FLETCHER & SIPPEL LLC
ATTORNEYS AT LAW

29 North Wacker Drive
Suite 800
Chicago, Illinois 60606-3208

Phone: (312) 252-1500
Fax: (312) 252-2400
www.fletcher-sippel.com

ROBERT A. WIMBISH
(312) 252-1504
rwimbish@fletcher-sippel.com

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Ms. Cynthia T. Brown
Chief Section of Administration
Office of Proceedings
Surface Transportation Board
395 E. Street SW, Room 1034
Washington, DC 20024

Re: FD 36623
Rail Line Abutting Landowners – Verified Petition for Declaratory Order

Dear Ms. Brown,

The Massachusetts Bay Transportation Authority ("MBTA") hereby responds in opposition to the June 22, 2022 Verified Petition for Declaratory Order (the "Petition") filed in this docket by a consortium of residents of Middlesex County, Massachusetts (the "Landowners") all of whom, it appears, wish to block the installation of a subsurface electricity transmission line within a corridor of land (the "Corridor") held in fee by MBTA. For the reasons set forth herein, the Surface Transportation Board ("Board") should deny as premature the Landowners' request for a declaratory order. However, if the Board were to deem formal action on the Petition warranted under the circumstances, then MBTA would be receptive to a declaratory ruling that – (a) the Board does not have jurisdiction over the corridor due actions taken decades ago terminating the corridor's status as a line of railroad; and (b) MBTA has no common carrier status or obligations with respect to the Corridor.

The Petition appears to be the latest attempt to block the installation of a subsurface electricity transmission line along MBTA-owned land (the Corridor) that formerly had served as the right-of-way of a railroad line known historically as the Central Massachusetts Branch of the Boston & Maine Corporation ("B&M"), a branch line that originated at Clematis Brook Station east of Waltham, Massachusetts, extended westward through Sudbury and other communities, and terminated at Marlborough, Massachusetts. MBTA has reached an agreement with Eversource Energy ("Eversource") to install the aforementioned subterranean power line – a

project favored by the Commonwealth of Massachusetts – despite repeated efforts by certain local individuals to block the project by way of various failed legal maneuvers before the Board, Commonwealth agencies, and the state courts.

A previous effort before the Board to thwart the power line installation project was spearheaded by a group calling itself Protect Sudbury, Inc. ("PSI"),[1] a Sudbury-based non-profit organization that had argued to the Board that installation of the power line along the Corridor would conflict with MBTA's alleged common carrier obligations. To that end, PSI filed a petition seeking a Board declaration that MBTA has residual common carrier obligations over the Corridor. PSI contended that the power line installation would be inconsistent with the common carrier obligations that PSI wanted the Board to find MBTA possessed. The Board, however, declined to render the declaratory order that PSI had hoped for. MBTA hereby incorporates into this reply by reference its April 30, 2022 response to the PSI petition for declaratory order (the "Reply to PSI") and the Board's decision served in that proceeding – *Protect Sudbury Inc. – Petition for Declaratory Order*, FD 36493 (STB served Feb. 2, 2022) ("*PSI – Declaratory Order*"). See Exhibits A and B, respectively. Both the Reply to PSI and the Board's order adequately set forth the pertinent background facts.

The Landowners – represented by the same legal counsel that advanced PSI's Eversource project obstruction efforts – are trying a different approach to the same PSI objective. Drawing from passages in *PSI – Declaratory Order* dealing, essentially, with the issue of PSI standing, the Landowners contend that a Board-issued declaratory order is needed to resolve whether the persons listed in the Petition have "possible property rights" (Petition, 11) in the Corridor. As MBTA understands it, the Landowners suggest, without conviction, that they "may have reversionary rights" (Petition, 2) in the portion of the Corridor that abuts the land that each landowner party owns. These Landowners, it appears, hope to invoke their "possible property rights" – if the Board were to find that the Corridor is beyond the scope of the Board's jurisdiction – to block the Eversource project.

The Landowners acknowledge, however, that shortly after MBTA acquired B&M's interest in the Corridor (subject to B&M's retention of a freight common carrier easement that B&M subsequently terminated), MBTA took the added step in 1977 of securing a fee simple interest in the land comprising the Corridor. Petition, 6 ("The land was taken in fee simple."). These details are reflected in the Petition, and are also recounted in the Reply to PSI and *PSI – Declaratory Order*, both attached and incorporated herein by reference.

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[1] The President of PSI appears to be among the Petition-filing Landowners.

Of course, it would stand to reason that if MBTA had secured fee interests in the land comprising the Corridor some 45 years ago, then the Landowners would have no reversionary rights in the Corridor and, hence, no property interests to invoke. To address this glaring property interest gap, the Landowners question (by way of what appears to be a sentence fragment), whether MBTA's 1977 "action" in securing fee simple interests in the Corridor was legitimate. Petition, 7. But the Landowners are not actively challenging MBTA's Corridor property interests in state court; MBTA is unaware of any such pending action against it.

Given, among other things, MBTA's continuous possession and asserted fee interests in the Corridor since 1977, the Landowners' bald allegation concerning the legitimacy of MBTA's longstanding property interests in the Corridor is entirely meritless, as is the Landowners' perfunctory and unsupported claim that certain abutting property owners "would have an interest in freight rail service if the Line [were to be] reactivated" (Petition, 3). Under applicable Massachusetts law, aggrieved landowners have three years to seek damages for a taking,[2] and three years to challenge the lawfulness of a taking under G.L. c. 79.[3] The Landowners are 42 years too late to challenge the taking in Massachusetts court, and appear to have initiated this proceeding in some sort of an effort to bypass otherwise-controlling state law.

MBTA also disputes the Landowners' vague accusation of procedural irregularity in connection with MBTA securing a permanent interest in the land comprising the Corridor in 1977. Even if such accusations were true (and they are not), then relief to undo the taking would be time-barred.[4] Indeed, MBTA questions why such allegations are surfacing now, some 45 years later, considering the significance and extent of the taking.[5] For all of the foregoing

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[2] G.L. c. 79, § 16.

[3] *Cumberland Farms, Inc. v. Montague Economic Development and Industrial Corp.*, 38 Mass. App. Ct. 615, 616 (1995).

[4] *See Whitehouse v. Town of Sherborn*, 11 Mass. App. Ct. 668, 675 (1981). Moreover, "failure to give notice to one whose land is seized by eminent domain does not invalidate the taking." *Merrymount Co. v. Metropolitan Dist. Commission*, 272 Mass. 457, 464-465 (1930).

[5] Similarly, MBTA vigorously disputes the Landowners' frivolous and baseless contention that MBTA's retention, and current deployment, of the corridor is somehow at odds with the original purpose behind securing fee simple interests in 1977. (Petition, 7 "Moreover, the stated purpose of the Taking has never been met . . ."). To the contrary, MBTA acquired B&M's interest in the Corridor and shortly thereafter secured fee interests in the land in order to preserve the Corridor as a strategic asset for the possible future restoration of commuter rail service, should circumstances warrant. MBTA utilized applicable state law processes to effectively "rail bank" the line for future passenger rail purposes without the need to rely upon federal preemption and the Trails Act to do so. Moreover, MBTA's arrangements with Eversource and

reasons, it is doubtful that the MBTA had an obligation to provide the Landowners with notice of the taking in 1977. It is less likely that the Landowners had a right to damages arising from this taking. But, regardless, even if the Landowners had been entitled to notice of the taking and to damages due to the lack of such notice in 1977 (if such could be proven in the first place), they have no right under Massachusetts law to challenge the legitimacy of the taking today.

As matters now stand, either – (a) the Corridor remains an unabandoned line of railroad subject to the Board's jurisdiction, in which case the Landowners are legally unentitled to invoke any "possible property rights" that would extinguish MBTA's interest in the Corridor; or (b) the Corridor is beyond the scope of the Board's jurisdiction (*i.e.*, is no longer a line of railroad), in which case MBTA's fee ownership directly conflicts with the Landowners' asserted "possible property rights," which "possible property rights" are, at the very best, mere legal speculation, if not legally-meritless wishful thinking. In either case, the requested declaratory order would resolve nothing with respect to Corridor disposition.

This agency has been consistently, and wisely, loathe to exercise its broad discretion to entertain a declaratory order request presented prematurely, especially where the requesting party has not offered a fully-formed case or controversy warranting the commitment of Board resources to resolve, and where the factual allegations undergirding the Petition are speculative at best.[6] For the reasons supplied above, the Petition is unripe for adjudication and, accordingly, Board declaratory action would be premature. Here, the Landowners lack an essential predicate to warrant a Board determination on the legal status of the Corridor – specifically, legally-established reversionary interests in the property. And unless and until the

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the Massachusetts Department of Conservation and Recreation (the latter responsible for the maintenance and upkeep of the Corridor for recreational purposes) contemplate the future deployment of the Corridor for railroad transportation purposes. As such, MBTA has retained the Corridor consistent with the agency's passenger rail service mandate.

[6] *See*, *e.g.*, *Association of American Railroads – Petition for Declaratory Order*, FD 36369 (STB served Dec. 30, 2020); *Commuter Rail Division of the Regional Transportation Authority and Northeast Illinois Regional Railroad Corporation – Petition for Declaratory Order – Status of Chicago Union Station*, FD 36171 (STB served Aug. 22, 2018); *San Luis & Rio Grande Railroad – Petition for Declaratory Order*, FD 35380 (STB served Jul. 25, 2011); Fletcher Granite Company, LLC – Petition for Declaratory Order, FD 34020 (STB served June 29, 2001); *CSX Corporation and CSX Transportation, Inc. – Control and Merger – Conrail Inc. and Consolidated Rail Corporation*, FD 33220 (Decision No. 5) (STB served Jan. 9, 1997) (declining to issue a declaratory order in connection with a proposed agreement that arguably could have permitted otherwise unaffiliated carriers to control the other without appropriate Board authorization, where the agreement was subject to carrier shareholder vote that had not yet occurred – thus rendering Board declaratory action premature).

Landowners undo MBTA's fee simple interest in the land comprising the Corridor (secured in 1977), a Board declaration would be irrelevant.

Should the Board elect, despite the clear prematurity of the Petition, to initiate a proceeding and rule on the jurisdictional issue as the Landowners have urged, then MBTA submits that the evidence and relevant jurisprudence supports a finding that the Corridor no longer falls within the scope of the Board's jurisdiction for reasons set forth previously in MBTA's Reply to PSI (Exhibit A) at 5-10. As explained in the Reply to PSI, MBTA does not have, and has never purported to have, a common carrier status (or attendant obligations) with respect to the Line, and its actions for more than 45 years consistently support such a determination (if such a ruling were necessary in the first place).

For the foregoing reasons, the Landowners' Petition (the latest in a concerted effort to block Eversource's subterranean transmission line installation along the Corridor in keeping with Commonwealth plans) should be denied as manifestly premature, despite all appearances that the transmission line's opponents may be spoiling to "out-Barrington" the Village of Barrington, Illinois.[7] And, while the Petition should be denied as unripe for adjudication by the Board in keeping with precedent, MBTA would nevertheless be receptive to a Board order declaring that the Corridor falls outside of the scope of the agency's jurisdiction.

Respectfully submitted,

/s/ R. A. Wimbish
Robert A. Wimbish
Attorney for Massachusetts Bay Transportation Authority

Attachments (Exhibits A and B)

cc: All parties of record

[7] *Canadian National Railway Company and Grand Trunk Corporation – Control – EJ&E West Company*, FD 35087 (Sub-No. 8) (STB served Aug. 30, 2019) (denying the Village of "Barrington's fifth petition to reopen this proceeding requesting substantially the same relief.").

