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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**KCVN, LLC AND COLORADO PACIFIC RAILROAD, LLC – FEEDER LINE
APPLICATION – LINE OF UNION PACIFIC RAILROAD COMPANY LOCATED IN
PUEBLO, FREMONT, CHAFFEE, LAKE, AND EAGLE COUNTIES, COLORADO**

**UNION PACIFIC RAILROAD COMPANY’S MOTION
TO REJECT FEEDER LINE APPLICATION
AND DENY DISCOVERY REQUESTS**

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I. INTRODUCTION

Union Pacific Railroad Company respectfully requests that the Board reject the Feeder Line Application filed on February 14, 2020 (the “Application”) by KCVN, LLC and Colorado Pacific Railroad, LLC (collectively, “KCVN”). KCVN seeks to compel Union Pacific to sell an irreplaceable strategic asset – a rail line through the Rocky Mountains known as the Tennessee Pass Line (the “Line”). But KCVN fails to allege facts sufficient to meet the criteria for a valid feeder line application established by statute, the governing regulations, and Board precedent. Critically, KCVN cannot make a threshold, *prima facie* showing that Union Pacific has refused to provide adequate service to shippers who transport traffic over the Line, or is inadequately serving those shippers, such that “the public convenience and necessity require or permit the sale.” 49 U.S.C. § 10907(b)(1)(A)(i); *see id.* §§ 10907(c)(1)(A) & (B). KCVN also fails to demonstrate its ability to finance the approximately \$287 million cost – according to its own estimates – to rehabilitate the Line. *See id.* § 10907(a)(2). The Board should thus reject the Application as deficient on its face. The Board should also deny KCVN’s discovery requests because the requested information cannot remedy the Application’s flaws.

If KCVN believes it has a better use for the Line than Union Pacific, its “remedy” is not to pursue a forced sale through a feeder line application, but rather to negotiate a mutually beneficial, market-based arrangement with Union Pacific.¹

II. BACKGROUND

A. Factual Background

Union Pacific owns all rights necessary to operate over the Tennessee Pass Line, so we can restore rail service over the entire Line if warranted by market or operating conditions. The Line runs between Union Pacific milepost (“MP”) 118.20, near Pueblo, Colorado, and MP 341.9, near Dotsero, Colorado. In 1995, as part of the UP/SP merger, Union Pacific initially proposed to abandon segments of the Line with little or no local traffic and to reroute overhead traffic on alternative lines, including our line through the Rocky Mountains via the Moffat Tunnel. But Union Pacific revised our plans in response to various expressions of concern. We decided to pursue more limited authority to discontinue service over the segments previously slated for abandonment. The Board granted our more limited request, explaining that “because of the importance of this through route, permitting abandonment now would be inconsistent with the rail transportation policy.” *Union Pacific/Southern Pacific Merger*, 1 S.T.B. 233, 508 (1996), *aff’d sub nom. Western Coal Traffic League v. STB*, 169 F.3d 775 (D.C. Cir. 1999).

Union Pacific never sought to abandon or discontinue service over the entire Line. We retained our common carrier obligations on 6.9 miles at the western end of the Line, between MP 335.0 near Sage, Colorado, and Dotesro. Union Pacific serves one shipper located on the Sage-Dotsero segment, American Gypsum. We also use the segment to store rail cars, as the need

¹ Statements regarding Union Pacific’s operations on the Line, commercial dealings with shippers transporting traffic over the Line, and negotiations with entities potentially interested in acquiring rights to operate on the Line are verified by Mark A. Bristol, Union Pacific’s General Director of Interline Operations.

arises. Union Pacific also retained our common carrier obligations on 43.8 miles at the eastern end of the Line, between MP 162.0 near Cañon City, Colorado, and Pueblo. Union Pacific currently conducts operations over the eastern end of the Line to serve two customers: Lafarge Holcim in Florence, and Thermo Fluids in Cañon City. The Rock & Rail Railroad also operates over the Line between Cañon City and Pueblo using trackage rights acquired from BNSF Railway. *See Rock & Rail, Inc. – Acquisition & Operation Exemption – The Burlington N. & Santa Fe Ry.*, FD 33738 (STB served Apr. 30, 1999). To the best of our knowledge, Rock & Rail serves four customers located on the Cañon City-Pueblo segment: Martin Marietta Minerals, Lafarge Holcim, Murco Wall Products, and GMCO. It interchanges some of that traffic with Union Pacific in Pueblo.

