LPG tank cars in the same yard because of the proximity to the McDonough Street neighborhood.

The rail line crosses Maplewood Avenue and Market Street at grade in downtown Portsmouth. These two crossings are currently adequate for the small volume of rail traffic on the line. We understand that while the proposed project will increase the number of tank cars per train, it will not necessarily increase the number of trains passing through the City on a daily or weekly basis. If the frequency of trains were to increase, these at-grade crossings should be evaluated for improvements.

We also understand that the railroad does not anticipate increasing the speed of trains in the City. Nonetheless, we have concerns about the condition of the tracks, and particularly of the bridge over the Route 1 Bypass, and request that the railroad evaluate these conditions and their acceptability for increased usage and potential increases in speed.

See Letter of Rick Taintor, Planning Director, dated December 9, 2014, attached hereto as Exhibit A.

On February 10, 2014, Portsmouth again advised the Planning Board of its concerns, which were again limited to rail operations, stating:

The City is primarily concerned about the public safety implications of increased rail traffic carrying hazardous materials close to neighborhoods and business areas. There are two components to this issue. First we are concerned that this rail corridor has not been maintained adequately to support the level and type of rail use proposed for this project, as reflected by the current limitations on travel speed. Given the lack of rail traffic volume on the corridor to date, it is understandable that the corridor has not been maintained to a higher level. However, the proposed increase in volume of rail traffic combined with the hazardous nature of the cargo warrants a higher standard of maintenance.

The second aspect of our safety concern has to do with the equipment that will be used to transport LPG through the City. It is our understanding that the majority of tank cars carrying propane are not built to the latest industry safety standards.

See Letter of Robert Lister, Mayor, dated February 10, 2014, attached hereto as Exhibit B (emphasis added).

On February 12, 2014, Portsmouth held a staff meeting with representatives from the other communities located on the Newington Branch and the State of New Hampshire. At this meeting, the only issue discussed was the proposed increased rail service through their communities. See Staff Meeting Summary, dated February 12, 2014, attached hereto as Exhibit C.

On February 18, 2014, Portsmouth wrote to U. S. Senator Jeanne Shaheen, asking the Senator to request that a representative of the Federal Railroad Administration appear at the Planning Board to answer questions. In its letter, Portsmouth stated that it was not concerned with the site itself but with the impact of increased rail activity:

As you know the Town of Newington has an application for expansion of the SEA-3 liquefied petroleum gas LPG [sic] at 190 Shattuck Way in Newington. **The City has concerns about the proposed terminal expansion not due to the site plan itself but to the operational changes that will be implemented as a result of the site improvements.**

It is our understanding that the upgraded facility will be receiving propane deliveries by rail 6 days per week, with each delivery consisting of up to 16 rail cars. Each rail trip to or from the Sea-3 terminal will require those trains with tank cars to travel through Portsmouth City streets, six (6) underpass or overpass crossings in the City as well as a number of private property drive crossings. It goes without saying that the safety of the Citizens of Portsmouth and our infrastructure facilities are paramount.

See Letter of Robert Lister, Mayor, dated February 18, 2014, attached hereto as Exhibit D (emphasis added).

On March 6, 2014, Portsmouth stated in a letter to the Planning Board that, “[t]he City of **Portsmouth has concerns with the operational changes specific to rail operations that will be implemented as a result of the site improvements proposed by Sea-3 [sic][Emphasis added].**”

See Letter of Robert Lister, Mayor, dated March 6, 2014, attached hereto as Exhibit E.

On April 9, 2014, Portsmouth advised the Planning Board that:

As you are aware, **the residents of the City of Portsmouth have expressed abundant concern regarding the impact of the SEA-3 project on the public health, safety, welfare and the environment as a result of increased rail traffic through Portsmouth.** On Monday April 7, 2014, the City Council voted unanimously to oppose the approval of this project. As a project that has been designated a project of regional impact, the City Council felt that it was important to go on record in an official capacity to voice its continued concern regarding this project.

In the event that the Newington Planning Board approves the project over the City’s objection, the City requests that the applicant be required to provide a comprehensive safety and environmental plan. **Such a plan would identify risks as well as needed improvements for the purpose of protecting the citizens of Portsmouth from the exponentially increased hazards that will exist as a result of the rail transportation of propane through the heart of the City and along residential neighborhoods.**

See Letter of Robert J. Lister, Mayor, dated April 9, 2014, attached hereto as Exhibit F (emphasis added).

