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September 4, 2020

VIA E-FILING

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

Re: Ohio Rail Development Commission – Petition for Declaratory Order,
 FD 36387

ORDC Reply to Conrail's Comment on Line Status

Dear Ms. Brown:

By petition filed February 18, 2020, the Ohio Rail Development Commission ("ORDC") requested that the Board issue a declaratory order finding that, upon the existing operator's receiving discontinuance authority, ORDC may rail bank a 14.8-mile rail line it owns in Perry and Muskingum Counties, Ohio (the "Line") pursuant to section 8(d) of the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d), and the Board's interim trail use/rail banking regulations. In a decision served July 21, 2020, the Board held that before it could determine whether ORDC may pursue interim trail use/railbanking under the Trails Act, the Board needed to resolve a jurisdictional issue, whether Consolidated Rail Corporation ("Conrail"), a previous owner of the Line had consummated abandonment of the Line before selling the right-of-way to ORDC's predecessor.¹ To assist the Board in resolving the jurisdictional issue, the Board asked Conrail to comment on the Line's status at the time the Line was sold to ORDC's predecessor.

On August 20, 2020, Conrail notified the Board that it had not been able to locate any information that directly answered the Board's questions ("Conrail's Comment"). However, to

¹ The February 18, 2020 decision explained if Conrail did not consummate the abandonment and ORTA purchased the Line under section 308(e)(3)(A) of NERSA, the Line is still within the Board's jurisdiction. However, if Conrail consummated the abandonment before ORTA purchased the Line, the Line is no longer within the Board's jurisdiction, and interim trail use/rail banking under the Trails Act is unavailable.

assist the Board, Conrail attached a copy of the Deed associated with the sale, as well as a copy of Conrail's internal Closing Report associated with the sale. ORDC has reviewed the Conrail's Comment and believes that the information contained therein is consistent with ORDC's position that Conrail had not consummated its abandonment prior to selling the Line to ORDC's predecessor. The deeds provided in the Conrail's Comment indicate the following:

- Conrail sold ORDC's predecessor "lines of railroad." See Conrail's Comment at PDF Page 4.
- Conrail excepted and reserved the right pursuant to permanent and perpetual easements for existing railroad crossing and appurtenances located on the "lines of railroad." Id.
- Conrail charged ORDC's predecessor \$20,000.00 to install a crossover on the "lines of railroad," which remained intact at the time ORDC's purchased them.

Even more important, the record as it stands is devoid of any evidence to suggest that Conrail exercised the authority granted and consummated abandonment of the Line. Prior to the consummation notice requirement being implemented, the Board examined whether a railroad manifested a clear intent to abandon through its statements and actions, including discontinuing operations and "salvage" of the line (removing rails and other materials from the property). See Birt v. STB, 90 F.3d 580, 585 (D.C. Cir. 1996) (Birt).² Given the absence of any evidence suggesting that Conrail consummated its abandonment, the Line remained jurisdictional trackage at the time ORDC's predecessor acquired it. Accordingly, ORDC respectfully requests that the Board find that the Line was and remains jurisdictional trackage, and provide ORDC with the requested clarification on pursuing interim trail use/rail banking under the Trails Act.

Sincerely,

/s/ **Crystal M. Zorbaugh**

Crystal M. Zorbaugh
Special Counsel for the Ohio Rail Development Commission

Enclosures

cc: Alan Klodell
Matt Dietrich
Parties of Record (Michael Rosenthal and Jocelyn Hill)

² See also FN 9 to the July 21st decision (stating prior to 1996, in order to determine if a rail carrier had consummated an abandonment, the agency employed a case-by-case evaluation of all the facts and circumstances to ascertain whether a rail carrier showed a clear intention to remove the line from the national rail network or if instead the record indicated an intent to preserve the right-of-way for future reactivation of rail service.)