



*The Leader in Public Sector Law*

July 31, 2019

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BY ELECTRONIC MAIL [[dpu.efiling@mass.gov](mailto:dpu.efiling@mass.gov)]  
AND BY HAND

Mr. Mark D. Marini, Secretary  
Department of Public Utilities  
Commonwealth of Massachusetts  
One South Station, 5<sup>th</sup> Floor  
Boston, MA 02110

Re: Petition of Grafton & Upton Railroad Company, D.P.U. 19-39

Dear Secretary Marini:

Enclosed please find the following in connection with the above-referenced matter:

1. Appearances of Counsel on behalf of the Town of Hopedale;
2. Petition of Town of Hopedale for Leave to Intervene; and
3. Certificates of Service.

Thank you for your attention to this matter. Please contact me with any questions.

Very truly yours,

Nicole J. Costanzo

NJC/

Enc.

cc: Board of Selectmen  
Jennifer Cargill, Hearing Officer (by hand and electronic mail)  
Sandra R. Austin, Esq. (by electronic and first class mail)  
James Howard, Esq. (by electronic and first class mail)

674539/HOPD/0141

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF PUBLIC UTILITIES

D.P.U. 19-39

PETITION OF GRAFTON & UPTON  
RAILROAD COMPANY FOR AUTHORITY  
TO EXERCISE POWER OF EMINENT  
DOMAIN TO ACQUIRE PROPERTY IN  
HOPEDALE, MASSACHUSETTS

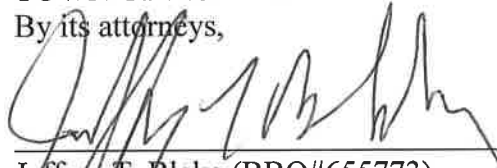
APPEARANCES OF COUNSEL

Please enter our appearances on behalf of the Town of Hopedale, in the above-captioned proceeding.

Respectfully submitted,

TOWN OF HOPEDALE

By its attorneys,



Jeffrey T. Blake (BBO#655773)

Nicole J. Costanzo (BBO# 692408)

KP Law, P.C.

Town Counsel

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DATED: July 31, 2019  
674528/HOPD/0141

## CERTIFICATE OF SERVICE

I, Nicole J. Costanzo, hereby certify that I have served a copy of the foregoing  
Appearances of Counsel for the Town of Hopedale, by electronic mail and by first class mail  
postage prepaid upon counsel on the Department of Public Utilities Service List:

Sandra Austin, Esq. 24 Bolton Street Marlborough, MA 01752 Email: <a href="mailto:sandra@attyaustin.com">sandra@attyaustin.com</a>	James Howard, Esq. 57 Via Buena Vista Monterey, CA 93940 Email: <a href="mailto:jim@jehowardlaw.com">jim@jehowardlaw.com</a>
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Nicole J. Costanzo

Dated: July 31, 2019

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF PUBLIC UTILITIES

D.P.U. 19-39

PETITION OF GRAFTON & UPTON  
RAILROAD COMPANY FOR AUTHORITY  
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HOPEDALE, MASSACHUSETTS

PETITION TO INTERVENE OF  
TOWN OF HOPEDALE

Now comes the Town of Hopedale, by and through its Board of Selectmen (the “Town”), pursuant to 220 CMR 1.03(1), and hereby moves the Department of Public Utilities (“Department”) for leave to intervene in the evidentiary phase of the above-captioned proceeding. As Grounds for this Petition the Town relies upon the following.

REASONS FOR INTERVENTION

Pursuant to 220 CMR 1.03(1)(b), the Town states that it is substantially and specifically affected by the Petition of Grafton & Upton Railroad Company (“GURR”), which is seeking authority from the Department of Public Utilities to exercise the power of eminent domain to authorize GURR to acquire certain real estate, which is located at 364 West Street, Hopedale, Massachusetts (the “Property”), as follows:

1. The Town is a municipal corporation incorporated in the Commonwealth of Massachusetts.
2. The Board of Selectmen is the Town’s executive branch, with an address of Board of Selectmen, Town Hall, 78 Hopdale St, Hopedale, MA 01747.
3. Among the Board of Selectmen’s primary responsibilities is the overall maintenance of public health, welfare and safety within the Town.

4. As the owner of substantial land directly abutting the site, and as the representative of the interests of the residents of the Town and persons who use the Town land, the Town will be specifically and substantially affected by the proposed taking of the Property, and is entitled to intervene in this matter.

5. Under G.L. c. 30A, § 10, in a state administrative proceeding, an agency “shall afford all parties an opportunity for full and fair hearing.” Upon a showing that a party “may be substantially and specifically affected by the proceeding,” an administrative agency may allow a person to intervene as a party.

6. GURR is seeking authority to acquire over 150 acres of land through which a rail corridor already exists. While GURR alleges in its Petition, that the Property is not only reasonably necessary for conducting rail operation, but is “critical and essential to the ability of GURR to provide rail service that meets the demands of customers,” its Petition is vague as to what operations it specifically intends to conduct at the Property.

7. Indeed, the Petition indicates, broadly, that the Property *may* be used to “transload commodities from railcars to trucks, store railcars, switch cars moving to and from the transloading yards, maintain equipment and conduct other activities that are essential to the functioning and support of GURR's rail operations generally.” However, this is not an adequate description of the *specific* intended use of the Property sufficient to justify acquisition of the Property by eminent domain.

8. Representatives of GURR who have been present at two public meetings have not responded directly to questions regarding GURR’s specific plans for the Property and in fact, upon information and belief, the Town understands that the Property, or at least a portion thereof, will be used for commercial wood pellet operations, not rail operations.