FD 36623

Rail Line Abutting Landowners – Verified Petition for Declaratory Order

REPLY OF MASSACHUSETTS BAY TRANSPORTATION AUTHORITY

EXHIBIT A

BEFORE THE
SURFACE TRANSPORTATION BOARD

FD 36493

PROTECT SUDBURY INC. –
VERIFIED PETITION FOR DECLARATORY ORDER

REPLY OF MASSACHUSETTS BAY TRANSPORTATION AUTHORITY

Robert A. Wimbish
Bradon J. Smith
Fletcher & Sippel
29 North Wacker Drive
Suite 800
Chicago, Illinois 60606-3208
(312) 252-1500

ATTORNEYS FOR MASSACHUSETTS BAY TRANSPORATION AUTHORITY

Dated: April 30, 2021

BEFORE THE
SURFACE TRANSPORTATION BOARD

FD 36493

PROTECT SUDBURY INC. -
VERIFIED PETITION FOR DECLARATORY ORDER

REPLY OF MASSACHUSETTS BAY TRANSPORTATION AUTHORITY

The Massachusetts Bay Transportation Authority ("MBTA"), hereby responds to the March 11, 2021 Verified Petition for Declaratory Order (the "Petition") filed in this docket by Protect Sudbury Inc. ("PSI"). For the reasons set forth herein, the Surface Transportation Board ("Board") should deny PSI's request for a declaratory order, because there is no genuine case or controversy warranting Board action based upon the facts presented. In the alternative, the Board may, if necessary, hold that – (1) MBTA did not become a common carrier with respect to the property that is the subject of this proceeding; (2) actions initiated by Boston & Maine Corporation ("B&M") in 1979 and 1980 (as discussed below) terminated federal regulatory jurisdiction over the subject property decades ago. Barring such a holding, the Board could (again, if it were to deem it necessary) instruct that it would terminate its jurisdiction over the subject corridor provided that B&M, the last and only common carrier on it, were to request and receive supplemental authority to abandon the easement interest in the corridor that B&M had relinquished pursuant to a bankruptcy court order in 1980.

BACKGROUND

The facts of this case, most of which are drawn from the Petition, are not generally in dispute, and, in summary, are as follows:

- PSI is a non-profit organization based in the Town of Sudbury, Massachusetts (the "Town" – a suburban community west of Boston). It is opposed to the installation of all power lines along or within MBTA-owned property in Sudbury. Petition, 2. PSI is neither a shipper nor does it appear to be aligned with any shipper located in or nearby to Sudbury seeking rail service. PSI's objective in this proceeding is to try to persuade the Board to block MBTA's arrangements with Eversource Energy ("Eversource") pursuant to which Eversource would install and maintain a subsurface electricity transmission line on MBTA-owned property.

- The MBTA-owned property within which Eversource would install its transmission line was once part of a railroad line owned by B&M that historically was known as the Central Massachusetts Branch, a branch line that originated at Clematis Brook Station east of Waltham, Massachusetts, extended westward through Sudbury and other communities, and terminated at Marlborough, Massachusetts (also referred to in B&M records as "Marlboro"). See B&M Employee Timetable #17 (April 28, 1968), 21 (Exhibit A). Another branch line extended from the Central Massachusetts Branch at Gleason Junction (east of Hudson, Massachusetts) to Berlin, Massachusetts. Id., 22. (Collectively, the Central Massachusetts Branch and the Gleason Junction-Berlin branch will be referred to herein as the "Lines.")

- In 1976, the Trustees of the then-bankrupt B&M (the "Trustees") arranged to sell all of B&M's "right, title, and interest" in right-of-way and rail and track assets (the "Property") comprising the Lines to MBTA, subject, however, to B&M's retention of an easement under which B&M would retain the exclusive rights to provide common carrier freight service over the Lines, and subject to B&Ms' obligation also to maintain the Lines. Petition, 5. The Lines were among a group of "freight only" lines over which MBTA had no current plans to establish commuter rail service. Id. The Lines have not seen regular passenger service since 1971, when South Sudbury-Boston commuter service ended. See id, 21 (reflecting the passenger schedule as of 1968).

- To solidify and expand its ownership interest in the Lines, MBTA, following its purchase of the Property from the Trustees, secured through process of state law, a fee simple interest in the land comprising the Lines' right-of-way in 1977. Id.

- To the best of MBTA's knowledge, at such time as MBTA acquired the property, it did not seek or obtain authorization from the Interstate Commerce Commission ("ICC") to acquire, or to provide common carrier service over, the Lines, and it has never sought such authorization from the ICC or the Board thereafter. Consistent with B&M's retention of an exclusive freight common carrier service easement, MBTA has never purported to be a rail common carrier over the Lines and it has never held itself out to the public to provide freight common carriage.

- The Deed (formally entitled as an "Indenture," but which PSI refers to in its Petition as the "Deed") negotiated between MBTA and the Trustees at the time of the sale of the Property contemplated, among other things, that B&M's future termination of freight service over any portion of the Lines, would be accomplished by way of an abandonment proceeding before the ICC. See id., Exhibit B (Deed), 22. Furthermore, the Deed provided that, once B&M had "legally abandoned" service over all or any portion of the Lines, B&M's easement in that portion of the Property "shall terminate . . . regardless of whether such abandonment was at the request of [MBTA] or whether it was upon the Trustee's own motion." Id., Exhibit B (Deed), 24.

- In 1979, the Trustees initiated proceedings before the ICC seeking authority to abandon the Lines pursuant to the Milwaukee Railroad Restructuring Act. Id., 6. In a decision served on April 1, 1980 (the "ICC Order"), the ICC acted favorably on the Trustees' application, but, in the process, held that B&M could only seek to discontinue common carrier operations over the Lines, since MBTA owned the Property comprising the Lines, and not B&M. Hence, the ICC recommended to the United States District Court for the District of Massachusetts (the "District Court") that B&M be permitted permanently to discontinue common carrier service over the Lines. In turn, the District Court, in an order dated October 3, 1980 (the "Court Order"), permitted such discontinuance in keeping with the ICC's recommendations.

- Neither the ICC Order nor the Court Order addressed the post-discontinuance legal status of the Property or MBTA's rights or obligations related to it, if any. However, each Order clearly presumes that, upon the discontinuance of B&M's common carrier service over the Lines, affected freight customers would lose access to railroad service permanently. Neither Order ascribes to MBTA a common carrier status or a residual common carrier obligation to provide service to customers on the Line in place of B&M.

- Although it neglected to point this out in its Petition, the Town sought, unsuccessfully, to block MBTA's land use arrangements with Eversource to install an electricity transmission line within the Property. Specifically, on September 27, 2017, the Town initiated legal action in Massachusetts Land Court, arguing that the state law "prior public use doctrine" barred the MBTA-Eversource lease intended to facilitate Eversource's installation of an underground electricity transmission line in Sudbury. The Land Court dismissed the Town's suit, ruling that the prior use doctrine did not apply to the facts of the case. The Town appealed the Land Court's decision, ultimately leading to a unanimous ruling of the Massachusetts Supreme Judicial Court ("SJC") upholding the Land Court's dismissal order in favor of MBTA. (The SJC decision is attached as Exhibit B). MBTA and other Commonwealth agencies have welcomed the SJC's decision as providing valuable certainty to public landholders — from agencies to municipalities to redevelopment authorities — who are pursuing innovative public-private partnerships, whether in the form of arrangements such as the MBTA-Eversource lease at issue here, affordable housing, renewable energy, or other such partnerships.

- Separately, PSI and the Town have has challenged the transmission line project by challenging the issuance of a permit by the Massachusetts Department of Public Utilities. The matter is currently pending before the SJC.

Based upon the foregoing facts, it is evident that the subject Petition is PSI's attempt at an end-run around previously-concluded and currently-pending state court actions, and that PSI hopes through the petition to persuade the Board to override applicable state law upholding MBTA's prerogative.

ARGUMENT

The Board may under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 issue a declaratory order for purposes of terminating a controversy or resolving uncertainty, and it has broad discretion not to initiate such a proceeding where, as here, the Petition is neither significant to the Board's federal mandate to protect common carrier service, and where the purported "controversy" is not ripe for adjudication.[1]

As discussed herein, there is no reason for the Board to initiate a declaratory order proceeding, since PSI's Petition is predicated upon non-existent common carrier obligations and a purely hypothetical assumption of future demands for railroad service that ended decades ago. MBTA has never been a rail common carrier on the Lines, and PSI has offered no evidence demonstrating otherwise. Indeed, no one has had a common carrier service obligation with respect to the Lines as of the District Court's ruling permitting B&M – the last and only railroad

[1] *See Intercity Transp. Co. v. United States*, 737 F.2d 103 (D.C. Cir. 1984); *Delegation of Auth. – Declaratory Order Proceedings*, 5 I.C.C.2d 675 (1989); *Commuter Rail Division of the Regional Transportation Authority and Northeast Illinois Regional Commuter Railroad Corporation – Petition for Declaratory Order – Status of Chicago Union Station*, FD 36171 (STB served Aug. 22, 2018) ("*Chicago Union Station*"), 4 (Amtrak's hypothetical, prospective threat to cut off access to station facilities owned by a rail common carrier is not sufficient basis for Board declaratory action regarding the jurisdictional status of Chicago Union Station – a declaratory order would be "premature at this time").

common carrier on the Lines – to terminate operations and extinguish its easement interest. Nothing in the ICC Order or the Court Order contemplated that the Lines would remain subject to federal regulatory oversight post-discontinuance, and there is no reason to assume from either Order that the ICC would (or could) retain jurisdiction over the Property.

1. PSI's Petition should be denied as premature for agency adjudication.

Assuming for the sake of argument that MBTA possessed a common carrier status with respect to the Lines (and, as explained below, it does not), PSI is not a prospective freight customer, and is not joined in its Petition by any entity that asserts an interest in MBTA-provided freight common carrier service over any portion of the Lines. Absent an actual demand for, or a clearly-emerging interest in, rail service (some 40 years following B&M's cessation of operations), a declaratory order would be premature, and, for that reason alone, PSI's Petition should be denied in keeping with *Chicago Union Station*. Board action based upon PSI's hypotheticals is unwarranted, and the Petition is thus unripe for adjudication.[2]

2. MBTA does not have, and never had, a common carrier obligation with respect to the Lines, which were removed from the scope of ICC jurisdiction 40 years ago.

PSI's efforts to block the installation of Eversource's transmission line depend entirely upon its unfounded assumption that – (1) the Lines remain subject to the Board's jurisdiction; and, as a consequence (2) MBTA, as owner of the Property, has a common carrier

[2] Taking this line of argument to its logical conclusion – that is, assuming that MBTA were a common carrier with respect to the Lines – the Petition does not establish that MBTA would not or could not either – (a) take action immediately following such a finding from the Board to terminate entirely the Board's jurisdiction over the Lines (as they have been inactive for over 40 years), or (2) in the face of a reasonable (and remunerative) demand for common carriage, timely restore the Line to operating condition. For these reasons, also, Board action act on the Petition would be premature.

obligation to provide railroad service, should such an interest in service materialize. Neither premise is correct.

PSI has not offered a shred of evidence to prove that MBTA has ever sought or obtained federal authorization to hold itself out to the public to provide common carrier service over the Property. MBTA is unaware of any ICC proceeding under which MBTA sought authorization to acquire the Property or to hold itself out to offer common carrier service to the public over it, and MBTA can conceive of no reason why it would ever have done so. Rather, the materials appended to PSI's Petition show that MBTA was contractually prohibited from providing such service. See Petition, Exhibit B (Deed), 5-6. None of the materials in the record contradict the proposition reflected in the Deed that B&M alone would hold the right and obligation to provide common carrier service over the Lines. Neither the ICC Order nor the Court Order contains an affirmative finding that MBTA is a common carrier as a consequence of its ownership interests in the Property.

It is abundantly clear that, in the ICC Order, the ICC recommended to the District Court to permit the Lines to be removed from the scope of federal regulatory oversight, and the District Court, in turn, permitted the Lines to cease functioning as lines integral to the interstate railroad network. That the ICC and the District Court both intended such an outcome is reflected in the assumptions contained in both the ICC Order and the Court Order that PSI supplied with its Petition that B&M's effectuation of discontinuance would end permanently shipper access to common carrier service over the Lines. If either the ICC or the District Court determined that MBTA, due to its ownership interest in the Property, had a residual common carrier obligation over the Lines, such an observation surely would have surfaced in one or both of the Orders, but neither Order imputes to MBTA a common carrier status or obligation. Each Order accepts that

common carrier service over the Lines would permanently cease upon termination of B&M's easement interest. The notion generally posited by PSI that the ICC intended to retain jurisdiction over the Property when the ICC also recognized that no one would have a common carrier obligation over it after the termination of B&M's common carrier easement is illogical.