On May 19, 2014, the Planning Board unanimously voted to approve SEA-3's application, supporting its decision with 54 separate findings of fact (hereinafter the "Approval"). A copy of the Approval is attached hereto as Exhibit G.

Portsmouth's Appeals.

On June 16, 2014, Portsmouth signed a Petition that it filed in the New Hampshire Superior Court (The City of Portsmouth v. Newington Planning Board, Rockingham Co. Super. C. Docket No. 218-2014-CV-00654), seeking to overturn the Approval or in the alternative, require a study of the rail impacts (hereinafter "Superior Court Petition"). See Superior Court Petition, attached hereto as Exhibit H.

Also on June 16, 2014, Portsmouth signed an Appeal that it filed with the Newington Zoning Board of Adjustment (ZBA) seeking to overturn the Approval or have it remanded to the Planning Board for further proceedings (hereinafter "ZBA Appeal"). See ZBA Appeal, attached hereto as Exhibit I.¹

Using identical language in its Superior Court Petition and ZBA Appeal, Portsmouth seeks to challenge the Planning Board's Approval, on all grounds, based on its claim of injury caused by rail operations:

38. **Proximity:**

The City of Portsmouth is a community that abuts Newington. Although it does not own property immediately adjacent to the site itself, the City and

¹ N.H.R.S.A. § 677:15, I-a(a) requires that any appeal issue from a Planning Board decision that involves the interpretation of a Town's zoning ordinance must first be resolved by the Town's Zoning Board of Adjustment. All other issues are appealable direct to the Superior Court. In instances such as this, where dual appeals are filed, the Superior Court action is stayed pending resolution of the ZBA appeal. If the ZBA's decision is then appealed, the two appeals will be consolidated in the Superior Court.

Newington share common transportation systems of rivers, roads and rails. In terms of proximity, any catastrophic event at the site would likely require the evacuation of City's residents and the loss of property and damage. **Any significant logistical issues related to bringing materials into the SEA-3 facility by rail would have a substantial effect on the logistics and operations of ordinary traffic and concourse in and for the City of Portsmouth.**

39. Type of Change of Use:

The type of change of use requested by Sea-3 [sic] is an expansion and intensification of use of not only its property, but the shared transportation systems of river, road and rail through the City due to the increase in volume of LPG being delivered, stored, chilled and distributed from the site. Although the Planning Board is not able to unduly restrict the railroad from conduction [sic] operations or unreasonably burden interstate commerce, **its decision to allow Sea-3's [sic] expansion has caused an impact and increased burden on the City by increasing traffic of hazardous material and their associated risks by river, roads and rail through the City.**

40. Immediate Impact:

The impact of Sea-3's [sic] expansion will be immediate because Pan Am has represented that it would be improving the tracks to accommodate a larger volume of LPG transported by rail cars that can travel at higher speeds. The City would be required to improve several rail crossings at an estimated cost of \$2,400,000.00 million dollars. Although part of the cost may be deferred by working with NH DOT, some 20% of these costs will be borne by City taxpayers. Citizens of Portsmouth will not only be obligated to pay for improved roadways at rail crossings, but will be supplementing Newington's Fire Department, given their limited number of firefighters and equipment, in the event of an incident at the site. The City's taxpayers will pay for this burden and will not receive any of the tax benefit Newington receives from Sea-3 [sic]. The City also supplies water to Newington at the site and to the Newington Fire Department and the City's water resources would be impacted in the event of an incident at the site. In addition, on information and belief, there will be a diminution in value of property in the City, specifically those residential neighborhoods that abut the railway, reducing the City's tax base.

See Ex. H at ¶¶ 38-40; Ex. I at ¶¶ 38-40 (emphasis added).

On June 18, 2014, Portsmouth sent a letter to the Governor of New Hampshire, in which it reiterated its concerns regarding the increased rail traffic through Portsmouth, stating:

While the Newington Planning Board performed a thoughtful and deliberate review of this application, there was reluctance on the part of the Planning Board to address the significant impacts on safety this project places on the abutting communities. During the public hearing process, the City specifically requested

that Newington require a safety/hazard assessment to identify the risks and hazards associated with the transporting LPG through the City and other affected communities. Unfortunately, no such stipulation was required of the applicant and the City has appealed the Newington Planning Board's approval of Sea-3's expansion to compel such study.