9. Further, GURR's Petition only asserts that, generally, additional space for rail operations is needed for future growth of its rail operations and that GURR does not have any other yard or vacant property that could be used to address its unspecified needs. Similarly to its failure to state what its specific intended use is for the Property, GURR does not adequately address why the acquisition of this *particular* Property is "reasonably necessary" for the "proper construction and security" and the "convenient operation" of the railroad.

10. In order to come within the preemptive scope of 49 U.S.C. §10501(b), GURR's activities "must be integrally related to the railroad's ability to provide rail transportation services." Hi Tech Trans., LLC – Petition for Declaratory Order – Hudson County, NJ, STB Finance Docket No. 34192, slip op. at 3 (Nov. 20, 2002). Whether a particular activity constitutes "transportation by rail carrier" is a case-by-case, fact-intensive determination. In Hi Tech Trans., LLC – Petition for Declaratory Order – Newark, NJ, STB Finance Docket No. 34192 (Aug. 14, 2003), the STB rejected the proposition that "any third party or noncarrier that even remotely supports or uses rail carriers would come within the statutory meaning of transportation by rail carrier." Instead, the STB stated that the "jurisdiction of this agency may extend to certain activities and facets of rail transloading facilities, but that any such activity must be closely related to providing direct rail service." Id.

11. Given the uncertainties surrounding GURR's intentions for the Property, the Town should be permitted to intervene in order to engage in discovery with respect to the GURR's plans pursuant to the concerns raised above.

12. In addition, the Town owns land abutting the Property which is known as the "Parklands" and which is an approximately 275 acre parcel of conservation land that surrounds Hopedale Pond. The Parklands, established at the end of the 19<sup>th</sup> century, is the "jewel" of Hopedale – providing nearly four miles of trails for the residents of Hopedale and visitors to the Town. The

Board of Selectmen has a fiduciary responsibility to preserve and protect the Parklands, and is also concerned that GURR's intended – and unknown – activities at the Property, which may adversely impact the use of the Town property. Therefore, the Town may be directly and uniquely affected by GURR's operations at Property.

13. Lastly, the proposed railroad operations may pose risks to the current, and possibly future, water supply for the Town as the Property to be acquired is within the watershed which feeds the Town's water supply. Accordingly, the Town's water supply is at risk of being adversely affected by the proposed railroad operations.

14. GURR currently conducts operations in the Town's Zone II Wellhead Protection Area and the Hopedale Water and Sewer Commission is already concerned and actively considering issues relative to wetlands, contaminants and newly installed fly ash silos. These concerns will be significantly increased should GURR acquire additional property for expansion purposes as an area within the boundary of the Property has been identified through studies to be a viable source for future water sourcing. Acquisition of the Property by the Railroad may thus eliminate a viable water source for the Town.

15. The Town has a responsibility to ensure adequate and clean water for its residents. The proposed acquisition of the Property potentially jeopardizes both present, and potentially future, water sources. The Town's interest in this property, and the effect of GURR's intended use upon water resources, is well-documented, and is an additional basis to grant the Town's Petition to Intervene.

16. The particular interests of the Town and its inhabitants, as set forth above, will not be adequately represented unless the Town is allowed to intervene in these proceedings. The Town, accordingly, has a direct interest on behalf of itself and its inhabitants regarding GURR's request to exercise eminent domain to acquire the Property.

### RELIEF SOUGHT

The Town seeks relief in the form of an order which establishes whether GURR's request to exercise the power of eminent domain to acquire the Property, is "reasonably necessary" for the "proper construction and security" and the "convenient operation" of GURR and which takes into account whether it is beneficial and prudent and the interests of the Town and its inhabitants or the public.

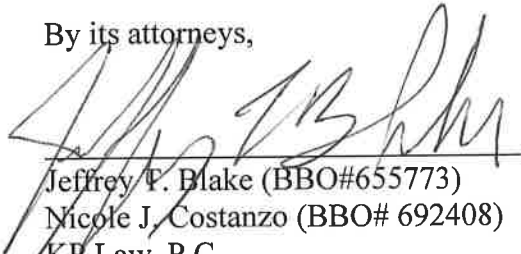
### NATURE OF EVIDENCE TO BE PRESENTED

The Town will present evidence regarding GURR's current operations within the Town's Zone II Wellhead Protection Area and the Hopedale Water and Sewer Commission, and the environmental impacts of additional operations if GURR is permitted to acquire the Property. The Town will also provide information regarding the Town's financial condition and the impact of GURR's proposal, local infrastructure and matters of water supply.

WHEREFORE, the Town requests that it be allowed to intervene in the evidentiary phase of this proceeding. In the alternative, the Town requests that it be allowed to participate in the proceeding upon such terms and conditions as the Department may order.

PETITIONER,  
TOWN OF HOPEDALE

By its attorneys,



Jeffrey P. Blake (BBO#655773)  
Nicole J. Costanzo (BBO# 692408)  
KP Law, P.C.

Town Counsel  
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jblake@k-plaw.com  
ncostanzo@k-plaw.com

DATED: July 31, 2019  
674194v2/HOPD/0141



## CERTIFICATE OF SERVICE

I, Nicole J. Costanzo, hereby certify that I have served a copy of the foregoing Petition to Intervene of Town of Hopedale, by electronic mail and by first class mail postage prepaid upon counsel on the Department of Public Utilities Service List:

Sandra Austin, Esq.  
24 Bolton Street  
Marlborough, MA 01752  
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57 Via Buena Vista  
Monterey, CA 93940  
Email: [jim@jehowardlaw.com](mailto:jim@jehowardlaw.com)

  
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Nicole J. Costanzo

Dated: July 31, 2019