PSI's Petition turns upon an unintended consequence of the ICC's and the District Court's re-classification of B&M's application as one seeking *discontinuance* authority rather than *abandonment*. On that note, it is important to remember that, in seeking to terminate B&M service over the Lines (and, in so doing to extinguish B&M's exclusive freight service easement permanently), the Trustees back in 1979 purposely filed for authorization to *abandon* service. In hindsight, given more recent precedent discussed below, B&M's effort to relinquish its common carrier service easement by way of an abandonment proceeding was proper and in keeping with a 2010 proceeding accepting and authorizing B&M's abandonment of its common carrier service easement interest in another railroad line whose assets MBTA also had acquired subject to B&M's retained easement.[3]

a. Under agency precedent emerging years after the B&M-MBTA transaction, it is clear that MBTA did not assume a common carrier status in acquiring the Property; B&M alone held common carrier obligations over the Lines until it relinquished its easement interests in 1980.

Agency jurisprudence after 1980 reinforces (in retrospect) that MBTA's ownership interests in the Property were not, and are not, subject to the Board's jurisdiction. Specifically, had the subject MBTA-B&M transaction happened, for example, in 1992, rather than in 1976, it likely would have been presented to the agency in the context of a *State of*

[3] *Boston & Maine Corporation – Abandonment Exemption – In Essex, Middlesex, and Suffolk Counties, Mass.*, AB-32 (Sub-No. 71X) (STB served Jul. 22, 2010) ("*Saugus Branch*").

Maine[4] proceeding, in which the agency would have addressed and resolved whether the proposed transaction required Board authorization, and, by extension, whether the MBTA would obtain a common carrier status over the Lines if it were to engage in the transaction, despite B&M's retained freight common carrier service easement. In explaining the *State of Maine* Construct, the Board has repeatedly stated as follows:[5]

> But when the carrier selling a rail line retains an exclusive, permanent easement to provide common carrier freight service and has sufficient control over the line to carry out its common carrier obligations, the Board typically has found that authorization is not required and that ownership of the line remains with the selling carrier for purposes of § 10901(a)(4). *See [State of Maine*], 8 I.C.C. 2d 836-37; *Mich. Dep't of Transp. – Acquis. Exemption – Certain Assets of Norfolk S. Ry.*, FD 35606, slip op. at 3 (STB served May 8, 2012); *Mass. Dep't of Transp. – Acquis. Exemption – Certain Assets of CSX Transp., Inc.*, FD 35312, slip op. at 6 (STB served May 3, 2010), *aff'd sub nom. Bhd. of R.R. Signalmen v. STB*, 638 F.3d 807 (D.C. Cir. 2011).

Thus, we now understand from *State of Maine*, its administrative progeny, and federal case law upholding such agency precedent (discussed above) that a public entity such as MBTA may acquire railroad assets and right-of-way from a railroad common carrier and yet avoid assuming a common carrier obligation as a result of such a transaction, provided that the selling railroad retains a permanent and exclusive easement entitling the seller, and the seller alone, to provide common carrier service over the assets to be conveyed, just as B&M did here.

Although *State of Maine* did not yet exist at the time, the concepts embodied in that precedent are nevertheless reflected, in turn, in the ICC Order and the District Court Order.

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[4] A proceeding before the Board so named for the seminal case *Me. Dep't of Transp. – Acquis. & Operation Exemption – Me. Cent. R.R.*, 8 I.C.C. 2d 835 (1991) ("*State of Maine*").

[5] *E.g., Massachusetts Department of Transportation – Acquisition Exemption – Certain Assets of CSX Transportation, Inc.*, FD 35892 (STB served Mar. 19, 2015), 3; *Massachusetts Department of Transportation – Acquisition Exemption – Certain Assets of Pan Am Southern LLC*, FD 35863 (STB served Dec. 24, 2014), 2; *Central Puget Sound Regional Transit Authority – Acquisition Exemption – Certain Assets of City of Tacoma in Pierce County, Wash.*, FD 35812 (STB served Oct. 27, 2014), 2-3.

Specifically, neither the ICC nor the District Court presumed that MBTA was a common carrier with respect to the Lines, given MBTA's easement-restricted ownership interests, or, by extension of such an assessment, that MBTA had any residual common carrier obligations to fulfill on the Lines following B&M's departure. Implicitly, then, the two Orders uphold the concepts set forth in *State of Maine* by tacitly imputing no common carrier obligation to the bundle of easement-restricted assets that MBTA had acquired in 1976 – the Property.[6] Furthermore, regardless of the nomenclature that the ICC and the District Court chose to employ in authorizing the termination of B&M's common carrier obligations ("discontinuance" as opposed to "abandonment"), those Orders clearly served nevertheless to remove the ICC's jurisdiction from the Lines. Were it otherwise, the ICC would have discussed MBTA's residual obligations in light of the termination of B&M service, but it did not.

b. PSI's Petition elevates form over substance by claiming that the ICC's use of the term "discontinuance" signaled the ICC's determination to retain jurisdiction over MBTA's ownership interest in the Property – the ICC intended for the Lines to be removed from the scope of its jurisdiction upon a District Court order approving the cessation of B&M service.

PSI's Petition overlooks the fact that, had B&M sought to terminate its easement interests in the Lines after *State of Maine*, the ICC (or the Board) would have authorized abandonment of the easement, rather than limiting relief, nominally, to discontinuance. The aforementioned *Saugus Branch* abandonment proceeding reinforces that this is so. That is also in keeping with post-*State of Maine* decisions effectively holding that the Board's jurisdiction extends to the holder of the easement and the common carrier services it provides pursuant to its

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[6] *See also Boston and Maine Corporation – Lease and Trackage Rights Exemption – Springfield Terminal Railway Company*, FD 390993 (ICC Decided March 12, 1987), 1987 WL 97642 at *2, n. 1 (in which the ICC did not question B&M's contention that MBTA's acquisition of track assets and rights-of-way from the Trustees, subject to B&M's retained easement rights, did not cause MBTA to become a rail common carrier).

easement interests, and that the public owner of the underlying assets to which the easement relates does not become a rail carrier subject to the Board's jurisdiction by virtue of the absence of any transfer of the seller's retained rights and obligations to provide common carrier service.[7] Accordingly, the agency has clarified that, under the *State of Maine* construct, the termination of a common carrier easement marks the end of the Board's interest in, and jurisdiction over, the subject corridor, and as such, is a step that requires abandonment authorization.[8] Here, PSI attempts to take advantage of the nominal distinction between "abandonment" and "discontinuance" that emerged only after the B&M abandonment/discontinuance proceedings in 1979-80 to argue baselessly that the ICC intended to retain jurisdiction over the Lines by recommending discontinuance, where the substance of the ICC Order clearly provides otherwise. Since the B&M abandonment/discontinuance proceedings reflect no assumption that MBTA had (or would acquire or retain) any common carrier obligation in the Lines, the ICC Order permitted, and the Court Order effectuated, the termination of the ICC's jurisdiction over the Lines. Accordingly, since 1980, the Property is free of any ICC or Board regulatory oversight. MBTA may therefore do as it wishes with the Property in accordance with state law.

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[7] *See, e.g., Santa Cruz County Regional Transportation Commission – Petition for Declaratory Order*, FD 36213 (STB served Oct. 24, 2018), 3; *Rail-Term Corp. – Petition for Declaratory Order*, FD 35582 (STB served Nov. 19, 2013), 11; *State of Texas (acting by and through the Texas Department of Transportation – Acquisition Exemption, West Texas & Lubbock Railroad Company, Inc.*, FD 33889 (STB served Mar. 6, 2001), 4.

[8] *See, e.g., Union Pacific Railroad Company – Abandonment of Freight Easement – In Adams County, Colo.*, AB 33 (Sub-No. 323X) (STB served Feb. 19, 2016); *Massachusetts Department of Transportation – Acquisition Exemption – Certain Assets of Housatonic Railroad Company, Inc.*, FD 35866 (STB served Dec. 24, 2014), 3 (stating that the easement-holding railroad's easement interest "can be terminated permanently only pursuant to a Board abandonment proceeding"); *New Jersey Transit Corporation – Acquisition Exemption – Norfolk Southern Railway Company*, FD 35638 (STB served Mar. 27, 2013), 5 ("We are satisfied that this freight easement retained by NSR is permanent because, under the agreement, freight service can be terminated only through obtaining Board authority to abandon service") (footnote omitted); *cf. Saugus Branch*.

c. Given the ICC's and the District Court's unmistakable intent to terminate ICC jurisdiction over the Lines, the Board could easily effectuate such intent, if not already accomplished, by appropriate remedial action, thereby eliminating any arguable uncertainty as to the legal status of the Property.

Because the ICC and the District Court did not intend for the ICC to retain nominal jurisdiction over the Lines after the B&M terminated its common carrier easement interests, the Board, if it were to deem it appropriate or necessary to do so, could clarify here that the 1979-80 proceedings culminated in District Court action that, in view of subsequent *State of Maine* precedent, terminated the ICC's jurisdiction over the Lines and accomplished an abandonment of the common carrier easement, the ICC's discontinuance nomenclature notwithstanding. Alternatively, if the Board were to agree that the ICC Order and the Court Order intended to terminate ICC jurisdiction, but find that, in retrospect, the ICC should have recommended abandonment authorization (and erred in not doing so) to accomplish that outcome, then the Board could remedy the situation easily enough by issuing on its own motion a supplemental order granting B&M retrospective abandonment authorization.[9] Or, if the Board were to recommend it, MBTA could work with B&M, which has offered, if necessary, to file separately for Board authorization nominally to "abandon" its easement, although MBTA would respectfully submit that, in soliciting such a remedial process, the Board would succumb to the same form-over-substance considerations that drive the Petition itself.

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[9] *See*, *e.g.*, *CSX Transportation, Inc. – Abandonment – In Barbour, Randolph, Pocahontas, and Webster Counties, WV*, AB-55 (Sub-No. 500) (STB served Jan. 9, 1997); *Springfield Terminal Railway Company – Discontinuance of Service Exemption – Cumberland and Oxford Counties, ME*, AB-355 (Sub-No. 38X) (STB served Sep. 18, 2008), 4 ("To remedy ST's inadvertent failure to seek discontinuance authority in the 1994 notice and to remove any doubt that MDOT did not acquire a common carrier obligation when it purchased Segment One in 1996, we will, on our own motion, exempt ST from the requirement that it obtain discontinuance authority for the MEC portion of the line (between mileposts 7.3 and 51.11) retroactively to the December 17, 1994 effective date of the 1994 notice") (footnote omitted).

3. ***If the Board were to conclude that MBTA is a common carrier and retains a common carrier obligation over the Property, then MBTA would promptly obtain authorization to remove the property from the scope of Board jurisdiction***.

Finally, if for some reason the Board, despite the forgoing discussion, were to hold that MBTA is a common carrier with respect to the Property, and, by extension, that the Property has not been fully abandoned, PSI's back-door effort to obstruct the Eversource lease transaction would be stillborn nevertheless. Aside from forcing MBTA to take stock of the broader scope of an unjustified and completely-unnecessary adverse Board determination (and the appropriate regulatory remedies that MBTA would need to consider in light of other properties that MBTA contemporaneously acquired from the Trustees in similar fashion), MBTA promptly would extinguish its common carrier obligation, and remove the Property from the Board's jurisdiction permanently, obtaining abandonment authorization under the available class exemption procedures for lines that have been without service for two years or more.[10] While MBTA, if it were to be found to be a carrier with respect to the Property, would be entitled to invoke the Board's abandonment class exemption procedures, such action is entirely unnecessary and would be a waste of Commonwealth and Board resources, given the scope and intent of the ICC Order, the Court Order, and B&M's termination of its common carrier rail service easement in accordance with those Orders.

CONCLUSION

WHEREFORE, the Board should deny PSI's Petition either as unripe for adjudication under the Board's broad discretion under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, or, in the alternative, on the basis that MBTA clearly is not a common carrier with respect to the

[10] 49 C.F.R. Part 1152, subpart F (Exempt abandonments and Discontinuances of Service and Trackage Rights).

Property, and that, as a consequence, no genuine case or controversy exists. If, on the other hand, the Board determines to act in accordance with its declaratory order authority, then the Board should find that – (1) MBTA did not, by virtue of the structure of the 1976 transaction, acquire any lines of railroad or assume any common carrier obligation; and (2) the ICC Order, the Court Order, and B&M's subsequent termination of its easement interest served to terminate the ICC's jurisdiction over the Lines.