Union Pacific has carefully preserved our rights to operate over the entire Line, including the portions on which we obtained authority to discontinue service. In 1998, we sold 11.75 miles of the discontinued Line between MP 171.90, at Parkdale, Colorado, and MP 160.15, at Cañon City, to the Royal Gorge Express, LLC, for passenger excursion train operations. *See Royal Gorge Express, LLC – Acquisition & Operation Exemption – Union Pac. R.R.*, FD 33622 (STB served July 15, 1998). However, Union Pacific expressly retained permanent, irrevocable overhead trackage rights over the Parkdale-Cañon City segment “so as to preserve the integrity of the Tennessee Pass through route.” *Id.* at 1 n.1. Union Pacific thus can restore freight service over the entire Line, if restoration of such service proves justified.

Union Pacific takes seriously the possibility of restoring service over the entire Line. Shortly after the UP/SP merger, Union Pacific recognized the wisdom of the Board’s decision to preserve an intact, alternate rail corridor through the Rocky Mountains. We expressed our intent to retain the whole Line by removing the portions previously designated for abandonment from

“Category 1” on our system diagram map in 1998. *See Union Pacific/Southern Pacific Merger*, 3 S.T.B. 987, 1012 n.95 (1998). In the years since the merger, Union Pacific has engaged with various parties who expressed interest in restoring service on some or all of the discontinued portions of the Line.

Union Pacific continues to have a strong interest in restoring service on the Line. In fact, when KCVN sent Union Pacific a letter offering to acquire the Line in November 2019, we were already engaged in preliminary discussions with {{

}}² about restoring service on discontinued portions of the Line. Specifically, {{ }} had expressed interest in {{ }}.

We told KCVN we intended to see those discussions through before exploring other options. *See also* Application, Osborn VS, Att. 5. Union Pacific hosted a productive meeting with {{ }} on February 17, 2020, and our negotiations are continuing. However, even if we were not already dealing with {{ }}, and even if our negotiations with {{ }} are unsuccessful, Union Pacific would not accept KCVN’s proposal to sell all our rights in the Line. In Union Pacific’s discussions with {{ }}, and in our prior discussions with other parties, we have insisted on retaining the right to use the Line as an alternative route for our operations through the Rocky Mountains – just as we did when we sold a discontinued portion of the Line to Royal Gorge Express. Indeed, KCVN’s own Application repeatedly describes the Line’s significant strategic value as an alternative to Union Pacific’s through route via the Moffat Tunnel. *See* Application at 10, 32–33; *id.*, Osborn VS at 12; *id.*, Crowley VS at 11–12, 44–46,

² Material within double brackets is Highly Confidential. This material has been redacted from the Public version of this motion.

50–56, 63–66. Union Pacific does not agree with all KCVN’s views regarding the Line’s value – for example, we believe our existing alternatives are superior, at least under present circumstances, to through routes that would include the Line. But Union Pacific recognizes the practical impossibility of building a new line through the Rocky Mountains if demand exceeds capacity on the Moffat Tunnel route or if other future conditions preclude use of the Moffat Tunnel. Union Pacific regards the Line as a critical, strategically valuable alternative for handling traffic moving across our network.

B. Legal Background

Congress passed the feeder line development law to preserve service to shippers on lines receiving inadequate service or lines a railroad identifies as potentially subject to abandonment or discontinuance of service. “[T]he provision provides, through acquisition, a viable alternative to poor service or total abandonment.” *See Caddo Antoine & Little Missouri R.R. v. United States*, 95 F.3d 740, 746 (8th Cir. 1996) (quoting H.R. No. 96–1430, 96th Cong., 2d Sess. 124 (1980)). The law is now codified at 49 U.S.C. § 10907; applicable regulations appear at 49 C.F.R. part 1151.

An applicant seeking to acquire a feeder line must be a “financially responsible person.” 49 U.S.C. § 10907(a). A “financially responsible person” must be: (1) “capable of paying the constitutional minimum value of the railroad line proposed to be acquired,” *id.* § 10907(a)(1), *and* (2) “able to assure that adequate transportation will be provided over such line for a period of not less than 3 years,” *id.* § 10907(a)(2).

