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Via E-Filing

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

Re: FD 36398, *Brookhaven Rail LLC – Construction and Operation
Exemption – Suffolk County, New York*

FD 36399, *Brookhaven Rail LLC – Petition For
Exemption from Requirements of 49 U.S.C. § 10909*

Dear Ms. Brown:

The Citizens Campaign for the Environment (“Campaign” or “CCE”) submits this response to the request for Board-sponsored mediation in FD 36398 (“Construction Petition”) that Brookhaven Rail LLC (“BHR”) and the Town of Brookhaven, New York (“Town”) submitted on November 6, 2020 (“Mediation Request”).

CCE opposes the request for an exclusive, confidential, two-party mediation in FD 36398. Under the Board’s mediation rules, “parties may seek to resolve a dispute brought before the Board using the Board’s mediation procedures.” 49 C.F.R. § 1109.1. However, as the Board emphasized in its October 23, 2020 Decision (“Decision”), “the scope of mediation [shall] not, under 49 C.F.R. § 1109.1, encompass any grant, denial, stay, or revocation of regulatory authority.” Decision. at 8, n.10.

The Board’s dismissal of the FD 36399 petition in its Decision requires that any mediation request be limited to the Construction Petition only. However, BHR and the Town fail to identify any specific issue in the Construction Proceeding on which they seek to mediate. While BHR and the Town have previously identified disagreements with respect to certain environmental review issues, it would be highly inappropriate, even with respect to the continuing general disagreements, and a violation of due process to allow only two

parties to a multi-party proceeding to use Board-sponsored, private, confidential mediation in an attempt to resolve issues to the possible impact and detriment of other parties.¹

Indeed, the environmental review of the Construction Petition involves a number of interested consulting public and private parties that is properly pending before, and is the sole responsibility of, the Office of Environmental Analysis (“OEA”). 49 C.F.R. § 1105.2 (the Director of OEA is delegated responsibility for environmental review). That process is open and public. It would also be highly inappropriate for the Board to allow OEA’s orderly environmental review, including appropriate public scoping and input, to be potentially sidestepped or truncated by only two parties through private, confidential mediation. *Consolidated Rail Corp. – Abandonment Exemption – in Hudson County, NJ*, AB-167 (Sub-No. 1189X) (STB served Oct. 7, 2020) (issues involving “interpretation of the Board’s environmental rules” and other similar matters need to be directed to, and are the responsibility of, OEA).

For these reasons, CCE respectfully submits that the Mediation Request should be rejected. However, if the Board concludes that § 1109 mediation is still appropriate with respect to any issue pending in FD 36398, CCE believes that fairness and due process requires that any interested party (or consulting party) be allowed to participate, and it respectfully requests that it be allowed to do so.

Respectfully submitted,

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Enclosures

cc: Service List for FD 36398 and FD 36399

¹ Another barrier is that a party representative to the mediation must have authority to bind that party. 49 C.F.R. § 1109.3(c). The Town’s ability to bind itself to a deal struck in a private and confidential mediation, without affording public notice and access, in matters that are contested and controversial is highly problematic at best.

CERTIFICATE OF SERVICE

I hereby certify that I have this 9th day of November, 2020, caused a copy of the foregoing filing to be served by U.S. Mail, postage prepaid or by more expedited means upon all parties of record.

/s/

Katherine F. Waring