Respectfully submitted,

By: /s/ R. A. Wimbish

Robert A. Wimbish
Bradon J. Smith
Fletcher & Sippel LLC
29 North Wacker Drive
Suite 800
Chicago, Illinois 60606-3208
(312) 252-1500

ATTORNEYS FOR MASSACHUSETTS BAY TRANSPORATION AUTHORITY

Dated: April 30, 2021

BEFORE THE
SURFACE TRANSPORTATION BOARD

FD 36493

PROTECT SUDBURY INC. -
VERIFIED PETITION FOR DECLARATORY ORDER

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY'S REPLY

EXHIBIT A

B&M EMPLOYEE TIMETABLE #17
(April 28, 1968)

TABLE OF CONTENTS

EXPLANATION OF SYMBOLS

A — Arrives.
e — Stops to leave passengers.
f — Stops on signal to receive or discharge passengers.
j — Stops at next station, which does not appear in station column (Specified on page).
s — Regular stop.
u — Regular stop which is not advertised (for employees).
v — Stops to receive passengers.
② — Applies only to trains 637 and 642.
③ — Applies only to train 639.
⑦ — Applies only to train 2667.
⑧ — Applies only to trains 2668 and 2669.
✕ — Does not carry passengers.

HOLIDAYS: May 30, July 4, Sept. 2, and Oct. 12.
On June 17, normal Monday service will be operated.

BOSTON AND MAINE CORPORATION

TIME TABLE No. 17

SUPERSEDING TIME TABLE NO. 16

FOR EMPLOYEES ONLY

EFFECTIVE 2.01 AM SUNDAY

APRIL 28, 1968

EASTERN STANDARD TIME

STUDY THE SPECIAL INSTRUCTIONS AND NOTE ALL CHANGES

W. H. HOLLAND
Vice President — Operations

W. HAYNES
General Manager

H. F. VAUGHAN
Assistant General Manager

IPSWICH AND PORTSMOUTH

BOSTON DIVISION

EASTWARD (OUTWARD) TRAINS READ DOWN — FIRST CLASS — WESTWARD (INWARD) TRAINS READ UP

23 Ex. Sat. Sun. & Hol. Newbp'rt	Miles from Boston	STATIONS	Approx. Car Capacity of Siding	22 Ex. Sat. Sun. & Hol. Newbp'rt
P M				A M
6.05	27.76	Ipswich	80	7.36
6.11	31.13	Rowley....T		7.30
6.18	35.75	Newburyport West....T		7.24
A6.21	37.27	Newburyport X		7.22
	39.32	Salisbury		
	42.66	Seabrook	37	
	46.58	Hampton	53	
	48.69	North Hampton		
	55.98	Emery		
	56.91	Portsmouth....DX		
P M				A M

CENTRAL MASSACHUSETTS BRANCH

CLEMATIS BROOK AND MARLBORO

WESTWARD (OUTWARD) TRAINS BOSTON DIVISION EASTWARD (INWARD) TRAINS

READ DOWN — READ UP

741 Ex. Sat., Sun., Hol. So. Sud.	Miles from Boston	STATIONS	Approx. Car Capacity of Siding	740 Ex. Sat., Sun., Hol. So. Sud.
P M				A M
5.50	8.30	Clematis Brook....T		s8.02
s5.54	9.77	Waltham (No.)	19	s7.59
s5.56	10.35	Waltham Highlands		s7.56
s6.02	12.93	Weston		s7.50
e6.04	13.69	Cherry Brook		v7.47
e6.07	15.24	Tower Hill		v7.43
s6.11	16.50	Wayland		s7.40
f6.15	18.55	East Sudbury		f7.37
A6.18	19.70	South Sudbury	11	7.34
	23.84	Ordway		
	25.35	Gleasondale		
	26.09	Gleason Jct		
	27.69	Hudson	22	
	31.26	Marlboro		
P M				A M

WILMINGTON AND HAVERHILL

BOSTON DIVISION

NORTHWARD (OUTWARD) TRAINS — SOUTHWARD (INWARD) TRAINS

READ DOWN — FIRST CLASS — READ UP

×191 Ex. Sat. Sun. Hol. D. H. Ex.	133 Ex. Sat. Sun. Hol. Haverhill	Miles from Boston	STATIONS	Approx. Car Capacity of Siding	108 Ex. Sat. Sun. Hol. Haverhill	×192 Ex. Sat. Sun. Hol. D. H. Ex.
A M	P M				A M	P M
	5.27	.00	Boston		A8.10	
	5.49	15.20	Wilmington....TD		7.49	
		17.18	Salem Street			
	5.56	18.19	Wilmington Junction...T		7.45	
	5.58	19.95	Lowell Junction ....T		7.43	
	s6.00	20.86	Ballardvale....T		s7.41	
	s6.04	23.06	Andover....T		s7.37	
	s6.07	24.29	Shawsheen....TX		s7.34	
6.55	s6.12	26.42	Lawrence....TNX	Yard	s7.30	A6.41
	s6.15	27.72	North Andover....TX		s7.25	
	s6.23	32.91	Bradford....DX	Yard	s7.17	
A7.05	A6.26	33.31	Haverhill....TX		7.15	6.31
A M	P M				A M	P M

WEST CAMBRIDGE AND BEDFORD

NORTHWARD (OUTWARD) TRAINS BOSTON DIVISION SOUTHWARD (INWARD) TRAINS

READ DOWN — READ UP

731 Ex. Sat., Sun., Hol. Bedford	Miles from Boston	STATIONS	Approx. Car Capacity of Siding	730 Ex. Sat., Sun., Hol. Bedford
P M				A M
5.39	4.16	W. Cambridge....TX		7.46
5.40	4.59	Fens....X		7.45
s5.42	5.48	Lake Street		s7.41
s5.44	6.34	Arlington		s7.39
	8.06	Arlington Heights	14	
s5.52	9.02	E. Lexington		s7.33
s5.54	9.72	Pierces Bridge		s7.31
s5.55	10.09	Munroe		s7.30
s6.00	11.06	Lexington		s7.26
s6.05	12.28	N. Lexington		s7.21
A6.12	14.81	Bedford....X	8	7.17
P M				A M

(17) 4-28-68

WORCESTER AND LOWELL JUNCTION

EASTWARD (OUTWARD) TRAINS READ DOWN — WESTWARD (INWARD) TRAINS READ UP

Third Class		First Class	Miles	STATIONS	First Class	Third Class	
8006	8204	8302			8301	8203	
Ex. Sat. Sun. & Hol.	Daily	Daily			Daily	Daily	
Ayer	Rigby	Mystic			Mystic	Rigby	
A M	A M	A M			P M	P M	
7.30	6.00	2.00		*South Worcester*.....NX	∧10.10	A8.00	
7.35	6.05	2.05	1.56	Garden Street Yard....DX	9.55	7.55	
7.40	6.10	2.10	2.92	Barber.....X	9.50	7.50	
7.45	6.15	2.15	5.81	Summit.....	9.45	7.45	
8.05	6.35	2.35	16.76	Clinton.....TD	9.25	7.25	
A8.30	A7.00	A3.00	28.01	Ayer.....TNX	9.00	7.00	
			30.34	Willows.....T			
			35.09	Graniteville.....			
			41.20	North Chelmsford.....X			
			44.39	*Lowell*.....			
			45.09	Bleachery.....TNX			
			52.73	Lowell Junction.....TN			
A M	A M	A M			P M	P M	

No. 8301 loses right and schedule after 5.00 A M.

Schedule times at So. Worcester are for information only.

New Haven R. R. First Class Trains between South Worcester and Worcester

Northward	So. Worcester	Worcester
No. 570 Ex. Sun.	12.02 PM.	∧12.05 PM.
No. 572 Sun. Only	12.45 PM.	∧12.48 PM.
No. 580 Daily	9.31 PM.	A9.34 PM.

Southward	Worcester	So. Worcester
No. 573 Daily	7.36 AM.	7.39 AM.
No. 579 Daily	4.32 PM.	4.35 PM.

ROLLINSFORD AND INTERVALE

Miles	STATIONS
0.00	Rollinsford.....T
2.79	Somersworth...DX
9.33	Rochester.....DX
17.21	Milton.....
22.87	Union.....
27.21	Sanbornville.....
32.54	Burleyville.....
40.61	Ossipee.....
45.53	Mountainview.....
51.16	Mount Whittier...D
55.92	Madison.....
62.94	Conway.....
68.26	North Conway....X
69.89	Intervale.....

NEWTON JCT. AND MERRIMAC

Miles	STATIONS
.00	Newton Jct....TX
1.47	Newton.....X
4.46	Merrimac.....X

BEMIS AND WALTHAM

Miles	STATIONS
.00	Bemis.....X
.77	Bleachery.....TX
1.41	Newton Street.....X
1.81	Waltham.....TNX

SALISBURY AND AMESBURY

Miles	STATIONS
.00	Salisbury.....T
3.78	Amesbury.....X

SOMERVILLE JCT. AND HILL CROSSING

Miles	STATIONS
.00	Somerville Jct..T
2.37	North Cambridge
3.07	Fens.....T
4.00	Hill Crossing...T

EPPING AND FREMONT

Miles	STATIONS
.00	Epping.....X
4.52	Fremont.....X

LAWRENCE AND MANCHESTER

Miles	STATIONS
.00	Lawrence....TNX
2.50	Methuen.....
6.46	Rockingham Park
6.93	Salem.....
8.74	Canobie Lake....
12.80	Windham.....
15.96	Derry.....
27.17	Manchester...NX

WAKEFIELD JCT. AND TOPSFIELD

Miles	STATIONS
.00	Wakefield Jct. TX
.47	Wakefield Center
3.15	Lynnfield Center.
6.04	West Peabody....
8.60	Tapleyville.....
9.15	Danvers .....DX
14.74	Topsfield.....

READING AND WILMINGTON JCT.

Miles	STATIONS
.00	Reading.....TD
4.29	N. Wilmington..T
5.78	Wilmington Jct. T

MEDFORD JCT. AND PARK ST.

Miles	STATIONS
.00	Medford Jct....X
1.23	Park Street.....X

CASTLE HILL AND FOREST RIVER

Miles	STATIONS
.00	Castle Hill....TX
2.08	Forest River....X

GONIC AND FARMINGTON

Miles	STATIONS
.00	Gonic.....X
2.06	Rochester.....DX
9.66	Farmington.....X

TILTON AND FRANKLIN FALLS

Miles	STATIONS
.00	Tilton.....TX
3.81	Franklin Falls.DX

BERLIN BRANCH GLEASON JCT. — BERLIN, MASS.

Miles	STATIONS
.00	Gleason Junction
9.25	Berlin.....

SOUTH ACTON AND MAYNARD

Miles	STATIONS
.00	S. Acton.....TX
2.21	Maynard.....X

SANBORNVILLE AND WOLFEBORO

Miles	STATIONS
0.00	San'bnv'le.....X
5.77	Cotton Valley...X
8.80	Fernald.....X
11.50	Wolf'b'o Fls....X
11.98	Wolfeboro X

EMERY AND MANCHESTER

Miles	STATIONS
.00	Emery.....
2.99	Greenland.....
9.01	Rock'ham X
18.31	Epping.....
22.97	Raymond.....
37.49	E. Manch'er....X
39.46	Manch'er.....NX

(17) 4-28-68

BEFORE THE
SURFACE TRANSPORTATION BOARD

FD 36493

PROTECT SUDBURY INC. -
VERIFIED PETITION FOR DECLARATORY ORDER

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY'S REPLY

EXHIBIT B

MASSACHUSETTS SUPREME JUDICIAL COURT DECISION

SJC-12738

TOWN OF SUDBURY vs. MASSACHUSETTS BAY TRANSPORTATION AUTHORITY & another.[1]

Suffolk. October 1, 2019. - September 22, 2020.

Present: Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.[2]

Massachusetts Bay Transportation Authority. Easement. Real Property, Easement. Public Utilities, Electrical transmission line.

Civil action commenced in the Land Court Department on September 27, 2017.

Motions to dismiss were heard by Gordon H. Piper, J.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

George X. Pucci (Audrey A. Eidelman also present) for the plaintiff.

Thaddeus A. Heuer for Massachusetts Bay Transportation Authority.

Joshua A. Lewin for NSTAR Electric Company.

[1] NSTAR Electric Company, doing business as Eversource Energy.

[2] Chief Justice Gants participated in the deliberation on this case prior to his death.

Mark R. Rielly & Rachel C. Thomas, for New England Power Company & another, amici curiae, submitted a brief.

Jessica Gray Kelly & Daniel C. Johnston, for NAIOP Massachusetts & others, amici curiae, submitted a brief.