An applicant who qualifies as a “financially responsible person” can seek to acquire a line under two circumstances. *First*, it can seek to buy a line designated on the operator’s system diagram map as a candidate for abandonment or discontinuance, or as a potential candidate for abandonment (Categories 1 and 2). 49 U.S.C. § 10907(b)(1)(A)(ii); 49 C.F.R. § 1151.4(b)(1)(ii).

Second, it can seek to buy a line where “the public convenience and necessity require or permit the sale.” 49 U.S.C. § 10907(b)(1)(A)(i). And the Board may conclude the public convenience and necessity require or permit a sale of a line if it determines:

- (A) the rail carrier operating such line refuses within a reasonable time to make the necessary efforts to provide adequate service to shippers who transport traffic over such line;
- (B) the transportation over such line is inadequate for the majority of shippers who transport traffic over such line;
- (C) the sale of such line will not have a significantly adverse financial effect on the rail carrier operating such line;
- (D) the sale of such line will not have an adverse effect on the overall operational performance of the rail carrier operating such line; and
- (E) the sale of such line will be likely to result in improved railroad transportation for shippers that transport traffic over such line.

49 U.S.C. 10907(c)(1).

In its Application, KCVN incorrectly claims Union Pacific marked discontinued portions of the Line as candidates for abandonment on our system diagram map. *See* Application at 5. Union Pacific’s system diagram map simply identifies those portions as “discontinued” – the portions are not highlighted in red and are not included in the description of lines by state, as they would be if they were candidates for abandonment.³ However, the issue is irrelevant: as KCVN acknowledges, it must satisfy the public convenience and necessity test because portions of the Line it proposes to acquire plainly are not marked as candidates for abandonment, and Board precedent requires application of the public convenience and necessity test in such circumstances. *Id.* at 25 (citing *Caddo Antoine & Little Missouri R.R. – Feeder Line Acquisition*

³ KCVN attached a copy of Union Pacific’s system diagram map to the Application, and KCVN, not Union Pacific, marked the Line in red. *See id.* at 5 n.15 (“Applicants have marked in red the location of the Tennessee Pass Line . . .”).

– *Arkansas Midland R.R. Line Between Gurdon and Birds Mill, AR*, FD 32479 (STB served Aug. 12, 1999) at 6).

In sum, for the Board to accept the Application, KCVN must demonstrate not only that it is a financially responsible person, but also that every element of the public convenience and necessity test is met. The law specifically places the burden of making each of these showings on KCVN. Under the Board’s regulations, the initial application must include “[i]nformation sufficient to demonstrate that the applicant is a financially responsible person.” 49 C.F.R. § 1151.3(a)(3). “If the applicant seeks a finding of public convenience and necessity, the application must contain detailed evidence that permits the Board” to make the necessary statutory findings. *Id.* § 1151.3(a)(11)(i)(A)–(E). As discussed below in Part III, KCVN’s Application fails to meet either burden, so the Board should reject it.

The Board’s regulations provide for the Board, through the Director of the Office of Proceedings, to reject an application that does not contain substantially all the information required by the statute and regulations. 49 C.F.R. § 1151.2(b). The Director may conditionally accept an incomplete application *only if* the applicant has requested discovery and the Director determines “the discovery sought is necessary for the application and primarily or exclusively within the knowledge of the owning carrier.” *Id.* § 1151.2(d)(2). Because the required showing of the applicant’s financial responsibility cannot turn on discovery against the owning carrier, the Director must reject any application that fails to make that showing. *See, e.g., PYCO Indus., Inc. – Feeder Line Acquisition – South Plains Switching, Ltd.*, FD 34844 (STB served June 2, 2006) at 7. The Director also should not permit the Board’s processes to be abused by an applicant engaged in a fishing expedition regarding public convenience and necessity factors where the applicant has not made a *prima facie* showing that the owning carrier has refused to provide

adequate service to a local shipper. *See Dr. Daniel R. Fiehrer – Feeder Line Application – Line of BNSF Ry. Between Helena and Great Falls, MT*, FD 34947 (STB served Aug. 29, 2007) at 5 (rejecting application where applicant “does not claim [owning railroad] refused a reasonable request for service on the line during the last 6 years”); *Forty Plus Foundation/Manhattan Cent. Ry. Sys., LLC – Feeder Line Acquisition – The Manhattan Highline*, FD 34606 (STB served Jan. 25, 2005) (“*Forty Plus I*”) at 3 (rejecting application where applicant “named no shippers that want to move any traffic”); *PYCO* at 5 (rejecting application where “evidence is lacking to show that the majority of shippers on the line experienced inadequate service from [the line’s owner] or that a majority of the shippers asked [the line’s owner] to improve its service to them”).