See Letter of Robert J. Lister, Mayor, dated June 18, 2014, attached hereto as Exhibit J (emphasis added).

A Hearing on Portsmouth's Appeal to the Newington Zoning Board of Adjustment is currently scheduled for August 25, 2014, at which time the ZBA will rule on Portsmouth's request that it overturn the Planning Board's Decision based on Portsmouth's claim that it will be injured by the additional rail traffic.

LEGAL ARGUMENT

As repeatedly confirmed by its statements to the Planning Board and its public statements to New Hampshire's elected officials, Portsmouth's sole objective is to block LPG rail car service from travelling through Portsmouth. As discussed below, any local or state remedy used to achieve this objective, including the requirement of a study or the instigation of non-railroad claims on appeal, to avoid STB jurisdiction, is preempted by federal law.

Pursuant to 49 U.S.C. § 11101, SEA-3 has a legal right to receive common carrier rail service, which entitles it to receive LPG rail cars from Pan Am over the Newington Branch. The Interstate Commerce Act expressly states that the jurisdiction of the Surface Transportation Board over "transportation by rail carriers and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers . . . is exclusive." 49 U.S.C. § 10501(b) (hereinafter "§ 10501(b)"). Upon its enactment, ICCTA:

broadened the express preemption provision of the Interstate Commerce Act to the point that "[i]t is difficult to imagine a broader statement of Congress' intent

to preempt state regulatory authority over railroad operations.” CSX Transp., Inc. v. Georgia Pub. Serv. Comm’n, 944 F. Supp. 1573, 1581 (N. D. Ga. 1996). Section 10501(b) gives the Board exclusive jurisdiction over ‘transportation by rail carriers,’ and the term ‘transportation’ is defined by our statute, at 49 U. S. C. 10102(9), to embrace all the equipment, facilities, and services relating to the movement of property by rail. Moreover, section 10501(b) expressly preempts any state law remedies with respect to the routes and services of Board-regulated rail carriers. Thus, under the plain language of the statute, any state or local attempt to determine how a railroad’s traffic should be routed is preempted.

CSX Transportation, Inc. – Petition for Declar. Order, Finance Docket No. 34662 at 2 (S.T.B. May 3, 2005).

In interpreting the reach of 10501(b) preemption, the Board and the courts have found that it prevents states or localities from intruding into matters that are directly regulated by the Board (e.g. railroad rates, services, construction, and abandonment). It also prevents states or localities from imposing requirements that, by their nature, could be used to deny a railroad’s ability to conduct rail operations. Thus, state or local permitting or preclearance requirements including building permits, zoning ordinances, and environmental and land use permitting requirements are preempted.

Boston and Maine Corporation and Springfield Terminal Railroad Company – Petition for Declar. Order, Finance Docket No. 35749 at 3 (S.T.B. July 19, 2013).

Based on § 10501(b)’s broad reach, any state or local law that allows a non-federal entity to restrict or prohibit a federal rail carrier’s operations is preempted, regardless of whether the state or local law is expressly directed at the carrier’s operations. See, Norfolk Southern Ry Co. v. City of Alexandria, 608 F.3d 150, 158 (2010) (ruling that a city ordinance regulating third party truckers travelling to Norfolk Southern’s transloading facility to pick up ethanol was preempted as an impermissible attempt to regulate transloading operations at the facility itself) (citing Green Mtn. R. R. Corp. v. Vermont, 404 F.3d 638, 643 (2d Cir. 2005)).

Any attempt to have the Planning Board’s Approval overturned based on its refusal to regulate Pan Am’s transportation of LPG rail cars is plainly preempted by § 10501(b).

Portsmouth's alternative request that the Planning Board be compelled to require a study from SEA-3 on railroad impacts as a condition of approval is likewise preempted by § 10501(b) as a *per se* impermissible pre-clearance requirement. See Green Mtn. R. R. Corp. 404 F.3d at 642-43; Norfolk Southern Ry Co., 608 F. 3d at 158; CSX Transportation, Inc. – Petition for Declar. Order, Finance Docket No. 34662 at p. 3 (S.T.B. May 3, 2005).