GAZIANO, J. In this appeal, we consider the scope of the common-law doctrine of "prior public use." Under this long-standing doctrine, public lands acquired for one public use may not be diverted to another inconsistent public use unless the subsequent use is authorized by plain and explicit legislation. Robbins v. Department of Pub. Works, 355 Mass. 328, 330 (1969). Here, we are asked to extend this doctrine and to determine that the prior public use doctrine bars the diversion of public land devoted to one public use to an inconsistent private use. Because such a sweeping change would not advance the purposes of the doctrine, and would create widespread uncertainty concerning numerous existing holdings of private land that were transferred by public entities, we decline to adopt the municipality's proposed reworking of the doctrine. Accordingly, we affirm the Land Court judge's decision dismissing the complaint, albeit, in part, on somewhat different grounds.[3]

[3] We acknowledge the amicus briefs submitted by NAIOP Massachusetts, the Real Estate Bar Association for Massachusetts, Inc., and The Abstract Club; and New England Power Company and Massachusetts Electric Company, both doing business as National Grid.

1. Prior proceedings. In November 2017, the town of Sudbury (town) filed an amended complaint in the Land Court seeking to prevent defendant Massachusetts Bay Transportation Authority (MBTA) from entering into an option agreement with defendant NSTAR Electric Company, doing business as Eversource Energy (Eversource), for an easement to install an electric transmission line underneath about nine miles of a disused right of way (ROW), approximately 4.3 miles of which extend through the town. The town argued that the prior public use doctrine precludes the MBTA from transferring public land to another public entity for an inconsistent use, here, changing the use of the ROW from the purpose set forth in the eminent domain transfer -- the extension and operation of mass transportation services -- to the installation and maintenance of underground electric transmission lines, absent legislative authorization.

The first count of the complaint sought a judgment declaring that the "inconsistent public use is illegal under the Massachusetts prior public use doctrine unless and until it is specifically authorized by legislation." The second count sought to enjoin MBTA's diversion of the inactive ROW to an inconsistent public use. The defendants moved to dismiss the complaint based on the town's lack of standing and the failure to state a claim for a violation of the prior public use

doctrine. See Mass. R. Civ. P. 12 (b) (1), (6), 365 Mass. 754 (1974).

A Land Court judge denied the defendants' motions to dismiss for lack of jurisdiction, see Mass. R. Civ. P. 12 (b) (1), after concluding that the town had standing to bring the claim, albeit that "the [t]own's standing appears at the precipice of adequacy." The judge then allowed the defendants' motions to dismiss on the ground that the complaint failed to state a claim upon which relief can be granted. See Mass. R. Civ. P. 12 (b) (6). In so doing, the judge ruled that Eversource is a private corporation and not, as the town claimed, a public entity. The judge declined the town's urging that he extend the long-established doctrine of prior public use to situations involving the diversion of an authorized public use of land to an inconsistent private use. The town appealed to the Appeals Court, and we transferred the case to this court on our own motion.

2. Background.[4] The MBTA acquired the ROW in part through an indenture from the trustees of the property of the Boston and Maine Corporation (B&M), subject to an easement for B&M's

[4] The facts are drawn from the complaint, the exhibits attached to the complaint, and undisputed documents provided by the parties in connection with the proceedings. See Lipsitt v. Plaud, 466 Mass. 240, 241 (2013); United States ex rel. Winkelman v. CVS Caremark Corp., 827 F.3d 201, 208 (1st Cir. 2016).

continued use of the ROW as a freight railroad, and subsequently through a taking by eminent domain for purposes of providing and extending mass transportation services. The MBTA has not constructed an extension of its transportation system through the ROW, and the ROW has been inactive as a rail line for over forty years. Although the rails and rail beds are still extant, the area has become heavily wooded. Multiple sections of the ROW abut environmentally sensitive areas, such as Federal, State, and private conservation areas, a farm, a fishery, streams, ponds, and wetlands. Numerous other sections abut "dense" areas of private properties, some of which are subject to conservation restrictions under G. L. c. 184, §§ 31-33. Parts of the ROW currently are used by the public as a walking or hiking trail, and other stretches generally serve as wooded areas of wildlife habitat. The railroad tracks and railroad beds formerly used by B&M have not been removed, and continue to extend through the ROW.

The 1976 indenture from B&M provided that, for consideration of $36,549,000, B&M granted the MBTA "all of [B&M's] right, title and interest . . . sufficient to permit the [MBTA] to operate a passenger and freight rail service over the rail line rights of way . . . and to [B&M's] rights of way and other lands thereon and including all track, signals, bridges, buildings, shops, towers, and other improvements affixed

thereto." B&M "reserve[d] unto themselves, their successors and assigns, the right and easement as are appropriate and necessary to the continuance of [B&M's] freight transportation business."

In 1977, the MBTA acquired title to the ROW in fee simple, pursuant to G. L. c. 161A, § 3 (o), "for[, among other things,] the purpose of providing and extending mass transportation facilities for public use." The order of taking was made subject to the same freight easement that was reserved to B&M in the indenture, as well as "all easements for wires, pipes, conduits, poles, and other appurtenances for the conveyance of water, sewerage, gas, oil, and electricity."

On June 9, 2017, the MBTA entered into an option agreement with Eversource. The agreement entitles Eversource to lease an easement in the ROW and to install an underground 115-kilovolt electrical transmission line, subject to obtaining "any necessary permits or approvals." The option agreement further provides that the MBTA reserves the right to relocate the transmission lines to anywhere within the ROW if the MBTA determines that the lines are interfering with its use of the ROW for transportation purposes. If exercised, the agreement is expected to generate $9.3 million for the MBTA over the subsequent twenty years.

The preferred route for the underground transmission line, through the entire length of the ROW, is approximately nine

miles.[5] The route begins at Eversource's Sudbury substation and travels through the ROW northwest through Sudbury, Marlborough, Hudson, Stow, and then Hudson again. In Hudson, the transmission line would proceed underneath public roadways to Eversource's Hudson substation.

The MBTA also has entered into a lease agreement with the Department of Conservation and Recreation (DCR) to allow for the construction of a segment of the Massachusetts Central Rail Trail (MCRT) over the buried transmission lines to be placed in the ROW. Under the terms of the option agreement, the easement granted to Eversource is subject to the provisions of the DCR lease, and Eversource is precluded from "materially interfer[ing] with or disturb[ing] the DCR's use of its leased premises." According to the complaint, "Eversource and DCR are entering into a memorandum of understanding in an effort to memorialize agreements related to design, permitting, construction, operation, and maintenance of both the underground electric transmission line and the above-ground publicly accessible rail trail within the MBTA ROW. Eversource has

[5] An alternative route, which Eversource believes would be much more expensive than using the ROW, would be placed under existing streets in Sudbury. Another alternative to provide the increase in electric transmission in this area that Eversource believes will be necessary to prevent power outages would involve modifying or replacing above-ground power lines. This option is not preferred for a number of reasons.

stated that it expects that DCR will be responsible for maintenance of the ROW following completion of the transmission project."

The proposed transmission project is subject to regulatory approval from the Energy Facilities Siting Board (EFSB) and the Department of Public Utilities (DPU), as well as review under the Massachusetts Environmental Protection Act (G. L. c. 30, §§ 61 et seq.) and the Wetlands Protection Act (G. L. c. 131, § 40), and by the Executive Office of Energy and Environmental Affairs and the Sudbury conservation commission. Eversource has undertaken the approval process with respect to the EFSB and the DPU, who have consolidated their proceedings in the matter.

In support of the town's argument that the transmission project is a diversion of one public use to another, the complaint states that Eversource's applications to regulatory entities describe the proposed service and Eversource as public. In its petition to the EFSB, Eversource maintains that the proposed transmission lines would serve a "compelling public use and purpose." The new transmission lines are necessary, Eversource asserts, in order to meet its customers' growing energy needs and to avoid service outages, which are estimated to occur given the current facilities and increasing demand. Eversource also maintains that coupling the underground

transmission line with the MCRT would confer a "public benefit," thus justifying approval of the project.

3. Discussion. a. Standard of review. "We review the denial of a motion to dismiss de novo, accepting the facts alleged in the complaint as true and drawing all reasonable inferences in the plaintiff's favor." Edwards v. Commonwealth, 477 Mass. 254, 260 (2017), citing Curtis v. Herb Chambers I-95, Inc., 458 Mass. 674, 676 (2011). In assuming the facts as alleged, however, "[w]e do not regard as 'true' legal conclusions cast in the form of factual allegations." Leavitt v. Brockton Hosp., Inc., 454 Mass. 37, 39 n.6 (2009). To survive a motion to dismiss, the "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). The facts alleged must "'plausibly suggest[] (not merely [be] consistent with)' an entitlement to relief." Iannacchino, supra, quoting Bell Atl. Corp., supra at 557. See Revere v. Massachusetts Gaming Comm'n, 476 Mass. 591, 609 (2017) (complaint survives motion to dismiss "if it includes enough factual heft" to raise basis for relief beyond speculation). "[A] well-pleaded complaint may proceed even if it appears 'that

a recovery is very remote and unlikely.'" Bell Atl. Corp., supra at 556, quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

b. Standing. The MBTA urges us to affirm the Land Court judge's decision, but on the alternative ground that the town lacked standing to bring a claim under the prior public use doctrine. "The issue of standing may be raised at any time." See Matter of the Receivership of Harvard Pilgrim Health Care, Inc., 434 Mass. 51, 56 (2001), quoting Ginther v. Commissioner of Ins., 427 Mass. 319, 322 (1998). According to the MBTA, the judge erred in finding "an automatic rule of injury-free municipal standing."

"To have standing in any capacity, a [plaintiff] must show that the challenged action has caused the [plaintiff] injury." Slama v. Attorney Gen., 384 Mass. 620, 624 (1981). See Enos v. Secretary of Envt'l Affairs, 432 Mass. 132, 135 (2000), quoting Bonan v. Boston, 398 Mass. 315, 320 (1986) ("standing requires 'a definite interest in the matters in contention in the sense that [a plaintiff's] rights will be significantly affected by a resolution of the contested point'"). Although "it is settled that G. L. c. 231A does not provide an independent statutory basis for standing," Enos, supra, citing Pratt v. Boston, 396 Mass. 37, 42-43 (1985), a party has standing under the statute where the defendant has "violated some duty owed to the

plaintiff[]," Enos, supra, quoting Penal Insts. Comm'r for Suffolk County v. Commissioner of Correction, 382 Mass. 527, 532 (1981), and where the plaintiff "can allege an injury within the area of concern of the statute or regulatory scheme." Service Employees Int'l Union, Loc. 509 v. Department of Mental Health, 469 Mass. 323, 328 (2014), quoting Enos, supra. See Northbridge v. Natick, 394 Mass. 70, 75 (1985) ("An injury alone is not enough; a plaintiff must allege a breach of duty owed to it by the public defendant").

In prior cases, this court generally has held that cities and towns lack standing to challenge zoning board decisions. See Hingham v. Department of Hous. & Community Dev., 451 Mass. 501, 506 n.9 (2008) ("The town is not a 'person aggrieved' within the meaning of this statutory provisions"); Burlington v. Bedford, 417 Mass. 161, 165 (1994) (no standing where there was no duty owed to town, and town's injury was too "remote, speculative, and undefined"). See also Planning Bd. of Hingham v. Hingham Campus, LLC, 438 Mass. 364, 368 (2003) (town's planning board was not "person aggrieved" as required to have standing under statute). At the same time, in cases involving zoning and permitting, abutting landowners are afforded a rebuttable presumption of standing. See Standerwick v. Zoning Bd. of Appeals of Andover, 447 Mass. 20, 33-34 (2006).

As the town points out, we have considered a case involving a change in a prior public use where the plaintiff was a municipality, see Selectmen of Braintree v. County Comm'rs of Norfolk, 399 Mass. 507 (1987) (Braintree). The town contends that this court's decision in Braintree "establishes that the [t]own has stated a valid claim upon which relief can be granted under the prior public use doctrine." In finding that the town had standing to bring its claims under the prior public use doctrine, the judge relied on the argument the town advances concerning our decision in Braintree, id. at 510-513. He reasoned that we "implicitly" must have conferred standing on the municipality in that case because we decided the case without any discussion of the municipality's standing to bring its claim.