As discussed below, the Application fails to show any possibility KCVN can meet the public convenience and necessity test. It also fails to show KCVN has the required financial responsibility to purchase and operate the Line. The Director should thus reject the Application, along with KCVN’s extensive discovery requests.

III. ARGUMENT

A. KCVN’S Application Fails To Establish Any “Public Convenience And Necessity” That Would Require Union Pacific To Sell The Line.

KCVN cannot make out even a *prima facie* case that “the public convenience and necessity require or permit the sale.” 49 U.S.C § 10907(b)(1)(A)(i). The Application does not satisfy any of the five separate statutory criteria. Most significantly, KCVN cannot show Union Pacific has refused to make necessary efforts to provide adequate service to shippers who transport traffic over the Line. KCVN also cannot show transportation over the Line is inadequate for the majority of shippers transporting traffic over the Line. KCVN fails to identify any shipper not receiving adequate service over the Line. Because the feeder line statute’s

purpose is to preserve service to shippers, KCVN's inability to show any unmet need for traffic moving over the Line is fatal to its Application.

KCVN may believe it has a better, more valuable use for the Line than Union Pacific. If that is the case, KCVN's "remedy" is to negotiate a commercial arrangement with Union Pacific. Section 10907's "public convenience and necessity" standard cannot be used to force an owning railroad to sell a lightly used or unused line it wants to retain, as long as the railroad is providing adequate service.

1. KCVN's Application contains no evidence Union Pacific has ever refused to provide service to any shipper over the Line.

Section 10907(c)(1)(A) requires the applicant to establish that the operating rail carrier "refuses . . . to make the necessary efforts to provide adequate service to shippers who transport traffic over the line." *See also* 49 C.F.R. § 1151.(3)(11)(i)(A) (incorporating statutory standard in regulations). This requirement is critical to the statute: when a line's existing users are satisfied (or no such users exist), there is no justification for a forced sale.

KCVN does not even try to make the required showing. Instead, KCVN says: "UP has 'refused . . . to make the necessary efforts to provide adequate service to shippers who transport over the line,' because UP has never had any interest in providing service to shippers who would transport over the entire [Line] to cross the Rocky Mountains." Application at 26 (citation omitted). However, the question is not Union Pacific's abstract interest in providing service, but whether Union Pacific has *refused* to make the necessary efforts to provide adequate service to *shippers who transport over the line*. *See* 49 U.S.C. § 10907(c)(1)(A). KCVN failed to provide any evidence of such refusals.

Moreover, Union Pacific is not aware of any shippers using the Line who are receiving or who have complained about receiving inadequate service on the Line. Union Pacific is also not

aware of any service demands from shippers using the Line that we have been unable to satisfy. Nor are we aware of any requests for service from *potential* shippers on the Line.⁴

KCVN representatives apparently identified and spoke with most of the few actual and potential shippers located on the Line, but apparently none of those shippers identified any refusal by Union Pacific to provide adequate service over the Line. See Application at 30-31 (discussing Freeport-McMoRan Inc., Martin Marietta Materials, Lafarge Holcim, and American Gypsum). In these circumstances, the feeder line statute simply cannot be used to force the sale of railroad property. See, e.g., *Dr. Daniel R. Fiehrer*, at 5 (lack of service is not *prima facie* evidence of inadequate service “if during that time there has been no request for service”); compare *KCVN, LLC & Colorado Pac. R.R., LLC – Feeder Line Application – Line of V and S Ry., LLC – Located in Crowley, Pueblo, Otero and Kiowa Counties, CO*, FD 36005 (STB served July 31, 2017), at 8-9 (finding carrier refused to make necessary efforts to provide adequate rail service where line owner actively drove shippers off the line).