Over the course of Portsmouth's participation in the public hearings before the Planning Board, it repeatedly stated that it was concerned with the effect of LPG rail traffic upon Portsmouth's citizens. Portsmouth made no other claim and in fact it publicly disavowed any interest in regulating the site itself, as stated in its letter to United States Senator Shaheen. See Ex. D. Furthermore, after Portsmouth filed its Superior Court Petition and ZBA Appeal, it publicly stated to New Hampshire's Governor that its purpose in appealing the Planning Board's Decision was to compel a study of the risks and hazards of transporting LPG through the City. See Ex. J.

Having publicly admitted that its purpose in appealing the Planning Board's Approval is to impose a *per se* impermissible preclearance requirement on rail operations, see Ex. J., Portsmouth should not be allowed to indirectly regulate rail operations by seeking to overturn the Planning Board's Approval on non-railroad issues, particularly when it failed to raise these issues itself at the Planning Board and publicly stated that it had no issues with the site plan. See Ex. D. Given Portsmouth's numerous statements of intent, the Board should not allow Portsmouth to make an end run around federal preemption.

Under New Hampshire law, Portsmouth is required to establish that it has legal standing in order to challenge the Planning Board's Approval at the Superior Court and at the ZBA. See Ex. H ¶¶ 32-48; Ex. I ¶¶ 32-48. To have standing under New Hampshire law, Portsmouth must

prove, among other factors, the immediacy of its claimed injury. See Golf Course Investors of NH, LLC v. Town of Jaffrey, 161 N.H. 675, 680 (2010); Joyce v. Town of Weare, 156 N.H. 526 (2007) (standing will not be given to those who allege a speculative injury).

As set forth in Portsmouth's Superior Court Petition and ZBA Appeal, Portsmouth alleges that it will be injured by increased LPG rail car traffic in Portsmouth:

40. Immediate Impact:

The impact of Sea-3's [sic] expansion will be immediate because Pan Am has represented that it would be improving the tracks to accommodate a larger volume of LPG transported by rail cars that can travel at higher speeds. The City would be required to improve several rail crossings at an estimated cost of \$2,400,000.00 million dollars. Although part of the cost may be deferred by working with NH DOT, some 20% of these costs will be borne by City taxpayers. Citizens of Portsmouth will not only be obligated to pay for improved roadways at rail crossings, but will be supplementing Newington's Fire Department, given their limited number of firefighters and equipment, in the event of an incident at the site. The City's taxpayers will pay for this burden and will not receive any of the tax benefit Newington receives from Sea-3 [sic]. The City also supplies water to Newington at the site and to the Newington Fire Department and the City's water resources would be impacted in the event of an incident at the site. In addition, on information and belief, there will be a diminution in value of property in the City, specifically those residential neighborhoods that abut the railway, reducing the City's tax base.

See Ex. H ¶ 40; Ex. I ¶ 40 (emphasis added).

Portsmouth alleges in its Superior Court Petition and ZBA Appeal that it will be immediately impacted by the Planning Board's Approval because railroad traffic will increase, causing it to spend money to upgrade crossings and devaluing its tax base.² On this basis, Portsmouth claims standing to proceed on all of its Superior Court Petition and ZBA Appeal issues. SEA-3 submits that any state or local proceeding that seeks a remedy for injuries

² The claimed immediate impacts from fire assistance and supplying water to the site already exist. Simply changing the method by which propane is delivered to the site will have no impact on these existing obligations.

allegedly caused by a federal carrier's railroad operations is preempted by § 10501(b), regardless of whether the specific claims are directly related to railroad operations.

As evident from the forgoing, the New Hampshire Superior Court and Newington ZBA are not the proper forums for resolving Portsmouth's concerns with LPG rail traffic:

[A]ny permitting or preclearance regime that could be applied to deny a railroad the right to conduct any part of its operations, or any other attempt by a state or local body to regulate the routing and movement of rail cars, is necessarily preempted under section 10501(b) without regard to the particular circumstances sought to be addressed by the state or local action. Where there is a particular local situation presenting safety or security concerns, those concerns must be directed to the federal authorities charged with assessing them and determining what measures (if any) would be appropriate to address the concerns in a manner that takes into account the operational needs of the national rail network.