Our holding in Braintree, 399 Mass. at 510-513, however, did not establish, as the town argues and the Land Court judge appears to have adopted, "an automatic rule of injury-free municipal standing." Nothing in Braintree should be read to confer automatic standing where a town brings a claim under the doctrine of prior public use. To survive a motion to dismiss under the prior public use doctrine, any entity, including a town, must establish standing, i.e., a claim of individualized harm. The question then becomes whether the complaint in this case sufficiently asserted an individualized harm to the town,

see Hingham, 451 Mass. at 506 n.9; Slama, 384 Mass. at 624, so as to withstand the motion to dismiss.

At the outset, we note that the town has no ownership interest in the ROW itself. The town asserts an individualized injury to town lands that abut the ROW, cf. Standerwick, 447 Mass. at 33-34, as well as apparently implicitly asserting representative standing on behalf of numerous others: Federal authorities who oversee Federal wildlife refuges, State and private trustees of conservation land and farms, and many private owners of residential properties, all of which also abut the ROW at some point. See Slama, 384 Mass. at 624.

The noted harms listed in the complaint, but not further discussed after having been identified, include the loss of 27.96 acres of trees, the loss of wildlife habitat, danger to certain species already designated as at risk, loss of recreational space, loss of aesthetic value, and reduction in property values. For most of these claims, the town either does not have standing to assert them, or the asserted harm is not legally cognizable.

Of the 4.3 miles (or 22,704 feet) of the ROW that run through the town, the town asserts that it owns various parcels, totaling 6,145 linear feet of land, that abut the ROW, that is, approximately twenty-seven percent of the total length of the land abutting the ROW within the town. The complaint delineates

two Federal wildlife refuges, a farm that is run as a joint State and private project, several areas of conservation land held under private trusts as well as town-owned conservation parcels, wetlands, ten vernal pools, and eight perennial streams as at risk of harm from the transmission project.[6] The complaint also asserts the diminution in property values for the many "dense[ly]" located residential parcels that abut the ROW, and loss of aesthetic view.[7]

The town has no standing to bring a claim under the prior public use doctrine concerning the majority of the land abutting the ROW in which the town has no property interest. See Slama, 384 Mass. at 624 ("[o]rdinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party"; "[r]epresentative standing is generally limited to cases in which it is difficult or impossible for the actual rightholders to assert their claims" [citation omitted]). The individual property owners and the government entities who own

[6] The water, wetland, and conservation areas enumerated abut or are proximate to the ROW; none is actually within the ROW.

[7] The complaint also presents as alleged harm that, if the project were to include certain types of fill around bridge abutments that affect floodplains, additional permits and agency review would be necessary. Any asserted harm that might result if particular mandated remediation procedures were not followed is entirely speculative. Moreover, the planned work as described in the complaint involves the electric wires remaining within the existing bridge footprint for the three bridges at issue, obviating any need for fill around newly dug abutments.

or manage these properties are not in that position. They could, and in some cases already have, pursued their own claims regarding the transmission project before the EFSB and the DPU.

Similarly, "[d]iminution in the value of real estate is a sufficient basis for standing only where it is 'derivative of or related to cognizable interests protected by the applicable zoning scheme.'" Kenner v. Zoning Bd. of Appeals of Chatham, 459 Mass. 115, 123 (2011), citing Standerwick, 447 Mass. at 31-32. "Zoning legislation 'is not designed for the preservation of the economic value of property, except in so far as that end is served by making the community a safe and healthy place in which to live.'" Kenner, supra at 123-124, citing Tranfaglia v. Building Comm'r of Winchester, 306 Mass. 495, 503-504 (1940). Thus, the "alleged diminution in value of [town] property is not a basis for standing." Kenner, supra at 124.

While the complaint says little other than listing the assertedly affected land and stating that loss of habitat and harm to wildlife will result, with respect to at least a few of the asserted losses,[8] the complaint sets forth specific, legally cognizable injuries, so long as we accept that the injury

[8] These include the claim that the cold water fishery at Hop Brook will be negatively affected by loss of tree cover and the resulting rise in water temperature, the potential contamination of drinking water resource areas during removal of the railroad tracks, and the potential danger to certain protected species whose habitat encompasses town conservation land.

resulting from the change to the ROW depends on some type of legally cognizable interest that the ROW remain in its current, disused, and overgrown condition.

As to that injury, the town seeks injunctive and declaratory relief for harm that purportedly would arise if the trees on the ROW were cleared to create an access road and rail trail, and the transmission wires and containers were installed. Only if one starts with the premise that the ROW will continue to be a rarely used strip of woodland with occasional recreational uses is it possible to infer any type of harm from the proposed clearing of a strip of land within the ROW, the placement of the underground conduits and the electrical wires, and the permanent paving of a narrower strip within the ROW. Indeed, if the MBTA chose to resume or extend rail or bus service along the ROW, it necessarily would have to remove, permanently, more than double the area of trees that Eversource contemplates removing for this project. The complaint does not state any ground on which the town would be entitled to insist that the ROW remain unused, or would be able to preclude the MBTA from using the ROW for the explicitly authorized purposes of operating freight and passenger rail service, as well as other mass transportation activities, for which the MBTA paid B&M $36,549,000.

Undoubtedly it is for all of these reasons that the motion judge found that "the [t]own's standing appears at the precipice of adequacy" before he dismissed the case on other grounds. In these circumstances, we assume without deciding that the town would be able to establish some individualized harm, and therefore has standing. See Bell Atl. Corp., 550 U.S. at 556.

c. Doctrine of prior public use. The doctrine of prior public use is a "firmly established" creation of the common law, dating back to the Nineteenth Century. See Smith v. Westfield, 478 Mass. 49, 60-61 (2017), citing Old Colony R.R. v. Framingham Water Co., 153 Mass. 561, 563 (1891), and Boston Water Power Co. v. Boston & W.R. Corp., 23 Pick. 360, 398 (1839). Under this doctrine, "public lands devoted to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation authorizing the diversion." Robbins, 355 Mass. at 330. See, e.g., Brookline v. Metropolitan Dist. Comm'n, 357 Mass. 435, 440 (1970) ("The principle that land appropriated to one public use cannot be diverted to another inconsistent use without plain and explicit legislation to that end has been well established in our decisions"); Sacco v. Department of Pub. Works, 352 Mass. 670, 672 (1967) (specific statutory language is required to divert land devoted to one public purpose to another inconsistent public purpose); Higginson v. Treasurer & Sch. House Comm'rs of Boston, 212 Mass.

583, 591 (1912) (public purpose for which city has acquired land by eminent domain may be changed to another inconsistent public use by "plain and explicit legislation to that end"); Old Colony R.R., supra ("There can be no doubt that the Legislature may take, or authorize a corporation to take, land for a public use, which has previously been appropriated by legislative authority to a different public use . . . [b]ut it will not be deemed to have done so unless its intention so to take such land is plainly manifested in the statute").

To survive the defendants' motions to dismiss, the town was required to plead sufficiently that the option agreement met all four elements of the doctrine of prior public use: (1) a subsequent public use; (2) previous devotion of the property to only "one public use"; (3) an inconsistent subsequent use; and (4) a lack of legislative authorization. See Smith, 478 Mass. at 60, quoting Robbins, 355 Mass. at 330. See, e.g., Higginson, 212 Mass. at 591, citing Eldredge v. County Comm'rs of Norfolk, 185 Mass. 186 (1904).

On appeal, as they did before the Land Court judge, the MBTA and Eversource raise a number of grounds in support of their motions to dismiss for failure to state a claim upon which relief can be granted, e.g., failure to show that the option agreement violated the doctrine of prior public use. The defendants argue that dismissal was required because the public

uses for which the ROW initially was acquired by the MBTA were not a single use; Eversource's right under the option agreement to use the ROW to construct and operate an underground transmission line is not inconsistent with the MBTA's rights to use the ROW for mass transportation services; the subsequent inconsistent use must be public, not private, and here, Eversource is a private entity; and the MBTA's enabling legislation, G. L. c. 161A, contains specific provisions authorizing the MBTA to grant easements that do not interfere with rail service, and further obligates the MBTA to maximize its nontransportation revenue.[9]

[9] Even if a subsequent use is inconsistent, the prior public use doctrine is satisfied where the Legislature has adopted the subsequent public use by plain and explicit legislation. See Robbins v. Department of Pub. Works, 355 Mass. 328, 330 (1969). The MBTA argues that its enabling statute, G. L. c. 161A, satisfies that requirement here, either by explicitly allowing the MBTA to grant the easement to Eversource, or by abrogating the common-law doctrine by necessary implication. See Ferriter v. Daniel O'Connell's Sons, Inc., 381 Mass. 507, 521 (1980) (discussing repeal of common law by direct enactment or necessary implication). Under its enabling statute, the MBTA has the authority to grant easements over "any real property held by the authority" that do not "unduly" interfere with mass transportation facilities, G. L. c. 161A, § 3 (m); and to "develop, finance and operate the mass transportation facilities and equipment in the public interest," including the disposition of real property without any further legislative approval, G. L. c. 161A, § 5 (a)-(b). In addition, the MBTA is obligated to "[e]stablish and implement policies that provide for the maximization of nontransportation revenues from all sources." G. L. c. 161A, § 11. Because of the result we reach, we need not address these arguments by the MBTA further.

As stated, in allowing the motions to dismiss, the judge relied on his determination that Eversource is a private entity, the use at issue is a private use, and the doctrine of prior public use does not apply to a subsequent inconsistent private use. Based on this, the judge did not reach the defendants' arguments concerning the other three elements of the prior public use doctrine: prior devotion of the property to only "one public use"; an inconsistent subsequent use;[10] and the absence of legislative authorization. See, e.g., Smith, 478 Mass. at 60, quoting Robbins, 355 Mass. at 330.

On appeal, the town contends that the judge's decision was erroneous for two reasons. First, while Eversource is a private corporation, its use of the ROW for an underground electrical transmission line to service its customers is in reality a public use. Second, the judge's narrow construction of the prior public use doctrine "would defeat the purpose of the [doctrine], which is to protect public land acquired for a

[10] While the complaint states that railroad use would be impossible if the underground transmission wires were to be constructed, the MBTA asserts that it currently operates commuter rail service on some lines over such underground conduits. The judge did not reach the issue whether Eversource's proposed use is inconsistent with the prior use, and, for purposes of the motions to dismiss, we must accept the town's assertion that the use would be inconsistent. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007), quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

particular public use . . . without the required legislative awareness and specific authorization."

i. Public use of the ROW. For the prior public use doctrine to be applicable under our existing law, we must accept the town's contention that the option agreement in reality is a diversion to a public use. The town maintains that the prior public use doctrine focuses on the "use" of the land, not on the corporate status of the user. The town points out that Eversource represented in its petition before the EFSB and the DPU that the project serves "a compelling public use and purpose,"[11] and that the construction of the MCRT walking and biking trail through the ROW confers a further "public benefit." Moreover, the town argues, Eversource is able to pass along the costs of the project to its public ratepayers.

Relying on this asserted public use, the town contends, as it did in the Land Court, that this court's decision in Braintree, 399 Mass. at 509, "establishes that the [t]own has stated a valid claim upon which relief can be granted under the prior public use doctrine." The comparison is inapt. First,

[11] In its brief, Eversource contests some of the town's assertions about the content of Eversource's statements to the EFSB, and points to a published set of documents it says do not contain the asserted language. For purposes of a motion to dismiss, however, we assume "that all the allegations in the complaint are true (even if doubtful in fact)." Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), quoting Bell Atl. Corp., 550 U.S. at 555.

the judge properly rejected the contention that Eversource is a public entity, or that the transmission project is a public use. Second, our holding in Braintree, supra, did not suggest that the doctrine of prior public use applies to a subsequent private use.

The judge rejected the town's efforts "to paint the [p]roject as one of public use." He recognized that, in regulatory proceedings, Eversource argues that laying the transmission lines underneath the ROW will afford a public benefit with respect to power grid enhancements and, later, the construction of the MCRT in concert with the DCR. Nonetheless, he concluded, "[t]hat a utility, owned by its shareholders, is subject to considerable public oversight does not make it a public entity for purposes of the legal doctrine. . . . Nor does the fact that a utility such as Eversource only can proceed to build and operate power lines with the approval of public regulatory agencies, and has its rates reviewed in a public manner."

