

ENTERED
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Public Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 36384, SILLS ROAD REALTY LLC – ACQUISITION EXEMPTION –
RAILROAD LINE IN THE TOWN OF BROOKHAVEN, NEW YORK

DOCKET NO. FD 36385, SPECTRUM RR HOLDINGS, LLC –
ACQUISITION AND OPERATION EXEMPTION – RAILROAD LINE IN THE
TOWN OF BROOKHAVEN, NEW YORK

REPLY OF BROOKHAVEN RAIL, LLC

Pursuant to the Surface Transportation Board’s (“Board” or “STB”) procedural rules, Brookhaven Rail, LLC (“BHR”) hereby replies in opposition to the two interrelated Verified Notices of Exemption filed contemporaneously by Sills Road Realty LLC (“Sills”) in Docket No. FD 36384 (“Sills Notice”) and by Sills’ subsidiary Spectrum RR Holdings, LLC (“Spectrum”) in Docket No. FD 36385 (“Spectrum Notice”). For the reasons set forth hereinbelow, both the Sills Notice and the Spectrum Notice should be rejected because the legal actions and transactions they contemplate are obviously not the routine, non-controversial transactions that the shortened notice of exemption process was designed for. Rather, the Notices and the accompanying “Joint Motion of Sills Road Realty LLC and Spectrum RR Holdings, LLC for Partial Dismissal” - the latter of which should be dismissed as moot upon rejection of the two notices - raise significant factual disputes and legal questions of whether the proposed actions are consistent with the public convenience and necessity pursuant to 49 U.S.C. §10901. Indeed, there are numerous reasons

why the actions proposed in the Notices – and their clear goal of displacing BHR as the common carrier railroad serving the Brookhaven Rail Terminal (“BRT”) over its objection – are *not* consistent with the provisions of §10901 and the National Rail Transportation Policy in 49 U.S.C. §10101, particularly when viewed in the context of the history of this particular location. In keeping with applicable Board precedent, Sills and/or Spectrum should be required to obtain Board approval for their scheme by either a petition for an individual exemption, under 49 C.F.R. Part 1121, or an application under 49 CFR Part 1150 Subpart A. Following these more appropriate procedures would permit all affected parties to submit relevant information and ensure the development of a full factual record upon which the Board can render a decision. BHR maintains that development of a complete record would result in the Board determining that the Sills/Spectrum scheme to replace BHR (or even the notion of two railroads feasibly providing common carrier services to BRT) is completely unfounded and inconsistent with the public convenience and necessity and other principles underlying 49 U.S.C. §10901.

I. **Factual Background**

BHR is the Class III railroad that possesses the common carrier rights and obligations to provide freight rail service to the BRT. These rights, along with the rights to construct 18,000 feet of common carrier railroad line on Parcel A of the BRT, were originally granted to BHR’s predecessor in interest U.S. Rail Corporation (“US Rail”) by decision served September 9, 2010 in Docket No. FD 35141, *US Rail Corporation – Construction and Operation Exemption – Brookhaven Rail Terminal* (“2010 Decision”). During the course of that proceeding, in response to a request from the Board for information about the proposed construction project, US Rail

explained that its proposal entailed leasing Parcel A from Sills pursuant to a long term lease¹, and that “[t]he Lease obligates US Rail to construct and install the Line and Terminal substantially in accordance with the Site Plan and, once constructed, to operate and maintain the Line and Terminal during the Lease term.”² US Rail also stated that [t]his proceeding involves the construction, lease and operation of a Line of Rail by a common carrier, US Rail.”³ Despite having clear opportunities to do so,⁴ at no time in the process of US Rail obtaining authority to construct and operate the 18,000 feet of rail line on Parcel A did Sills request or assert that, as the underlying landowner or the potential owner of the track to be constructed on its property, Sills acquired or would acquire any status as common carrier by rail pursuant to 49 U.S.C. §10901. Sills’ attempt to imply in its Notice that this was merely a “past regulatory oversight” is therefore not credible.⁵ Accordingly, the *2010 Decision* expressly granted that construction and operating authority only to US Rail. On January 11, 2011, the Board approved a corporate family transaction that “involve[d] the creation

¹ The initial lease term was 30 years.

² STB Finance Docket No. 35141, Supplement to Petition of US Rail Corporation, submitted December 5, 2008.

³ *Id.* at 6.

