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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 36441

ENTERED
Office of Proceedings
September 29, 2020
Part of
Public Record

**COMMONWEALTH OF VIRGINIA
MOTION TO DISMISS
PETITION FOR EXEMPTION**

MOTION FOR PROTECTIVE ORDER

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Dated: September 29, 2020

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Pursuant to 49 C.F.R. § 1104.14(b), the Commonwealth of Virginia, acting by and through its Department of Rail and Public Transit (“DRPT”), hereby requests that the Surface Transportation Board (“STB” or “Board”) issue a protective order allowing DRPT to file under seal (1) a draft Joint Operating and Maintenance Agreement and a draft Comprehensive Rail Agreement (together, “Draft Agreements”) between DRPT and CSX Transportation, Inc. (“CSXT”), which, when finalized, will govern the transaction that is the subject of the above-docketed proceeding, and (2) the list of shippers served by CSXT on the relevant lines (“Shipper List”).

DRPT is filing concurrently herewith a Petition for Exemption and Motion to Dismiss related to its acquisition of a lateral portion of the right-of-way and associated trackage on the CSXT-owned and operated rail corridor between Washington, D.C. and Petersburg, Virginia (the “Subject Line”). The objective of the transaction is to create additional interoperable freight and passenger rail network capacity on the Subject Line. The Petition for Exemption covers the acquisition of the Subject Line; the Motion to Dismiss then asserts that the acquisition is not subject to Board jurisdiction.

DRPT has included under seal the Draft Agreements as Exhibits A and B to its Motion to Dismiss. The Draft Agreements are the subject of continuing confidential negotiations, and

contain commercially sensitive and confidential terms and information the public release of which could cause competitive or other injury to DRPT and CSXT. Public disclosure of the Draft Agreements is not necessary for the consideration or disposition of the Motion to Dismiss. DRPT requests that the Board treat the terms of the Draft Agreements as Confidential.

DRPT has also included under seal the Shipper List as Exhibit E to its Motion to Dismiss. The Shipper List contains commercially sensitive information the public release of which could cause competitive or other injury to CSXT. Public disclosure of the Shipper List is not necessary for the consideration or disposition of the Motion to Dismiss. DRPT requests that the Board treat the Shipper List as Highly Confidential.

DRPT further proposes that when the final Joint Operating and Maintenance Agreement and Comprehensive Rail Agreement are executed (the “Final Agreements”), DRPT will file public, redacted versions of the Final Agreements in STB Docket No. FD 36441 and submit Confidential, unredacted versions of the Final Agreements under seal with the Board.

DRPT thus requests that the Board accept the Draft Agreements and the Shipper List for filing under seal, designated as noted above, and that it adopt the proposed protective order contained in the appendix hereto to govern access to the Draft Agreements. This approach is consistent with that previously taken by the Board in similar circumstances. See, e.g., Chai Trust Company, LLC, EGI-Fund (14-16) Investors, L.L.C., and EGI-IPH Investors, L.L.C.—Acquisition of Control Exemption, STB Docket No. FD 35816 (STB served Apr. 23, 2014).

Respectfully submitted,



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APPENDIX

PROTECTIVE ORDER

1. For purposes of this Protective Order, "Confidential Information" means the draft Joint Operating and Maintenance Agreement and the draft Comprehensive Rail Agreement submitted by the Commonwealth of Virginia, acting by and through its Department of Rail and Public Transit ("DRPT") in STB Finance Docket No. 36441.

2. For purposes of this Protective Order, "Highly Confidential Information" means the list of shippers served by CSX Transportation, Inc. ("CSXT") on the relevant lines (the "Shipper List") submitted by DRPT in STB Finance Docket No. 36441.

3. Confidential Information shall be provided to any party only pursuant to this Protective Order and only upon execution and delivery to DRPT of the attached Undertaking for Confidential Material. Confidential Information shall be used solely for the purpose of this and any related Board proceedings, or any judicial review proceeding arising therefrom, and not for any other business, commercial, or competitive purpose.