In addition, contrary to KCVN’s claim, Union Pacific has been, and remains, interested in promoting sustainable and beneficial rail uses of the Line, including its use as an alternative route through the Rocky Mountains. As explained above, the Line has significant strategic value to Union Pacific, and KCVN’s own Application recognizes the Line’s potentially critical role as market and operating conditions continue to evolve. See *supra* pp. 4–5. Union Pacific does not

⁴ KCVN incorrectly says that when the Board allowed Union Pacific to discontinue most operations on the Line, “it was estimated traffic originating and/or terminating on the rail line was generating approximately \$3 million per year (in 1996 dollars) in annual revenue above the railroad’s operating costs.” Application, *Crowley VS* at 62. In fact, the referenced figure was the Colorado Wheat Administrative Committee’s estimate of *potential* revenue, not an actual figure provided by the railroads or developed by the Board. See *Union Pacific/Southern Pacific Merger*, 1 S.T.B. at 298 n.62. In evaluating the evidence, the Board found “[n]o local traffic [was] expected to be generated” on the Sage-Malta portion of the Line, *id.* at 505, and total projected revenues of approximately \$1.3 million on the Malta-Cañon City portion were significantly less than losses that could be avoided by discontinuing service, *id.* at 506.

currently need the Line as a through route. We handle all traffic that might otherwise move over the Line on our Central Corridor route through the Moffat Tunnel, our Overland Route through Wyoming, and our Sunset Route through the Southwest. Under current circumstances, the overall characteristics of these alternative routes are favorable compared to the everyday operating challenges of using the Line. As confirmation, KCVN's failure to identify any complaints from the shippers it contacted speaks volumes. *See* Application at 30-31.

2. KCVN's Application contains no evidence that transportation over the Line is inadequate for a "majority" of shippers where it cannot point to a single shipper who complains about inadequate service.

Section 10907(c)(1)(B) contains a requirement closely related to § 10907(c)(1)(A) and also closely tied to the feeder line statute's core purpose. It requires an applicant to establish the transportation over the line subject to the application "is inadequate for the majority of shippers who transport traffic over such line." KCVN does not try to satisfy the "majority" requirement because it cannot show even a single shipper is receiving inadequate service. To the contrary, KCVN's Application shows Union Pacific provides adequate service to shippers who transport traffic over the Line.

KCVN's Application identifies four actual or potential shippers on the Line and shows *none* is complaining about inadequate service. *See* Application at 30–31. Of the four, just one purportedly "indicated" it would ship products over discontinued portions of the Line. *See id.* at 30.⁵ But KCVN does not claim the shipper, Martin Marietta Materials, which is served directly by Rock & Rail and indirectly by Union Pacific via an interchange in Pueblo, complained about

⁵ KCVN's Application does not include a verified statement or letter from the shipper, Martin Marietta Materials, or identify the shipper KCVN representatives who participated in the conversation.

the adequacy of current service. KCVN also claimed Freeport McMoRan – a shipper that is not rail served – “indicated . . . its interest in discussing rail access.” *See id.*⁶ But KCVN does not claim the shipper complained about its lack of rail service. In addition, KCVN *speculates* that two other shippers on active portions of the Line would also ship over discontinued portions if they had the opportunity. *See id.* at 31. But KCVN does not claim the shippers complained about their current service or offered any support for KCVN’s speculative claims. Finally, KCVN identified several shippers located near the Line and speculated they would use the Line as a through route. *See id.*, Crowley VS at 12. However, KCVN apparently could not identify even one shipper, much less a “majority,” who complained the current service was inadequate.⁷

Demonstrating shipper dissatisfaction with current rail service is a critical burden an applicant must meet under the feeder line statute and regulations. KCVN fails entirely to meet that burden. In fact, KCVN’s Application suggests shippers on the Line are satisfied with their current service. As a result, KCVN’s Application must be rejected. *See, PYCO* at 5 (rejecting application as deficient where “evidence is lacking to show that the majority of shippers on the line experienced inadequate service from [the line’s owner] or that a majority of the shippers asked [the line’s owner] to improve its service to them”).

⁶ Again, KCVN’s Application contains no supporting details.

⁷ In estimating future traffic levels under the assumption it acquired the Line, KCVN identified only one shipper on or near the Line that it was “confident” would use discontinued portions of the Line – American Gypsum. *See id.*, Crowley VS at 57. But American Gypsum has not complained about service over the line and was not the shipper that purportedly indicated an interest in using discontinued portions of the Line. *See Application* at 30–31. (KCVN identified two other anticipated sources of future traffic. Both involve speculative movements from off-Line origins to off-Line destinations that Union Pacific could handle using alternative routes. *See id.*, Crowley VS at 57–58.)

3. KCVN's Application fails to meet the other statutory criteria because KCVN fails to consider the Line's strategic value to Union Pacific.