⁴ U.S. Rail’s Petition for Exemption in Finance Docket No. 35141 was preceded in May 2007 by a Notice of Exemption filed by an entity created by Sills named the “Suffolk and Southern Rail Road LLC” in Finance Docket No. 35036, *Suffolk & Southern Rail Road LLC – Lease and Operation Exemption – Sills Road Realty, LLC*. In that filing, the Sills-created entity informed the Board that Sills was “currently constructing” 11,000 feet of railroad tracks on Parcel A, and that the purpose of the exemption notice was for the Sills-created entity to lease and operate the tracks as a common carrier after they were constructed. The Board declined to process the notice of exemption in Docket No. 35036, stating “Based on its intent to provide for hire service over the trackage, it appears that Sills is constructing a line of railroad subject to the Board’s jurisdiction. Under 49 U.S.C. 10901, Board authority is required to construct a line of railroad. However, Sills has not sought Board authority for this construction.” STB Finance Docket No. 35036 (decision served June 1, 2007). This decision eventually led to the Suffolk entity being permitted to withdraw its notice of exemption, which was replaced by the Petition for Exemption for construction and operation approval under §10901 filed by U.S. Rail, not Sills, in Finance Docket 35141.

⁵ Sills Notice at 9.

of U S Rail New York (USR-NY) and the acquisition by USR-NY of the leasehold rights, *and construction and operation rights* of U S Rail Corporation (U S Rail) related to the Brookhaven Rail Terminal.”⁶ The equity shares of USR-NY were subsequently acquired by Oakland Transportation Holdings, LLC (“Oakland”) which changed USR-NY’s name to Brookhaven Rail, LLC sometime before June, 2012.⁷ Accordingly, Brookhaven Rail’s connection to US Rail is much more direct than Sills asserts in its Notice, which refers to Brookhaven Rail as “an entity known as Brookhaven Rail, LLC” that “appears to have Board authority . . . to ‘lease,’ and to operate as a common carrier” over the tracks authorized by the *2010 Decision*.

BRT disagrees with Sills’ assertion in its Notice that US Rail did not oversee or manage the construction of any of the track located on Parcel A pursuant to the *2010 Decision*, and that Sills alone constructed all of the track.⁸ Subsequent filings at the STB concerning the BRT belie such a blanket assertion.⁹ Moreover, BHR noted in its Comments Regarding Spectrum’s request for an operation exemption, filed on December 20, 2019 in Docket No. FD 36376, *Spectrum RR Holdings, LLC – Operation Exemption – Railroad Line in the Town of Brookhaven, New York*,¹⁰ (“First Spectrum Notice”) that pursuant to an Interchange Agreement between BRT and the New York & Atlantic Railroad (“NY&A”), BHR controls the only switch and the interchange tracks

⁶ STB Docket No. FD 35458, *Gabriel D. Hall – Corporate Family Transaction Exemption – U S Rail New York, LLC* (served January 7, 2011)(emphasis added).

⁷ STB Docket No. FD 35635, *Nevada 5, Inc. and Oakland Transportation Holdings, LLC – Control Exemption – GTR Leasing LLC and US Rail Holdings LLC* (served June 15, 2012).

⁸ Sills Notice at 3.

⁹ See, e.g., STB Finance Docket No. 35189, *Brookhaven Rail Terminal and Brookhaven Rail, LLC - Petition for Declaratory Order*, filed April 28, 2014 (“*For the construction of BRT, US Rail hired Adjo Contracting Corporation ("Adjo"), a New York corporation, to serve as the general contractor to grade and excavate the Parcel A site. Watral Brothers, Inc. ("Watral") and Pratt Brothers, Inc. ("Pratt") are both New York corporations that subcontracted with Adjo to perform related construction activities at the Parcel A site.*”)(emphasis supplied).

¹⁰ BHR’s Comments are attached hereto as Exhibit 1 to this Reply for the Board’s convenience.

that connect the Parcel A tracks to the main line of the Long Island Railroad (“LIRR”), which is operated by the NY&A. Neither Sills nor Spectrum address this fact and its impact on their proposed scheme in their newly filed Notices despite BHR raising this issue in Docket No. FD 36376. It is not disputed that Sills currently owns the other tracks constructed on Parcel A pursuant to the *2010 Decision*. This is consistent with the construction petition for exemption and the *2010 Decision*, where Sills chose to be merely a non-carrier owner of tracks and US Rail was the entity authorized to construct and conduct common carrier operations on the tracks as constructed subject to Board jurisdiction.