CSX Transportation, Inc. – Petition for Declar. Order, Finance Docket No. 34662 at 7 (S.T.B. May 3, 2005). As noted above, if Portsmouth has any safety concerns regarding the Newington Branch rail line, it must address those concerns to the Federal Railroad Administration which is solely responsible for the safety of the Newington Branch rail line under the Federal Railroad Safety Act ("FRSA").

Basis for Emergency Relief.

SEA-3 asks that this Board consider its request on an emergency basis because state and local action to overturn the Planning Board's Approval is imminent and may result in significant delay to the completion of SEA-3's proposed improvements, leading to future fuel shortages in New England.

According to the U.S. Census Bureau's 2009 American Community Survey, approximately 246,499 homes used propane as their primary heat source.³

³ As reported by Warren Wilczewski and Michael Sloan on page 97 of their November 2011 Report titled, Propane Industry Impact on U. S. and State Economies, prepared for the Propane Education and Research Council, portions attached hereto as Exhibit K.

As the only primary storage tank facility in New England with rail access, the Facility plays a critical role in the New England market.

The presence of a primary storage tank facility allows propane to be stockpiled and released during peak-demand, cold-weather months, thereby stabilizing the local propane market and securing a critical energy supply for the New England region.

For decades, New England's propane demand has been met with propane obtained from international sources such as the North Sea, North Africa, the Middle East and Venezuela, brought to New England by ship. In recent years however, international propane prices have increased while at the same time U. S. propane prices have sharply decreased, due to increased supply as the result of new drilling techniques. As a result, domestically-produced propane is now substantially cheaper than internationally-produced propane.

Due to this price difference, it is no longer economically viable to import propane to New England via ship and SEA-3's distribution figures have dropped as a result, as shown by the below table, which sets forth the number of truck transports from SEA-3's Facility on an annual basis as well as the number of truck transports per day for the busiest month of the year, for the period 2009-2013:

Calendar Year	Total Annual Tank Truck Transport Count	Average Daily Tank Truck Transport Count For Peak Month (January)
2009	17,287	158
2010	14,710	133
2011	8,227	105
2012	2,839	40
2013	436	8

With New England's propane primary storage tank facilities now virtually dormant, the region has been forced to rely on rail and truck shipments to satisfy demand on an as-needed

basis. As a result, 75% of all LPG now comes into New England by rail from various production facilities throughout the U. S. and Canada with the remaining LPG being trucked into New England, primarily from the terminus of the TEPPCO pipeline in Selkirk, New York.

The effect of this market change has been to eliminate SEA-3's ability to stockpile propane. As a result, retail propane distributors now face shortages during the critical winter heating season due to supply and logistical bottlenecks as they all compete for the delivery of product at the same peak-demand periods.

As a direct result of these conditions, the New Hampshire Department of Safety declared an emergency last winter on December 27, 2013, allowing interstate truck drivers carrying propane to exceed the hours of service regulations set forth in the Federal Motor Carrier Regulations during the period of the emergency. In declaring this emergency, the New Hampshire Department of Safety specifically cited the shortage of propane at SEA-3's Facility.

As stated in the Department's Declaration of Emergency Notice:

Pursuant to 49 CFR Section 390.23 and New Hampshire RSA 266:72-a, the New Hampshire Department of Safety declares that an emergency exists pertaining to the delivery of propane, gasoline, diesel, and fuel oil to distributors, residential and business establishments within the State of New Hampshire.

The emergency exemption is issued in connection with anticipated emergency conditions from a shortage of propane at Sea-3 in Portsmouth [sic], two major winter storms in a row, and a period of sub-zero temperatures, all of which have resulted in hazardous driving conditions and extra demands on fuel supplies. It is deemed that a declaration of emergency is required to ensure the continuation of these essential services to both residential and commercial establishments and governmental buildings within the State.

See Declaration of Emergency Notice (Title 49 CFR 390.23), dated December 27, 2013, attached hereto as Exhibit J (emphasis added). The conditions that created the propane shortage at SEA-3's Facility last winter will remain unless the Facility's rail capacity is increased.