We agree. Eversource's proposed use of the MBTA ROW to construct and operate underground transmission lines is not a public use. Eversource, a domestic corporation, privately owns and operates its electric transmission and distribution systems. See ENGIE Gas & LNG LLC v. Department of Pub. Utils., 475 Mass. 191, 206 (2016) ("The business of electric distribution

companies is to plan for, build, and operate distribution infrastructure . . . ; deliver electricity; and be compensated for doing so"). Eversource will pay taxes on the transmission line as an asset, see G. L. c. 59, § 18, Fifth, and is entitled to earn a profit on its investment through rates approved by the DPU. See G. L. c. 164, § 94. See Higginson, 212 Mass. at 589 (court focuses on "character of the use"); Abbott v. Inhabitants of Cottage City, 143 Mass. 521, 525 (1887) ("[public] use is in the public at large").

Like many other privately owned corporations doing business in the Commonwealth, such as banks and common carriers, Eversource is publicly regulated. In order to site a new electric transmission line, Eversource is required to demonstrate to the EFSB and the DPU that the project "will or does serve the public convenience and is consistent with the public interest" and is "reasonably necessary for the convenience or welfare of the public." See G. L. c. 164, § 72; G. L. c. 40A, § 3. A statutory requirement that regulators consider the public's interest in siting transmission lines, however, does not convert the construction and operation of a four-mile segment of a privately owned electric transmission grid into a public use.

ii. Extension of doctrine to diversion to private use. The town's second argument rests on the mistaken premise that

the sole purpose of the prior public use doctrine is to prevent the diversion of public land acquired for a particular public use to any inconsistent use without specific legislative awareness and approval.

Although the prior public use doctrine undoubtedly protects public land, it developed in our common law as a means to resolve conflicts over the use of public lands between State-chartered corporations, municipalities, or other governmental agencies that might claim authority to use another government entity's land, or to take the land by eminent domain, in a potentially never-ending cycle of takings.[12] See, e.g., Brookline, 357 Mass. at 436-437 (dispute between town and State agency over taking of property previously acquired as parkland for road construction); Needham v. County Comm'rs of Norfolk, 324 Mass. 293, 295-297 (1949) (dispute between town and county commissioners over relocation of public way on strips of land

[12] The prior public use doctrine has been applied particularly stringently to protect public lands acquired as "parkland." Smith v. Westfield, 478 Mass. 49, 61 (2017). "The policy of the Commonwealth has been to add to the common law inviolability of parks express prohibition against encroachment." Higginson v. Treasurer & Sch. House Comm'rs of Boston, 212 Mass. 583, 591-592 (1912). See Robbins, 355 Mass. at 330; Gould v. Greylock Reservation Comm'n, 350 Mass. 410, 419 (1966). We noted in Mahajan v. Department of Envtl. Protection, 464 Mass. 604, 616 (2013), that the "spirit" of art. 97 of the Amendments to the Massachusetts Constitution derived from the public use doctrine, and that the protections of inconsistent subsequent use in that doctrine in large part were intended to ensure that public parkland remain parkland.

previously appropriated for school and library); Bauer v. Mitchell, 247 Mass. 522, 525 (1924) (dispute between trustees of agricultural school and county commissioners over attempt to take portion of school land for hospital sewage system); Boston & Albany R.R. v. City Council of Cambridge, 166 Mass. 224, 224 (1896) (dispute between city and railroad over city's taking of land to build park); Old Colony R.R., 153 Mass. at 563-564 (dispute between railroad and water company over operation of pumping station on land previously acquired for rail use).

The doctrine of prior public use prevents the absurd result of public entities, each with the authority to exercise eminent domain, taking and retaking the same property from each other "ad infinitum."[13] Commonwealth v. Massachusetts Turnpike Auth., 346 Mass. 250, 254-255 (1963). See Appleton v. Massachusetts Parking Auth., 340 Mass. 303, 310 (1960) (specific legislative authority required in order to prevent governmental agency from engaging in "roving eminent domain"). See generally Comment, Judicial Balancing of Uses for Public Property: The Paramount

[13] The doctrine of prior public use also promotes "fiscal and social stability" by protecting the long-term interests of a municipality or other government agency which "may have expended resources for the improvement of property in reliance on a continued right to use that property." Somerset v. Dighton Water Dist., 347 Mass. 738, 742 (1964). See Norfolk So. Ry. v. Intermodal Props., LLC, 215 N.J. 142, 162-163 (2013) (common-law rule developed to create certainty among public entitles, each with authority to exercise power of eminent domain over same property).

Public Use Doctrine, 17 B.C. Envtl. Aff. L. Rev. 893, 896 n.35 (1990) (prior public use doctrine was developed to avoid "impropriety of the [S]tate's nullifying its own prior dedication of property to public use, without specific consideration of the superseding public use"); Wilson, The Public Trust Doctrine in Massachusetts Land Law, 11 B.C. Envtl. Aff. L. Rev. 839, 866-867 (1984) (prior public use doctrine establishes priorities between multiple governmental entities each possessing power of eminent domain). See also Georgia Dep't of Transp. v. Jasper County, 355 S.C. 631, 635 (2003) (prior public use doctrine is "a rule of law limited to controversies between two [entities] each possessing a delegated, general power of eminent domain" [citation omitted]); In re Vt. Gas Sys., Inc., 2017 VT 83, ¶ 19 (purpose of common-law doctrine is to "protect public uses and to prevent land from being condemned back and forth between competing condemners, which would result in a lack of consistent public use of the land").

In this case, involving a transaction between public and private entities for a subsequent private use of land, we are not called upon to resolve a conflict over eminent domain authority. The common-law prior public use doctrine has never been applied to bar a subsequent private use carried out by a private entity. While the town urges that we extend the

doctrine of prior public use to encompass a diversion to an inconsistent private use, the town has not demonstrated that the benefits of expanding the prior public use doctrine to encompass subsequent inconsistent private uses outweigh the value of adhering to our long-standing common-law formulation. To adopt a vastly expanded view of the doctrine in order to add a similar requirement for diversion to an inconsistent private use would not serve the purposes of the doctrine we have discussed, and would lead to numerous deleterious consequences. Among other things, countless prior transfers of interests in land, including many easements for utility wires and pipes, and water and sewage pipes, would be called into question. Yet, as the town itself recognizes, these types of transactions between government and private entities are frequent and critical to maintaining a municipality's infrastructure. See Somerset v. Dighton Water Dist., 347 Mass. 738, 742 (1964). Moreover, it would render future developments between public and private entities, which, according to the amici, have been blossoming in the Commonwealth,[14] prohibitively expensive and time consuming to undertake.

[14] The amici point to several very recent housing projects involving public and private entities to create hundreds of units of much-needed affordable housing that also generates revenue for the government entities involved, affordable child-care facilities to address severe shortages, and the leasing of

As the Land Court judge explained, "at both the local and [S]tate level, transfers of government-owned property to private ownership happen with frequency, and at times in cases where the land's title was acquired by the public owner for an express public purpose which may be at odds with the private grantee's ensuing use." Thus, an expansion of the doctrine of prior public use to include subsequent private uses would "give rise to a significant number of lawsuits challenging the public disposition of . . . real estate." The concerns raised by the amici that "[i]mposing upon the Legislature a new common law requirement to provide site-specific approval before any such project could commence construction would add great uncertainty as to schedule (and, therefore, project costs), making development involving public land or rights therein far less attractive to the private sector than it is today" also are persuasive.

4. Conclusion. Because we decline to extend our long-standing doctrine of prior public use to include a diversion from public use to an inconsistent private use, the town cannot prevail on either of its claims, and we accordingly affirm the Land Court judge's decision allowing the defendants' motions to dismiss.

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land along State highways to support electrical panels that save the Department of Transportation millions of dollars annually.

So ordered.

CERTIFICATE OF SERVICE

I hereby certify that, on this 30th day of April, 2021, I served copies of the foregoing Reply electronically (via email) upon each the following parties of record:

Daniel R. Elliott
2169 Chain Bridge Road
Vienna, VA 22182
danelliottiii@outlook.com

/s/ R. A. Wimbish
Robert A. Wimbish

FD 36623

Rail Line Abutting Landowners – Verified Petition for Declaratory Order

REPLY OF MASSACHUSETTS BAY TRANSPORTATION AUTHORITY

EXHIBIT B

50926
EB

SERVICE DATE – FEBRUARY 2, 2022

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36493

PROTECT SUDBURY INC.—PETITION FOR DECLARATORY ORDER

Digest:[1] The Board in its discretion declines Protect Sudbury Inc.'s request for a declaratory order finding that a railroad line in Sudbury, Mass., has not been abandoned and that easement agreements related to the line are void.

Decided: February 1, 2022

On March 11, 2021, Protect Sudbury Inc. (PSI), filed a petition for a declaratory order asking the Board to find that a rail line in Sudbury, Mass., owned by the Massachusetts Bay Transportation Authority (MBTA) has not been abandoned and that easements MBTA has granted on the line for trail use and electric power transmission unlawfully interfere with the potential reactivation of rail service and are therefore void. For the reasons explained below, PSI's petition will be denied.

BACKGROUND

PSI is a non-profit organization located in Sudbury, whose "primary objective is to prevent all power lines along the MBTA rail line that runs through the town and to prevent above-ground power lines anywhere in Sudbury." (Pet. 2.) According to PSI, the rail line at issue here (the Line) was part of a branch line called the Central Massachusetts Railroad Division operated by the Boston and Maine Corporation (B&M). (Id. at 4.) PSI states that the Line runs from milepost B23/N81 to milepost B27/N86 and is now a portion of the Mass Central Rail Trail. (Id.) PSI explains that B&M entered bankruptcy in 1970 and in the bankruptcy proceeding the trustees of B&M granted to MBTA ownership of the physical assets of the Line but reserved an easement allowing B&M to continue freight transportation on the Line. (Id. at 4-5.)

PSI states that in 1979, B&M filed an application to abandon two branch lines that included the Line, but the Board's predecessor, the Interstate Commerce Commission (ICC), found that B&M could not abandon the branch lines because MBTA rather than B&M owned them and recommended to the United States District Court for the District of Massachusetts that

[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

discontinuance authority be granted instead.[2] (Id. at 6 (citing Meserve, Aban. Between Waltham N., Berlin, & Marlboro, Mass., AB 32 (Sub-No. 7F) (ICC served Apr. 1, 1980).) PSI states that in In re Boston and Maine Corp., No. 70-250-M (D. Mass., Oct. 3, 1980), the District Court issued an order that followed the ICC's recommendation and granted B&M discontinuance authority. (Pet. 6.) PSI asserts that there has been no rail service on the Line since that order. (Id. at 7.)

According to PSI, on December 30, 2010, MBTA and the Massachusetts Department of Conservation and Recreation (DCR) entered into a trails-use agreement for the Line. (Id.) PSI claims that a trail now runs through the right-of-way of the Line and that under the agreement, MBTA may continue to utilize the rail corridor for rail transportation purposes but any portion so utilized in connection with third-party transactions must continue to provide for the continuity of the rail-trail corridor. (Id. at 7, 16.)

PSI states that on June 9, 2017, MBTA entered into an agreement with an energy company called Eversource Energy (Eversource) for an easement to allow Eversource to install a new 115 kv subsurface electric transmission line along the rail right-of-way for approximately 8.63 miles, including the right-of-way for the Line. (Id. at 7.) According to PSI, the easement reserves to MBTA the right to install, operate, repair, and maintain transportation/rail infrastructure within the easement area provided that such rights will not unreasonably interfere with Eversource's use of the easement for its purposes. (Id.) PSI asserts that installation of the subsurface transmission line would result in the removal of all tracks and a substantial portion of the ballast on the Line. (Id. at 17.) PSI and the Town of Sudbury attempted to stop installation of the power line by challenging in state court, and as a matter of state administrative law, issuance of a permit by the Massachusetts Department of Public Utilities. (MBTA Supp. 2.) The Supreme Judicial Court of Massachusetts (SJC) recently issued an opinion upholding the issuance of the permit. (Id.) The Town of Sudbury also separately challenged in state court the legality of the agreement between MBTA and Eversource, contending that the agreement was barred by the state law "prior public use" doctrine. The SJC upheld the lower court's decision dismissing the Town's claims. (Id.; see also MBTA Reply 3.)