As explained in its Comments on the First Spectrum Notice BHR has provided common carrier service to shippers in the BRT for the past 10 years under this basic arrangement, *i.e.* Sills as the non-carrier owner of track and BHR as the entity with common carrier authority to provide freight service subject to the Board’s jurisdiction.¹¹ This service is provided via the aforementioned interchange tracks and switch off of the LIRR main line. As BHR stated in its Comments, there are also numerous other agreements in place between BHR and Sills and between BHR and other entities regarding the provision of rail service at BRT now and as other parcels of the BRT are developed.¹²

¹¹ The contractual documents around the STB jurisdictional relationship established in the 2010 Decision have evolved over the past 10 years. In several contracts all dated effective June 1, 2012 the original long term lease between Sills and US Rail was terminated and simultaneously replaced with (1) a Lease between Sills and Brookhaven Terminal Operations (“BTO”) of the tracks and the land; and (2) an Operating Agreement and Sublease between BTO and Brookhaven Rail that affirmed Brookhaven Rail as the common carrier railroad operating on the leased property. The sublease agreement was later replaced in 2016 with the Railroad Operating Agreement and Sublicense Agreement referenced in BHR’s Comments, but BHR has always been the sole entity with the common carrier obligation to provide service over all of the tracks eventually constructed pursuant to the *2010 Decision*.

¹² Comments at 3-4.

Despite the well-established status quo of BHR fulfilling its common carrier obligations to shippers located in the BRT, and the presence of numerous, long term agreements regarding BHR's continued provision of such services into the future as the other parcels of the BRT are developed, Sills launched a scheme to try and remove BHR from BRT in December 2019 through the filing of the First Spectrum Notice. No reason for taking this action was provided to the Board other than "Sills Road recently has decided that it would prefer to bring the BRT common carrier operations in-house."¹³ Proof that Sills' intent was (and BHR believes remains so) to force BHR's removal from BRT was found in the Notice itself, which affirmatively stated that "the anticipated sequence of events contemplates the future cessation of Brookhaven Rail operations . . .,"¹⁴ and that "SRHL intends to provide common carrier service over the subject railroad assets."¹⁵ The Notice also falsely implied (1) that BHR, who had no prior knowledge of the filing, agreed with the scheme, (2) that Sills and Spectrum had "the expectation" that BHR "will, in a separate proceeding, seek formally to discontinue its common carrier operations over the subject trackage" and (3) that BHR would "through appropriate Board processes, cease to be a rail common carrier within the BRT"¹⁶

On February 6, 2020, BHR filed its aforementioned Comments that voiced its strong opposition to the scheme set forth in the Notice. On that same date, Spectrum filed a letter seeking leave to withdraw its Notice of Exemption in Docket No. FD 36376. That letter motion remains pending. Neither the Sills Notice nor the Spectrum Notice respond to any of the factual assertions

¹³ Notice of Exemption at 5.

¹⁴ *Id. at 1, note 1.*

¹⁵ *Id. at 3.*

¹⁶ *Id.*

and complaints made by BHR in its Comments, and so those assertions and complaints remain un rebutted.

As a final factual background component, in BHR's view, the only thing that has changed in the parties' relationship that coincides with Sills' sudden actions starting in December 2019 to force BHR to discontinue its common carrier service to BRT is that in 2019 BHR's owner, Oakland, began exploring the possibility of selling its equity interests in BHR and related landholdings. To this end, Oakland first engaged in discussions with Sills. However, those negotiations were not successful and ended, and Oakland began negotiating with other parties. The First Spectrum Notice was filed after the discussions with Sills had ended and talks with another party were in progress, which leads BHR to conclude that the two events are related, and that Sills is seeking to displace BHR in retaliation for its owner negotiating with someone other than Sills to purchase the BHR and related landholdings.

III. Argument

A. The Notices Must be Rejected Because the Actions They Contemplate Are Inappropriate for Consideration under the Class Exemption Procedure

It is well established that "the class exemption is meant to be used for routine transactions that have not attracted substantial controversy and local interests, such as transactions where new operators would be continuing an existing common carrier rail service over lines that selling carrier can no longer operate profitably."¹⁷ In *Riverview*, the STB explained that [t]he class exemption procedures were adopted to serve shippers and community interests by facilitating continued rail

¹⁷ STB Finance Docket No 34734, *Northeast Interchange Railway, LLC – Lease and Operation Exemption – Line in Croton-on-Hudson, NY* (served November 18, 2005) at 4 citing STB Finance Docket No. 33980, *Riverview Trenton RR Co.- Acquisition and Operation Exemption – Crown Enterprises, Inc.* (served February 15, 2002)(“*Riverview*”).