4. Highly Confidential Information may be disclosed only to outside counsel or outside consultants of the party requesting such materials who have a need to know, handle, or review the materials for purposes of this proceeding and any judicial review proceeding arising herefrom, and only upon execution and delivery to DRPT of the attached Undertaking for Highly Confidential Material prior to receiving access to such materials. Material designated as "Highly Confidential Information" shall be subject to all of the other provisions of this Protective Order.

5. Confidential Information and/or Highly Confidential Information shall not be disclosed in any way or to any person without the written consent of DRPT or an order of the Board, solely for use in connection with this and related Board proceedings, or any judicial review proceeding arising therefrom, provided that such person has been given and has read a copy of this Protective Order and agrees to be bound by its terms by executing the attached Undertaking prior to receiving access to this information.

6. If the Board retains the Confidential Information and/or Highly Confidential Information, it shall, in order to keep it confidential, treat the information in accordance with the procedure set forth at 49 C.F.R. § 1104.14.

7. If any party intends to use Confidential Information and/or Highly Confidential Information at hearings in this proceeding or in any related Board proceedings, or in any judicial review proceeding arising therefrom, the party shall submit any documents setting forth or revealing such Confidential Information to the Board, or the reviewing court as appropriate, under seal, and shall accompany such submission with a written request to the Board or the court to (i) restrict attendance at the hearing during discussion of such Confidential Information and/or

Highly Confidential Information, and (ii) restrict access to the portion of the record or briefs reflecting discussion of such Confidential Information and/or Highly Confidential Information in accordance with the Protective Order.

8. All parties must comply with all of the provisions stated in this Protective Order unless good cause, as determined by the Board, is shown by any party to warrant suspension of any of the provisions herein.

UNDERTAKING – CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order governing the filing of the draft Joint Operating and Maintenance Agreement and the draft Comprehensive Rail Agreement (“Confidential Information”) by the Commonwealth of Virginia, acting by and through its Department of Rail and Public Transit (“DRPT”) in STB Docket No. FD 36441, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any data or information obtained under this Undertaking, or to use or permit the use of any techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in STB Docket No. FD 36441 or any judicial review proceeding taken or filed in connection therewith. I further agree not to disclose any data or information obtained under this Protective Order to any person who is not also bound by the terms of this Protective Order and has not executed an Undertaking in the form hereof.

Signed: _____

Position: _____

Affiliation: _____

Dated: _____

UNDERTAKING

HIGHLY CONFIDENTIAL MATERIAL

As outside [counsel] [consultant] for _____, for which I am acting in this proceeding, I have read the Protective Order served on _____, 2020, governing the production of confidential documents in STB Docket FD 36441, understand the same, and agree to be bound by its terms. I further agree not to disclose any data, information or material designated “HIGHLY CONFIDENTIAL” to any person or entity who: (i) is not eligible for access to HIGHLY CONFIDENTIAL material under the terms of the Protective Order, or (ii) has not executed a HIGHLY CONFIDENTIAL undertaking in the form hereof. I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any documents designated “HIGHLY CONFIDENTIAL,” that I will limit my use of those documents and the information they contain to this proceeding and any judicial review proceeding arising herefrom, that I will take all necessary steps to assure that said documents and information will be kept on a confidential basis by any outside counsel or outside consultants working with me, that under no circumstances will I permit access to said documents or information by personnel of my client, its subsidiaries, affiliates, or owners, and that at the conclusion of this proceeding and any judicial review proceeding arising herefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel may retain file copies of pleadings filed with the Board. I further understand that I must destroy all notes or other documents containing such highly confidential information in compliance with the terms of the Protective Order. Under no circumstances will I permit access to documents designated “HIGHLY CONFIDENTIAL” by, or disclose any information contained therein to, any persons or entities for which I am not acting in this proceeding.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Outside [Counsel] [Consultant]: _____

Dated: _____