KCVN's Application is also deficient because it fails to address adequately the financial and operating impacts of a forced sale on Union Pacific and affected shippers. *See* 49 U.S.C. §§ 10907(c)(1)(C)-(E). KCVN says a forced sale would not harm Union Pacific's financial or operational performance and would likely improve transportation for shippers because Union Pacific presently does not currently provide service over most of the Line. *See* Application at 27–30. But the Application fails to consider Union Pacific's strong financial and operating interests in retaining the Line for future use. Union Pacific could suffer significant adverse financial and operations effects if future traffic overwhelms the Moffat Tunnel's capacity or if we could no longer use the Moffat Tunnel. KCVN's failure to address these issues renders its Application deficient.

KCVN's failure to address Union Pacific's strong financial and operational interests in retaining rights over the Line is inexplicable, particularly because the Application repeatedly emphasizes the Line's strategic value as an alternative route through the Rocky Mountains. For example, KCVN quotes a Colorado State Freight and Passenger Rail Plan issued in 2019 that states: “[t]he [Line] provides *critical network redundancy* and opportunities for alternative uses.” Application at 10 (emphasis added). KCVN also quotes a 2017 report prepared by the Colorado Department of Transportation that states: “The [Line] may be able to be used as an alternative route as trans-mountain rail demand grows . . . or if the Moffat Tunnel were damaged or closed for any reason.” *Id.*

KCVN's cursory and incomplete analysis of important elements of the public convenience and necessity standard provides yet another reason to reject the Application on its face.

B. KCVN’s Application Fails To Demonstrate KCVN Is A “Financially Responsible Person” Within The Meaning Of 49 U.S.C. § 10907.

KCVN’s Application also does not make a *prima facie* showing that KCVN “is able to assure that adequate transportation will be provided over [the Line] for a period of not less than 3 years.” 49 U.S.C. § 10907(a)(2). Specifically, it fails to show KCVN could pay the approximately \$278 million cost – according to its own estimate – to rehabilitate the Line. This threshold evidentiary failure provides an additional reason to reject the Application.

As KCVN acknowledges, to meet the requirements of being a “financially responsible person” it must show it “has the financial resources to acquire the Tennessee Pass Line and fulfill its responsibilities to pay the expenses of rehabilitating, operating, and maintaining the line for at least the first three years from the date of acquisition of the line.” Application at 20.⁸ However, KCVN does not show it could pay the cost to rehabilitate the Line. KCVN says it “will seek to finance the rehabilitation cost of the line with a loan from the Federal Railroad Rehabilitation & Improvement Financing Program (‘RRIF’).” *Id.* at 19–20. But Board precedent establishes that KCVN’s mere reference to the RRIF program is not sufficient to show funding would be likely for its proposal. *See Forty Plus I* at 4 (“Applicant alludes to several possible sources of income, including the RIFF loan program The mere existence of these programs does not represent a committed source of funds for [applicant], and [applicant] has failed to show that funding would be likely for its proposal.”).

⁸ *E.g.*, *KCVN, LLC & Colorado Pac. R.R., LLC – Feeder Line Application – Line of V and S Ry., LLC – Located in Crowley, Pueblo, Otero and Kiowa Counties, CO*, FD 36005 (STB served Apr. 15, 2016), at 3–4 (applicant demonstrated it was a financially responsible person by showing “access to considerable funds to pay the expenses of acquiring and rehabilitating” the line); *Forty Plus Foundation/Manhattan Cent. Ry. Sys., LLC – Feeder Line Acquisition – The Manhattan Highline*, FD 34606 (STB served June 10, 2005) at 5 (upholding Director’s determination that applicant was not a financially responsible person where applicant “did not show that it had any committed source of funds” to meet “cost of rehabilitating the line and operating it for 3 years”).

