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November 18, 2020

VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, DC 20423-0001

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

Dear Ms. Brown

Sills Road Realty LLC (“SRR”), Brookhaven Terminal Operations LLC, and Brookhaven Rail Freight Services LLC (collectively, the “Sills Parties”) hereby reply in opposition to the joint request (the “Joint Request”) of Brookhaven Rail LLC (“BHR”) and the Town of Brookhaven, New York (the “Town”)¹ for mediation in the above-referenced railroad line construction proceeding. Through the Joint Request, the BHR Parties seek inappropriately to shroud from public disclosure an exclusive side dialogue under the guise of Surface Transportation Board-sponsored mediation, when such matters should be addressed openly amongst all of the parties of record. The highly-suspect Joint Request should also be rejected as an unnecessary and unwarranted expenditure of Board resources. If the Board nevertheless were to offer mediation, then the Sills Parties must be permitted to participate fully in it.

On November 9, 2020, the Citizens Campaign for the Environment (“CCE”) registered its opposition to the Joint Request, pointing out the impropriety of exclusionary mediation, and requesting to take part if the Board nevertheless were to order mediation. The Sills Parties endorse CCE’s position that the Joint Request should be denied for all of the reasons set forth in CCE’s filing, and for other reasons offered herein. In responses to CCE offered on November 13, 2020, BHR and the Town reinforce that they are seeking to engage in a Board-supported, confidential dialogue that clearly will bear on the rights and interests of others. Such an exclusionary tactic, if it were to be permitted, would deprive the Sills Parties and CCE of due process, and would sanction the abuse of the Board’s alternative dispute resolution procedures.

¹ BHR and the Town will be referred to herein collectively as the “BHR Parties.”

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Neither the Joint Request nor the BHR Parties' subsequent efforts to defend it articulate any genuine issue or dispute upon which BHR and the Town should mediate here. On October 15, 2020, for example, the Town rushed to BHR's defense in response to CCE's contention that the subject railroad line construction project is intertwined with the proposed construction and operation of a solid waste rail transfer facility that had been the subject of FD 36399 (a failed petition for exemption for Board issuance of a land use exemption permit). The Town stated there that the "proposed rail construction should therefore be evaluated *and approved* by the Board regardless of the Board's decision on whether to commence a petition for exemption proceeding in [FD 36399] . . ." Town Letter Filing (October 15, 2020), at 2 (emphasis added). The Town supports BHR's construction petition, so it is unclear what the BHR Parties think they need to mediate, aside from the Town's passing reference to the conservation easement upon a portion of Parcel D. *Id.* at 2, n.1.

The BHR Parties insist that this proceeding involves "complicated issues" along with "unique factual and legal circumstances" and "several complex documents of which the Town and BHR are parties."² BHR Letter Filing (November 13, 2020), at 1, 2. As support, BHR refers to the "So-Ordered Stipulation of Settlement entered by the United States District Court for the Eastern District of New York on March 17, 2016" (the "2016 Settlement"), and a Voluntary Draft Environmental Impact Statement and Negative Declaration and Notice of Determination of Significance Finding, each of which is a byproduct of the 2016 Settlement. *Id.* at 2. BHR offers only that the 2016 Settlement implicates a traffic study that the Board's Office of Environmental Analysis would undertake in the ordinary course, and the aforementioned conservation easement. Neither of those "issues" warrants mediation, and neither is the source of a substantive dispute. As such, the BHR Parties' collective efforts suggest ulterior motives.

For its part, the Sills Parties have participated in this proceeding from the outset. They have highlighted to the Board their role in the 2016 Settlement along with BHR and the Town. It is thus alarming that, in proposing mediation (and knowing the Sills Parties' essential, ongoing role in the 2016 Settlement), the BHR Parties fail to mention the Sills Parties, and purposely avoid proposing their involvement in mediation. Also, the BHR Parties do not explain why the "complicated" issues to which they vaguely refer warrant mediation in this venue. The federal district court – which has jurisdiction over the 2016 Settlement and the "complex documents" to which "the Town and BHR" (*id.*) and the Sills Parties are parties – would be better-suited to oversee mediation, considering its experience with those documents.

As explained above, the BHR Parties have failed to articulate any dispute warranting Board-sponsored mediation. They do not, and cannot, to explain why alternative

² If so, then BHR's requested for a bifurcated proceeding with a merits decision before the Board's environmental analysis of the project is completed would be highly inappropriate.

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dispute resolution before the federal district court is unsuitable compared to Board-sponsored mediation, or why the Board should exclude other interested parties from such mediation. Furthermore, the Board should not commit its resources to suborn the BHR Parties' tactical maneuver when it is evident that BHR and the Town are working cooperatively for an outcome opposed by the Sills Parties and CCE. For these reasons, the Board should reject the Joint Request. Were the Board nevertheless order mediation, it should – (a) permit the Sills Parties to participate; and (b) require the parties to disclose publicly the specific issues slated for mediation, and later, the issues resolved thereby, if any.

Respectfully submitted,

/s/ *R. A. Wimbish*

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Terminal Operations LLC, and Brookhaven Rail
Freight Services LLC

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cc: All parties of record