service, on lines that the selling carrier could no longer operate profitably, by new smaller carriers seeking to provide service more efficiently.”¹⁸ Moreover, [t]he procedures are designed to meet the need for expeditious handling of a large number of requests that are rarely opposed. In most instances the transactions under this proposal will involve resumed or continued rail service with no change in operations.”¹⁹ Finally, the class exemption procedure “is typically reserved for uncomplicated and noncontroversial cases,” not cases that involve legal questions of Board jurisdiction over the rail lines at issue.²⁰

In this case, the actions proposed by Sills and Spectrum are not routine, and they certainly do not involve a non-controversial situation where a new operator would merely continue operations that are being provided unprofitably or inefficiently by BHR. On the contrary, in apparent retaliation for Oakland considering selling its interests in BHR to a party other than Sills, Sills and Spectrum now seek to displace BHR as the railroad providing common carrier operations at BRT against its wishes. Sills and Spectrum give lip service in their respective current Notices to the fact that BHR is the entity with the authority to provide common carrier services at the BRT, and that such authority may only be terminated by the Board.²¹ They have also replaced declarative assertions in the First Spectrum Notice that “SRHL will operate within the BRT as a

¹⁸ *Id.* at 7.

¹⁹ *Id.*, citing *Class Exemption – Acq. & Oper. Of R. Lines under 49 U.S.C. 10901*, 1 I.C.C. 2d 810 (1985).

²⁰ STB Finance Docket No. 34645, *The Burlington Northern and Santa Fe Railway Co. – Acquisition and Operation Exemption – State of South Dakota* (served January 14, 2005). See also Docket No. FD 35586, *Southern San Luis Valley RR, LLC – Acquisition and Operation Exemption – Iowa Pacific Holdings*, (served February 10, 2012)(where legal questions of ownership and Board jurisdiction over a rail line made the notice of exemption process inappropriate).

²¹ See, e.g., STB Docket No. FD 35468, *Pinelawn Cemetery – Petition for Declaratory Order* (served April 21, 2015) at 6, 9-10.

rail common carrier”²² with more vague statements that “SRHL has no immediate plans to commence rail operations over the Line . . .,”²³ but the clear intent of the overall scheme was revealed in the First Spectrum Notice and that is to force BHR to cease common carrier operations on Parcel A and other the other parcels making up the BRT where BHR has contractual rights to operate. Vague representations in the Sills Notice and Spectrum Notice that Spectrum and BHR could somehow both conduct rail operations over the same tracks²⁴ are utterly unsupported by any evidence of how this could feasibly occur, particularly given the layout of the tracks at issue and since there is only one switch and interchange track, and both are controlled by BHR and NY&A pursuant to their Interchange Agreement. Such unresolved issues further demonstrate that this matter is not appropriately considered by the Board through the notice of exemption process.

Nor do Sills or Spectrum provide any explanation as to *why* their scheme should be approved by the STB, which is another reason why seeking authority through the notice of exemption process is inappropriate. Neither allege that BHR is not operating efficiently and profitably or not fulfilling its common carrier obligations, and BHR would have strongly disagreed with any such assertion if one had been made. There is no assertion that traffic is expected to increase in the BRT to levels that require two common carrier railroads to be operating in the BRT, even assuming that this could be done feasibly and efficiently. In short, BHR has exhibited no behavior, and Sills has alleged none, that would justify BHR’s removal and the current service it provides to BRT being disrupted.

The proposed transaction is also not routine or uncomplicated because, as the Sills Notice recognizes, Sills currently has no legal rights *vis a vis* the use or disposition of the common carrier

²² Spectrum Initial Notice at 5

²³ Spectrum Notice at 4.

²⁴ Sills Notice at 6.

obligation and authority granted pursuant to the *2010 Decision*. This was not due to oversight, but by choice. Whether Sills should now be granted “prospective Board authorization to own the subject line” and the residual common carrier obligations to provide service²⁵ under these facts and circumstances is a question for the Board to decide based on the principles of §10901 and the factual history of this matter. Similarly, should the Board accede to Sills’ request for exemption authority to grant it ownership status and underlying common carrier obligation it seeks over BHR’s objection, the transfer of those interests and obligations to Spectrum as subsidiary of Sills for the only stated purpose of “bring[ing] BRT common carrier operations in-house” also deserves scrutiny for compliance with §10901 because the statement on its face implies that Sills intends to replace BHR’s common carrier service to the public at large with a more narrowly targeted service plan.