The Facility's current rail capacity is too small to meet market demand. With just three unloading berths, the Facility can only receive six rail cars per day, or 198,000 gallons, enough to fill just 18 tank trucks per day, falling far short of normal winter market demand. The below table illustrates the amounts involved in both gallons and barrels (42 gallons = 1 barrel):

Unit	Capacity in Gallons	Capacity in Barrels
Tank Truck	11,000 gallons	262 barrels
Rail Car	33,000 gallons	786 barrels
6 Rail Cars	198,000 gallons	4,714 barrels
16 Rail Cars	528,000 gallons	12,571 barrels
Sea-3 Facility's Primary Storage Tanks	23,520,000 gallons	560,000 barrels

Based on its current rail capacity of six cars per day, it would take Sea-3 one hundred and nineteen (119) receiving days to fill its Primary Storage Tanks, assuming no distribution of product. This offload capacity is inadequate to build and maintain a stockpile going into the critical winter heating season. In order for consumers to benefit from the stabilizing effect of Sea-3's Primary Storage Tank Facility, and avoid future fuel emergencies, Sea-3 must be allowed to increase its railcar off-loading capacity.

Any significant delay in proceeding with SEA-3's proposed improvements at this point in time will likely push the project completion date beyond the 2015-2016 winter heating season, meaning that New England's propane consumers will have to go at least two more winters without a fully operational primary storage facility in the region.

CONCLUSION AND REQUESTED RELIEF

As made clear by Portsmouth's public statements and actions, its sole objective in filing its Superior Court Petition and ZBA Appeal is to block LPG rail traffic from travelling through Portsmouth. As made clear by the Board in CSX Transportation, Inc. – Petition for Declar. Order, Finance Docket No. 34662 at 2 (S.T.B. May 3, 2005), any local or state attempt to direct

railroad traffic is preempted. Also preempted are any indirect attempts to regulate rail traffic by imposing pre-clearance requirements such as a study or by raising non-railroad claims in an effort to regulate rail operations without triggering federal preemption. Any state or local remedy that is sought as a means to regulate railroad operations is preempted.

Based on the Board's broad authority under 5 U.S.C. § 554 and 49 U.S.C. § 721(a) to issue a declaratory order to eliminate a controversy or remove uncertainty, SEA-3 requests that the Board promptly issue an order:

- A. Declaring that all claims made in Portsmouth's Superior Court Petition and ZBA Appeal are preempted by § 10501(b) ; or, in the alternative
- B. Declaring that all claims made in Portsmouth's Superior Court Petition and ZBA Appeal which are derived from or in any way dependent upon an allegation that Portsmouth will be adversely affected as the result of rail transportation are preempted by § 10501(b); and
- C. Granting such further relief as the Board deems proper.

Respectfully submitted,



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Portsmouth, NH 03801
(603) 436-3110

Counsel for Petitioner SEA-3, Inc.

Dated: August 1, 2014

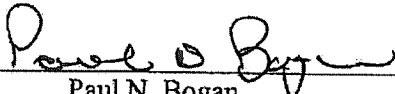
SEA-3, Inc. 000020

VERIFICATION

I, Paul N. Bogan, declare under penalty of perjury that the foregoing is true and correct.

Further, I certify that I am qualified and authorized to file this pleading.

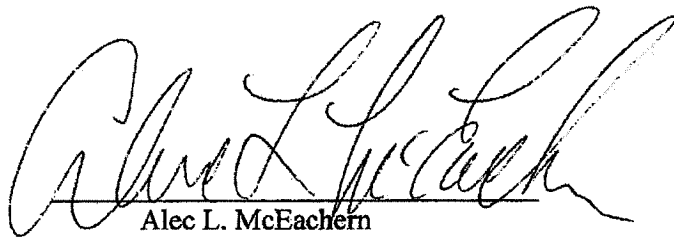
Executed on July 31, 2014.


Paul N. Bogan

STATEMENT REGARDING SERVICE

I hereby certify that on this 1 day of August, 2014, I have served the Defendant in this proceeding with this document by United States Mail as follows:

Robert P. Sullivan, City Attorney
City of Portsmouth
1 Junkins Avenue
Portsmouth, NH 03801



Alec L. McEachern

Counsel for Petitioner SEA-3, Inc.