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November 13, 2020

By E-Filing

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

Re: Docket No. FD 36399, *Brookhaven Rail LLC – Petition for
Exemption from Requirements of 49 U.S.C. §10909*

Docket No. FD 36398, *Brookhaven Rail LLC – Construction and
Operation Exemption – Suffolk County, New York*

Dear Ms. Brown:

This letter is filed on behalf of Brookhaven Rail LLC (“BHR”) in response to the letter submitted by Citizens Campaign for the Environment (“CCE”) in these dockets on November 9, 2020. CCE’s letter objects to the Board-sponsored mediation jointly requested by BHR and the Town of Brookhaven, New York (“Town”) in Docket No. FD36398 but also requests that “any interested party” or a “consulting party” be permitted to participate in a mediation session should the Board convene one. CCE also specifically requests that it be allowed to participate although it identifies no disputed issues it needs mediation to resolve. CCE’s objection to BHR and the Town attempting to resolve through mediation some of the complicated issues related to the rail construction project posed by the unique factual and legal circumstances surrounding development of Parcel D of the Brookhaven Rail Terminal is disappointing. It is yet another manifestation of CCE’s transparent goal to throw as many roadblocks as possible in front of the long-planned development of railroad infrastructure and industry on Parcel D.

Ms. Cynthia T. Brown
November 13, 2020
Page 2

CCE's stated reason for opposing the Town and BHR engaging in mediation is its speculation that the issues to be mediated are unspecified "environmental review issues" which CCE claims are the sole responsibility of the Board's Office of Environmental Analysis ("OEA"). However, the respective records of these proceedings have established that the development of Parcel D for rail transloading operations is subject to several complex documents of which the Town and BHR are parties. These include the So-Ordered Stipulation of Settlement entered by the United States District Court for the Eastern District of New York on March 17, 2016, a Voluntary Draft Environmental Impact Statement, and Negative Declaration and Notice of Determination of Significance Finding. CCE is not a party to any of these documents and the commitments contained therein.

Each of the foregoing contain provisions and requirements that pertain to the rail construction and operation proposed by BHR that are not just "environmental review issues" being now reviewed by OEA. This being said, the contractual and operational issues BHR and the Town seek to mediate and clarify could provide helpful guidance to OEA on the key issues its needs to address, such as, for example a traffic study, or the extent to which the new railroad will physically infringe on the conservation easements on Parcel D, among other issues.

BHR therefore believes Board-sponsored mediation would help clarify some of the complex issues presented by this project, and CCE's attempt to thwart BHR's and the Town's request should be denied. As for CCE's request to participate in any scheduled mediation, BHR notes that the only prior submission by CCE in Docket No. FD 36398 was a letter attaching CCE's Reply in Opposition to the Petition for an Exemption from the Requirements of 49 U.S.C. § 10909 that BHR filed in Docket No. FD 36399. The letter implored the Board to either reject the construction exemption petition outright or hold the proceeding in abeyance while CCE sought the rejection of the petition for exemption filed by BHR in Docket FD No. 36399. The Board denied CCE's requests. Given that CCE has no present dispute to be mediated other than perhaps its position that the requested approval for rail construction authority should be denied, its participation in a mediation between BHR and the Town would be contrary to 49 C.F.R. §1109.1, which does not permit mediation of disputes over the grant, denial, stay, or revocation of regulatory authority, including rail construction authority.

For the foregoing reasons the Board should proceed to schedule a mediation session between BHR and the Town at its earliest opportunity. BHR adds that it has reviewed the November 13, 2020 letter submitted in Docket No. FD 36399 by the Town and BHR concurs with the points raised therein.

Sincerely,



Thomas W. Wilcox
Attorney for Brookhaven Rail LLC



GKG Law, P.C.

Ms. Cynthia T. Brown
November 13, 2020
Page 3

Cc: All parties on the official service lists for these proceedings



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CERTIFICATE OF SERVICE

I hereby certify that, on this 13th day of November 2020, a copy of the foregoing Letter was served by email on all parties on the official Service Lists for Dockets No. FD 36398 and 36399.



Thomas W. Wilcox