The two notices should therefore be rejected because they are not the appropriate vehicles for seeking such authority. Rather, the disputed issues and controversy surrounding the actions proposed in the Notices should be resolved through either petition for exemption proceeding or a formal application proceeding, where evidence can be taken and §10901 principles applied. BHR maintains that when those principles are applied to the facts of this matter, Sills’ request for common carrier status and its attempt to transfer those rights and obligations to its subsidiary should not be approved.

B. The Joint Motion to Dismiss is Not Appropriate for a Notice Proceeding, and it Should be Denied as Moot in Any Event.

In their “Joint Motion,” Sills and Spectrum ask the Board to accept *their* unilateral re-classification of the tracks that were constructed pursuant to the petition for exemption filed by US

²⁵

Id.

Rail in Docket No. 35141 and the *2010 Decision* from lines of railroad subject to §10901 to excepted tracks subject to §10906.²⁶ BHR was not consulted about the proposed re-classification of these tracks it has common carrier operating authority for. BHR submits initially that the Joint Motion is yet another example why the notice of exemption procedures are obviously inappropriate for the actions contemplated by Sills and Spectrum. As Sills and Spectrum readily concede, their Joint Motion is far from routine, and they suspect Board might not be persuaded that this Motion is the “correct vehicle to reasonably delineate between [yard track and track that is a 10901 line of railroad].”²⁷ Whether it is a correct “vehicle” or not to take on such issues, the Joint Motion raises evidentiary and legal issues for which the notice of exemption process was not designed to address. As one example, the Joint Motion asks the Board to rule on the status of tracks Sills and Spectrum represent “would be installed on Parcels B and C that the Board previously has held would qualify as ancillary track under §10906.”²⁸ However, as shown on Exhibit 2 to this Reply, the exhibit to the Joint Motion that purports to depict the to-be-constructed Parcel B and C tracks is markedly different than the layout of tracks that were the subject of the declaratory order proceeding in Docket No. FD 35819, where the Board ultimately granted the petition only after litigation between Sills, the Town of Brookhaven and other parties resulted in a Joint Stipulation and Settlement Agreement that specifically included the configuration of tracks to be constructed on Parcels B and C.²⁹ The Joint Motion does not state that Sills has obtained the agreement of all

²⁶ The petition for exemption in Docket 35141 sought §10901 line of railroad status for all 18,000 of the tracks proposed to be constructed. The *2010 Decision* granted that request, and clearly all of the tracks that were eventually constructed pursuant to that decision and which are being operated by BRH were and currently are, classified as subject to the STB’s jurisdiction under §10901.

²⁷ Joint Motion at 3.

²⁸ *Id.* at 4, citing *Brookhaven Rail Terminal and Brookhaven Rail, LLC – Petition for Declaratory Order*, Docket No. FD 35819 (STB Served Aug. 30, 2016).

²⁹ August 30, 2016 Decision at 3.

parties to the settlement agreement (1) to modify it to change the to-be-constructed track configuration on Parcels B and C; and (2) that all of the tracks under the new configuration should be classified by the STB as §10906 tracks. BHR does not believe either event has occurred. But in any event, it is not true that the Board has previously held the tracks depicted in the exhibit to the Joint Motion are §10906 tracks.

Regardless of the foregoing however, the Joint Motion should be dismissed as moot. A ruling on the Joint Motion to partially dismiss the Sills Notice and the Spectrum Notice can only occur if the Board accepts the Notices as valid, and BHR has demonstrated that they should be summarily rejected. Such rejection would moot any need to consider the many issues presented by the Joint Motion. BHR submits that Sills and Spectrum should pursue any future attempt to reclassify the tracks constructed pursuant to the authority granted in the *2010 Decision* – after first consulting with BHR as the holder of the federal operating rights on those tracks - in conjunction with petition for an individual exemption under 49 C.F.R. Part 1121, an application under 49 CFR Part 1150 Subpart A regarding the proposals in their Notice, a petition for declaratory order, or other more formal process. Any such process would be more appropriate and provide BHR in particular a means to protect its interests and for the Board to receive evidence upon which to make an informed decision.

IV. Conclusion

For all the reasons stated in this Reply, the Board should reject the Notices of Exemption filed by Sills and Spectrum and it should dismiss the Joint Motion as moot and/or inappropriate

for consideration in a notice of exemption proceeding.

Respectfully submitted,



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Attorney for Brookhaven Rail, LLC

March 3, 2020

Exhibit 1

OAKLAND LAW GROUP, PLLC

38955 HILLS TECH DRIVE
FARMINGTON HILLS, MICHIGAN 48331

February 6, 2020

By E-Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423

Re: STB Docket No. FD 36376, *Spectrum Holdings, LLC – Operation
Exemption – Railroad Line in the Town of Brookhaven, N.Y.*

Dear Ms. Brown:

Attached for filing in the above-captioned proceeding is Brookhaven Rail, LLC's Comments Regarding Spectrum RR Holdings, LLC's Request for Operation Exemption.