PSI argues that the issues it raises are ripe for review by the Board. (Pet. 9.) PSI claims that guidance from the Board regarding the status of the Line is necessary so that landowners with property abutting the Line can determine what legal avenues are available to protect their property interests. (Id.) PSI further argues that Meserve was wrongly decided in holding that B&M had to seek discontinuance authority rather than abandonment authority and is inconsistent with subsequent cases that have allowed carriers in situations similar to B&M's to seek abandonment authority, and that the Board must act to resolve this inconsistency. (Id. at 9-13.) In addition, PSI claims that the easements granted by MBTA would prohibit the reactivation of rail service and that under Board precedent the Board must void these easements to ensure that rail service can be reactivated in the future. (Id. at 10, 17-18.)

[2] According to PSI, section 17(a) of the Milwaukee Railroad Restructuring Act, Pub. L. No. 96-101, 93 Stat. 736 (1979), transferred jurisdiction over B&M abandonments and discontinuances from the ICC to the District Court. (Pet. at 6.)

In response, MBTA argues that PSI's petition should be denied as premature. (MBTA Reply 5.) MBTA asserts that since PSI has not asserted any interest in service over the Line and there has been no demand for service since service ceased approximately 40 years ago, there is no reason for the Board to issue a declaratory order. (Id.) MBTA further argues that it never acquired a common carrier obligation with respect to the Line, and, although the decisions by the ICC and the District Court in 1980 were framed in terms of discontinuance, those decisions were intended to remove the Line from the national rail system and the ICC's jurisdiction. (Id. at 6-10.) Finally, MBTA argues that, if the Board were to find that the Line has not been abandoned, MBTA would simply obtain abandonment authority under class exemption procedures for lines that have been without service for two years or more and PSI therefore would still fail to prevent installation of the power line. (Id. at 11.)

On October 20, 2021, the Town of Sudbury (the Town) filed a reply to PSI's petition requesting that, in order to preserve an existing rail-trail, the Board issue a notice of interim trail use/rail banking (NITU) should the Board determine that the Line is abandoned. (Town Reply 1.)

DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 to issue a declaratory order to eliminate controversy or remove uncertainty. See Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Delegation of Auth.—Declaratory Ord. Proc., 5 I.C.C.2d 675 (1989). For the reasons explained below, the Board, in its discretion, will decline to issue a declaratory order here.

The Board has exclusive jurisdiction over transportation by rail carrier. 49 U.S.C. § 10501(a) & (b). In § 10501(b), Congress adopted a broad preemption provision, which serves as the basis for PSI's request.[3] As the Board has explained, preemption under 10501(b) "is broad enough to preclude all state and local regulation that would prevent or unreasonably interfere with railroad operations." Norfolk S. Ry.—Pet. for Declaratory Ord., FD 35196, slip op. at 3 (STB served Mar. 1, 2010). The Board has noted, "the core purpose of this provision is to ensure the free flow of interstate commerce, particularly by preventing a patchwork of differing regulations across states." Ass'n of Am. R.R.s—Pet. for Declaratory Ord., FD 36369, slip op. at 2 (STB served Dec. 30, 2020) (and cases cited therein). PSI, however, has no interest in or relationship to rail transportation. PSI does not seek to provide rail service, nor is it a shipper seeking rail service, nor is it a landowner seeking a determination concerning its possible rights in the rail corridor. Rather, PSI acknowledges that its goal is to prevent the installation of power lines in the rail corridor and in the Town of Sudbury generally, even though such installation has been permitted by the Massachusetts Department of Public Utilities with that permitting decision upheld by the highest court in Massachusetts.

[3] PSI does not explicitly frame the issue in terms of preemption, but its request that the Board find that easement agreements governed by state law are void appears to be, in effect, a request for a finding of preemption.

Exercising its broad discretion, the Board issues declaratory orders to remove uncertainty or address controversies concerning rail transportation issues within its jurisdiction, including whether certain activities would unreasonably interfere with rail service and would therefore be preempted under § 10501(b). Here, however, PSI has no interest in the integrity of the rail system or the provision of rail service, which is what § 10501(b) is designed to protect. Because PSI has no interest in rail service, or even a claimed property interest in the rail line, it is unnecessary for the Board to determine the extent to which preemption might apply.[4] Under the circumstances present in this case, a party should not be allowed to use a statute designed to define the limits of rail regulation and preserve the integrity of the interstate rail system where it has no interest in those purposes, particularly in an effort to prevent a public use of property that has been approved by the relevant state agencies. Such a legal maneuver risks abuse of the Board's statute and processes. The Board also need not address the issue of whether the Line was abandoned. Apparently, PSI seeks a determination that the Line was not abandoned only because such a determination is necessary for the Board to reach the preemption question, which is, in effect, the issue raised by PSI.

PSI's arguments as to why the Board should issue a declaratory order are unpersuasive. PSI argues that the Board must act to void the easements entered into by MBTA because they make reactivation of rail service on the Line impossible and, under Board precedent, state actions that prevent reactivation of a rail line subject to Board jurisdiction are precluded. PSI cites statements from many cases to support its preemption argument, but these cases either involved restrictions that were found void in order to protect parties with a real interest in continuing or restoring rail service or simply contain dicta generally addressing limits on contractual or other restrictions of rail service.[5] Moreover, the types of actions taken or planned by MBTA—

[4] This decision should not be interpreted to suggest that the Board will only rule on the merits of a petition for a declaratory order regarding preemption filed by entities involved in rail transportation or with an interest in rail property. For example, the Board may be willing to issue a declaratory order where an interest group or a group of citizens has legitimate concerns about the potential effects on the environment of rail transportation activities, provided that the matter is within the Board's jurisdiction. However, in this case, petitioner's only stated concern is to prevent the installation of power lines in a right-of-way and, to attain that end, it has argued that such installation would interfere with rail operations despite having no legitimate interest in those operations or their effects. The Board will not entertain petitioner's request for declaratory relief under these circumstances.

[5] Union Pac. R.R.—Pet. for Declaratory Ord., FD 34090, slip op. at 2-3 (STB served Nov. 9, 2001) (finding any agreement with the carrier that permitted city, in response to reactivation, to terminate carrier's rights over the line and require it to remove tracks was void); New Orleans Terminal Co. v. Spencer, 366 F.2d 160, 162-63 (5th Cir. 1966) (finding city could not enforce ordinance directing railroad to remove tracks when line was in service and within the ICC's jurisdiction); R.R. Ventures, Inc.—Aban. Exemption—Between Youngstown, Ohio & Darlington, Pa. in Mahoning & Columbiana Cntys., Ohio, & Beaver Cnty., Pa., AB 556 (Sub-No. 2X) et al., slip op. at 3 (STB served Jan. 7, 2000) (finding terms of agreement were void as they unreasonably interfered with a party's efforts to restore service on a line); Hanson Nat. Res. Co.—Non-Common Carrier Status—Pet. for Declaratory Ord., FD 32248 (ICC served Dec. 5,

granting easements for a trail and subsurface utilities in the right-of-way and removing track—are not generally inconsistent with the reactivation of rail service in the future.[6] See, e.g., Jie Ao—Pet. for Declaratory Ord., FD 35539, slip op. at 7 (STB served June 6, 2012) (stating that an "easement does not take railroad property outright, and it is often possible for an easement that crosses over, under, or across a right-of-way, to co-exist with active rail operations without necessarily interfering with the latter"); Lincoln Lumber—Pet. For Declaratory Ord., FD 34915, slip op. at 3 (STB served Aug. 13, 2007) (finding permanent easement for underground storm sewer running along the entire length of the right-of-way would not necessarily prevent or unreasonably interfere with railroad operations); BNSF Ry.—Pet. for Declaratory Ord., FD 35164 et al., slip op. at 5-6 (STB served May 7, 2010) (stating that "[a] carrier may even remove track on a line over which it has a common carrier obligation, as long as no shipper seeks service and the carrier is prepared to restore the track should it receive a reasonable request for service"); Roaring Fork R.R. Holding Auth.—Aban. Exemption—in Garfield, Eagle & Pitkin Cntys., Colo., AB 547X, slip op. at 3 (STB served May 21, 1999) (denying a request to issue a cease and desist order with respect to an easement for a grade crossing and an easement for trail purposes over a portion of the right-of-way because these were "ordinary activities, fully consonant with the usual operations of a railroad" and placed "no burden upon maintaining transportation services").

1994) (finding purchaser was not common carrier but noting that any contractual restrictions that unreasonably interfere with common carrier operations are void); United States v. Balt. & Ohio R.R., 333 U.S. 169, 177-78 (1948) (holding that owner of track could not by contract compel railroads to operate in a way which violates the Interstate Commerce Act); Nat'l Wildlife Fed'n v. ICC, 850 F.2d 694, 703-04 (D.C. Cir. 1988) (stating that state laws are subject to the ICC's authority and "a state may not require a railroad to cease operations over a right-of-way") (internal citations omitted). The remaining cases PSI cites do not involve preemption or voiding contractual agreements as incompatible with the Interstate Commence Act and, thus, do not support PSI's assertion of preemption here. See Maumee & W. R.R.—Pet. for Declaratory Ord.—CSX Transp., Inc., Crossing Rts. at Defiance, Ohio, FD 34527 (STB served May 9, 2007); Wis. Dep't of Transp.—Aban. Exemption—in Winnebago Cnty., Wis., AB 343 (Sub-No. 2X) et al. (ICC served July 13, 1993).

[6] Even if the Board were to examine its preemption claims, PSI does not explain how the easements would interfere with the reactivation of rail service. With respect to the trail easement, PSI simply states that MBTA can use the corridor for rail purposes but that "any portion so utilized in connection with third-party transactions will continue to provide for the continuity of the rail-trail corridor." (Pet. 16.) It is not clear how this would prevent reactivation of rail service. With respect to the utility easement, PSI points to certain provisions of the easement as indicative of MBTA's "intent to eliminate the possibility of rail service reactivation." (Pet. 17.) However, as noted above, the easements contain provisions providing for MBTA's right to operate rail service on the Line. If MBTA intended to prevent the reactivation of rail service, presumably it would not have included such provisions. In any event, the Board will not issue a declaratory order based on inferences regarding MBTA's intent with respect to a hypothetical reactivation of rail service brought by a party with no interest in such service where there is no indication that MBTA could not reactivate rail service if required to do so.

PSI further argues that the ICC and the Board have been inconsistent in determining whether discontinuance or abandonment authority is appropriate for carriers in situations similar to B&M's in 1979, and that a declaratory order is needed to clarify this issue for the rail industry. But PSI does not represent the rail industry, nor does it have any interest in determining what type of authority was or may be necessary for carriers in situations similar to B&M in 1979. Ultimately, any such uncertainty need not be addressed here and can be addressed if a future case arises involving a carrier in a situation similar to B&M's seeking to end service.

PSI also argues that Board guidance on the status of the Line is needed so that landowners with property abutting the Line can determine what legal avenues are available to protect their property interests. However, PSI has not identified itself as a landowner with a potential property interest in the rail corridor, nor does it assert that it represents any such landowners. See, e.g., 14500 Ltd. LLC—Pet. for Declaratory Ord., FD 35788 (STB served June 15, 2014) (addressing preemption issue where party asserted state property law claims concerning rail yard property); Jie Ao, FD 35539 (deciding, in part, preemption issue where parties asserted state property law claims concerning railbanked rail line). Moreover, it is not clear how any existing uncertainty regarding the status of the Line has any effect on the ability of such landowners to protect their property interests.

The Board will also deny the Town's request for issuance of a NITU. Under the Board's regulations, NITUs are issued in proceedings where Board authority to abandon a line is sought, whether via application, petition for exemption, or notice of exemption. See 49 C.F.R. § 1152.29(b)-(d); Limiting Extensions of Trail Use Negotiating Periods Rails-to-Trails Conservancy—Pet. for Rulemaking, EP 749 (Sub-No. 1) et al., slip op. at 3-4 (STB served June 6, 2019). This declaratory order proceeding is not such a case. Moreover, in any event, on November 8, 2021, MBTA filed a reply to the Town's NITU request stating that it does not consent to negotiate for an interim trail use/railbanking agreement with the Town or any other party. The Board cannot issue a NITU without such consent. See, e.g., 49 C.F.R. § 1152.29(c), (d); Citizens Against Rails-to-Trails v. STB, 267 F.3d 1144, 1152 (D.C. Cir. 2001) (explaining that 16 U.S.C. § 1247(d) (the Trails Act) does not permit the Board to compel conversion to a trail where the railroad does not consent).

For the reasons discussed above, the petition for declaratory order and the request to issue a NITU will be denied.

It is ordered:

1. The petition for declaratory order is denied, as explained above.

2. The request for issuance of a NITU is denied.

3. This decision is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.