KCVN also says it “will seek commercial bank financing to cover a portion of the cost of rehabbing the [Line] for service” if the Federal Rail Administration “declines to approve [the RRIF] loan application.” Application at 20. But Board precedent establishes that KCVN’s reference to a possible commercial loan, without any evidence of a firm loan commitment from an outside source of revenue, is insufficient to establish financial responsibility. *See, e.g., Dr. Daniel R. Fiehrer* at 4 (“Dr. Fiehrer’s suggestion that he could rely on a line of credit is insufficient to show financial responsibility because he has not actually obtained a firm commitment for any line of credit.”); *PYCO* at 4 (application incomplete where statements from bank “do not constitute either a loan commitment to [applicant] or an assurance that [applicant] has sufficient available cash”); *Forty Plus I* at 4 (“Applicant also claims that future funding needs would be satisfied from public and private sources or commercial loans, but it has failed to provide any details regarding these sources.”); *Glenwood & Southern R.R. – Feeder Line Acquisition – Arkansas & Midland R.R. Line Between Gurdon and Birds Mill, AR*, FD 32613, 1994 WL 659336, *2 (ICC served Nov. 23, 1994) (application rejected in part because applicant “did not provide . . . any details about the proposed financing . . . , such as the amount of the loan and its terms”).

Finally, KCVN attempts to address its financial responsibility by providing information attesting to KCVN’s assets and the wealth of KCVN’s principals. *See* Application, Osborn VS at 2–3 & Att. 3. But even KCVN’s total assets fall well short of its estimated \$278 million cost to rehabilitate the Line. *See id.*, Att. 3 (showing assets of \$237.6 million and liabilities of \$91 million). Moreover, KCVN has not offered any evidence of a binding pledge to use its corporate assets, or assets of its principals, to fund the Line’s rehabilitation. Thus, KCVN’s assets and those of its principals simply are not relevant to its Application. *See Dr. Daniel R. Fiehrer* at 4

(“But Dr. Fiehrer’s total net worth would be relevant to the issue of how he would cover the new railroad’s operating expenses only if he were willing to pledge adequate personal assets either to fund the railroad directly or as collateral for a loan, neither of which he has done.”); *Glenwood & Southern* at *2 (“There is no indication that Mr. Root is obligated to provide any of his resources for the purchase. Therefore we cannot consider his financial ability in evaluating the financial responsibility of [applicant].”).

In sum, the Application fails to establish KCVN’s financial responsibility.

C. The Board Should Deny KCVN’s Requests For Discovery, Because KCVN Cannot Cure The Flaws In Its Application Through Discovery.

KCVN has requested discovery from Union Pacific, including the right to conduct a physical inspection of the Line and information responsive to 26 detailed document requests. *See* Application, Ex. A. The Board should deny KCVN’s request for discovery as futile. The Board’s regulations allow an applicant filing an incomplete application to seek discovery necessary “to obtain required information that is primarily or exclusively within the personal knowledge of the owning carrier.” 49 C.F.R. § 1151.2(d)(1). However, KCVN is not entitled to discovery here, because the flaws in its Application “would not be cured by obtaining discovery of information in [the incumbent railroad’s] possession.” *PYCO* at 7. KCVN certainly does not need discovery from Union Pacific to address its flawed showing of financial responsibility. KCVN has also shown it is capable of gathering information about shippers on the Line to address the public convenience and necessity considerations. *See id.* at 5 (“While, in some cases, only the owning carrier would know the shippers it serves and discovery tendered with the application would be necessary to complete an application, that is not the case here.”). The Board should not require Union Pacific to devote our resources to responding to KCVN’s discovery requests – especially its extensive requests for documents and data related to

calculations of the Line's value – unless KCVN first establishes, as it must, a *prima facie* case for acquiring the Line.

IV. CONCLUSION

KCVN's Application contains basic deficiencies because the Line is not properly subject to a feeder line application. Congress enacted the feeder line statute to preserve feeder lines and to preserve service to existing shippers. The Line is not a feeder line. It is a critical alternative rail line through the Rocky Mountains. And no shipper who transports traffic over the Line has complained about Union Pacific's existing service. KCVN's Application also fails to establish that KCVN qualifies as a "financially responsible person." The Board should reject KCVN's effort to seize the Line from Union Pacific.

Respectfully submitted,

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Attorneys for Union Pacific Railroad Company

March 6, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of March, 2020, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid, or a more expeditious manner of deliver on all parties of record in Finance Docket No. 36386.

/s/ Michael L. Rosenthal

VERIFICATION

I, Mark A. Bristol, General Director of Interline Operations for Union Pacific Railroad Company, declare under penalty of perjury that I have read the foregoing Motion to Reject Feeder Line Application and Deny Discovery Requests and that the facts and information set forth in the Motion are true and correct, to the best of my knowledge, information, and belief. Further, I certify that I am qualified and authorized to file this Verification.

Executed on March 6, 2020.

/s/ Mark A. Bristol