Please do not hesitate to contact the undersigned at (248) 536-3285 or wclifford@oaklandlawgroup.com if you have any questions. Thank you for your assistance on this matter.

Respectfully submitted,

OAKLAND LAW GROUP, PLLC

/s/ William B. Clifford, Jr.

William B. Clifford, Jr.
Attorney for Brookhaven Rail, LLC

Enclosure

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36376

SPECTRUM RR HOLDINGS, LLC

-- OPERATION EXEMPTION --

RAILROAD LINE IN THE TOWN OF BROOKHAVEN, NEW YORK

**COMMENTS OF BROOKHAVEN RAIL, LLC REGARDING
SPECTRUM RR HOLDINGS, LLC'S REQUEST FOR
OPERATION EXEMPTION**

William B. Clifford, Jr.
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ATTORNEY FOR BROOKHAVEN RAIL, LLC

Dated: February 6, 2020

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36376

SPECTRUM RR HOLDINGS, LLC

-- OPERATION EXEMPTION --

RAILROAD LINE IN THE TOWN OF BROOKHAVEN, NEW YORK

**COMMENTS OF BROOKHAVEN RAIL, LLC REGARDING
SPECTRUM RR HOLDINGS, LLC'S REQUEST FOR
OPERATION EXEMPTION**

Brookhaven Rail, LLC ("BHR"), the common carrier operator of the Brookhaven Rail Terminal (the "BRT") in Brookhaven, New York, submits these comments in response to the Decision served in this Proceeding on January 17, 2020, which was served on BHR by the Board on that date. The Decision followed a December 20, 2019 Verified Notice of Exemption (the "Notice") filed by Spectrum RR Holdings, LLC ("SRHL") in which SRHL requests Board approval to operate under license an approximately 0.47-mile rail line located at the BRT. BHR provides the following comments on the issues raised in the Decision, and as explained herein, BHR opposes SRHL's request for Board approval.

BACKGROUND

The BRT is a railroad transloading facility with approximately 16,850 linear feet of track on a piece of property known as Parcel A (i.e., "Yard A" in the Notice), on which certain activities were licensed by the Board in 2010. As the Decision notes, BHR is the successor to U.S. Rail Corp, who received authority under 49 U.S.C. §10901 to construct and operate approximately 18,000 feet of a line of railroad on Parcel A. Today, BHR provides rail and transloading services, including all switching and marshalling of rail cars, in the BRT. Line-haul freight rail service is

provided to the BRT over the Long Island Railroad (“LIRR”) by New York & Atlantic Railway Company (“NYA”), a Class III rail carrier that interchanges with BHR at the switch lead to the BRT. BHR operates five days per week and presently has three employees.

BROOHAVEN RAIL’S COMMENTS

As explained in its January 22, 2020 letter, prior to receiving the Board’s January 17, 2020 Decision, BHR was completely unaware that SRHL had filed the Notice. Neither SRHL nor its corporate parent, Sills Road Realty, LLC (“Sills”), informed BHR of its desire to replace BHR with its own corporate subsidiary. More surprising is that Sills believes it has the authority to unilaterally replace BHR despite the existence of the following contractual arrangements related to BHRs common carrier obligations:

1. *Interchange Agreement* between US Rail New York, LLC (the predecessor of BHR) and NYA. The Interchange Agreement governs the interchange of rail traffic moving to and from the BRT. Pursuant to the terms of the Interchange Agreement, BHR, and not Sills or its corporate subsidiary, Brookhaven Terminal Operations, LLC (“BTO”), controls the switch and interchange track. Further, based on inquiries made by BHR representatives, the NYA was completely unaware of both the Notice being filed and Sills’ overall plan to replace BHR with SRHL. That Sills took no steps to notify NYA of the proposed transaction or to explore NYA’s willingness to enter into an Interchange Agreement prior to filing the Notice – which was silent as to how SRHL would interchange traffic with NYA – is a clear indication of Sills’ lack of knowledge and experience in the operation of a common carrier railroad.

2. *Joint Commercial & Marketing Agreement* (the “JCMA”) between US Rail New York, LLC (the predecessor of BHR) and NYA. The JCMA governs the ongoing commercial relationship between BHR and NYA. Specifically, the JCMA authorizes NYA to establish pricing

for the movement of all freight traffic into and out of the BRT on by BHR over the switch and interchange, to enter into contractual arrangements with other shippers for the movement of freight over the switch and interchange, and it governs NYA's offering of linehaul rail transportation services for cars originating or terminating at BRT. Again, given NYA's lack of knowledge related to the Notice, it is clear that neither SRHL nor Sills have taken any steps to establish a pricing structure with NYA, let alone considered how such an arrangement would interfere with the existing contract between BHR and NYA.

3. *Railroad Operating Agreement and Lease (Parcel C)* (the "Parcel C Lease") between BHR and Brookhaven Eastern Holdings, LLC ("BEH"). Parcel C is an approximately 73-acre site located adjacent to Parcels A and B. BEH is the owner of Parcel C and a wholly owned subsidiary of BTO. Section 2 of the Parcel C Lease grants BHR, in relevant part, "all rights, free from restrictions, interference, or hinderance from [BEH], it agents, affiliates, employees, or any entity connected to any of them, to: . . . [o]perate [Parcel C] as a common carrier railroad" In other words, absent an Event of Default, BHR is the exclusive provider of common carrier services until the Parcel C Lease expires on May 31, 2032.

4. *Railroad Operating Agreement and Sublicense Agreement* (the "Rail Agreement") between BHR and Brookhaven Rail Freight Services ("BRFS"). BRFS is the operator of the BRT and a wholly owned subsidiary of BTO. Section 2.5 of the Rail Agreement expressly states that BHR shall be the exclusive provider of various rail services -- including all interchange, switching and marshalling of rail cars -- at BRT during the Term of the Rail Agreement. Upon expiration of that Agreement, BHR's continued provision of common carrier service to the BRT would be subject to a new agreement and/or the Board's jurisdiction.

Next, SRHL's inference in footnote 1 of the Notice is that BTO, as the "primary user of rail service at the BRT", is the only customer being served by BHR could not be more misleading. All customers at BRT including The Home Depot, Lehigh Hanson Cement, Riverhead Builders Supply, Renewable Energy Group, North Dakota Milling, Gourmet Foods, among others, are reliant on BHR's experience in providing common carrier services. For example, the monitoring of inbound and outbound traffic is done exclusively by BHR; all customer calls to BTO are referred to BHR; and customers regularly contact BHR directly regarding car movement. Further, if a waybill is needed for a car, BTO contacts BHR for assistance retrieving the waybill. And all conversations with prospective customers regarding the rail movement of goods are had with BHR, not with BTO, Sills or its affiliates. In other words, BHR, and not Sills or its affiliates, is the face of BRT vis-à-vis its customers and its operations.

Finally, most surprising to BHR was the revelation, as represented to the Board by SRHL, that Sills expects that BHR "will, in a separate proceeding, seek to formally [and seemingly voluntarily] discontinue its common carrier operations over the subject trackage." To be blunt: any implication that BHR concurs with the proposed transaction or that it has agreed to cease its common carrier operations within the BRT is blatantly false. BHR has no intention of voluntarily giving up its common carrier rights and obligations at the BRT. At present, BHR only operates at BRT. As such, any termination of BHR's common carrier operations at BRT would effectively put BHR out of business, resulting in the immediate loss of three railroad jobs. It goes without saying that, absent extenuating circumstances, BHR would never voluntarily agree to any transaction that would put it out of business.

CONCLUSION

In conclusion, BHR reiterates its objection to the attempt by SRHL and Sills to wrest away BHR's operating rights at the BRT. Beyond the fact that the Notice is factually incorrect and misleading vis-à-vis BHR's plans to provide common carrier services at BRT, the proposed transaction would disrupt BRT's operations to the detriment of its customers, the NYA, and, ironically, BRFS. As such, BHR respectfully requests that the Board reject SRHL's request for Board approval to operate as a common carrier at the BRT.

CERTIFICATE OF SERVICE

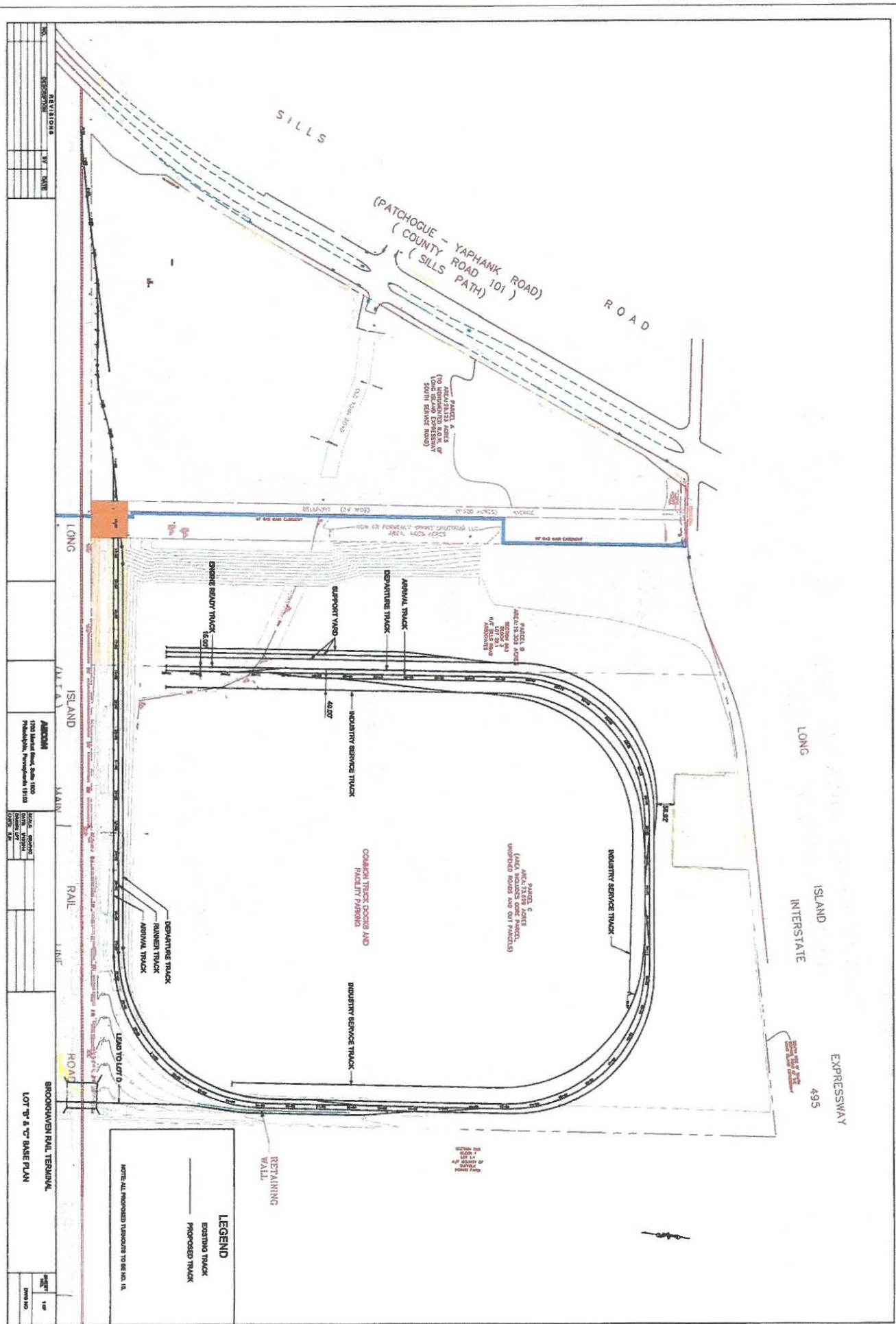
I certify that I have, on February 6, 2020, served a copy of the foregoing Comments of Brookhaven Rail, LLC Regarding Spectrum RR Holdings, LLC's Request for Operation Exemption on all parties of record in this proceeding.

/s/William B. Clifford, Jr.

William B. Clifford, Jr.

Attorney for Brookhaven Rail, LLC

Exhibit 2



REVISIONS

NO.	DESCRIPTION	BY	DATE
1	ISSUED FOR PERMIT	...	...

ADDITION

NO.	DESCRIPTION	BY	DATE
1	...	...	...

REVISIONS

NO.	DESCRIPTION	BY	DATE
1	...	...	...

ADDITION

NO.	DESCRIPTION	BY	DATE
1	...	...	...

REVISIONS

NO.	DESCRIPTION	BY	DATE
1	...	...	...

ADDITION

NO.	DESCRIPTION	BY	DATE
1	...	...	...

REVISIONS

NO.	DESCRIPTION	BY	DATE
1	...	...	...

ADDITION

NO.	DESCRIPTION	BY	DATE
1	...	...	...

CERTIFICATE OF SERVICE

I hereby certify that, on this 3rd day of March, 2020, a copy of this Reply of Brookhaven Rail, LLC was served by email and regular mail on the following parties:

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