

SERVICE DATE – DECEMBER 11, 2020

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36447

LAKE PROVIDENCE PORT COMMISSION—
FEEDER LINE APPLICATION—LINE OF DELTA SOUTHERN RAILROAD LOCATED IN
EAST CARROLL AND MADISON PARISHES, LA.

Digest:¹ The Board waives a regulatory limitation relating to the acceptance of incomplete applications and conditionally accepts an otherwise complete feeder line application, contingent upon applicant's submission of a valuation estimate by December 28, 2020.

Decided: December 10, 2020

On November 12, 2020, Lake Providence Port Commission, a noncarrier political subdivision of the State of Louisiana (LPPC or Applicant), filed an application under 49 U.S.C. § 10907 and 49 C.F.R. part 1151 to acquire from Delta Southern Railroad, Inc. (DSR), a 20-mile line between milepost 471.0 and milepost 491.0, together with various ancillary tracks, in East Carroll and Madison Parishes, La. (the Line). Concurrently, LPPC and the Southeast Arkansas Economic Development District (SEAEDD) filed a petition seeking expedited consideration and acceptance of LPPC's application prior to submission of evidence regarding the Line's valuation. DSR filed a reply in opposition to the petition to expedite on December 2, 2020, and stated that it would respond to the application, if accepted, in accordance with the procedural schedule set by the Board.

As discussed below, the Board finds that the application (apart from information pertaining to the net liquidation value (NLV) of the property)² is substantially complete. With respect to the NLV requirement and Applicant's related petition, the Board, under the circumstances presented, will waive its regulations at 49 C.F.R. § 1151.2(d) and conditionally accept the application, subject to Applicant's submission of a valuation estimate and supporting

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol'y Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² The Board's feeder line regulations require an applicant to submit an estimate of the NLV and the going concern value (GCV) of the line. See 49 C.F.R. § 1151.3(a)(4). As discussed below, Applicant asserts that the GCV is \$0 and so only an NLV estimate remains to be provided to fulfill the regulatory requirements.

information by December 28, 2020.³ Upon receipt of the valuation evidence by the specified date, the Board will publish notice of its acceptance of the application and a procedural schedule in the Federal Register.

BACKGROUND

LPPC initiated this proceeding by filing a feeder line application under 49 U.S.C. § 10907 to acquire the Line. Under § 10907(b)(1) and the corresponding regulations, the Board is authorized to require the sale of a rail line to a financially responsible person if the public convenience and necessity (PC&N) require or permit the sale.⁴ LPPC asserts that the proposed sale is required under the PC&N criteria and that it is a financially responsible person willing to pay not less than the constitutional minimum value (CMV) of the line. (Appl. 1, 4, 6.)⁵

In support of the application, LPPC explains that the Line is one segment (20 miles) of the 91.3-mile McGehee-Tallulah Railroad Corridor (the Corridor), which runs from milepost 408.9 in McGehee, Ark., to milepost 500.2 in Tallulah, La. Ownership of the Corridor is shared among LPPC, DSR, SEAEDD, and the North Louisiana & Arkansas Railroad (NLA). (Appl. 1.)⁶ An Infrastructure for Rebuilding America (INFRA) grant for restoration of the Corridor was awarded to SEAEDD on behalf of a public-private partnership composed of SEAEDD, LPPC, the Madison Parish Port Commission, NLA, and DSR. (Appl. 2.)⁷ Applicant alleges that the grant funds are to be used to reopen the entire Corridor, including the Line at

³ The petition states that this information is expected to be available within 45 days. (Pet. 4.)

⁴ A sale to a financially responsible person is also required if the line is designated in category 1 or 2 of the owning railroad's system diagram map and the owning railroad has not filed an application to abandon the line. See 49 U.S.C. § 10907(b)(1)(A)(ii); 49 C.F.R. § 1151.1. However, LPPC's application is not based on this criterion.

⁵ As a governmental entity, LPPC is presumed to be a financially responsible person. See Or. Int'l Port of Coos Bay—Feeder Line Appl.—Coos Bay Line of Cent. Or. & Pac. R.R., FD 35160, slip op. at 15 (STB served Oct. 31, 2008). The application states that LPPC will bear the entire cost of the acquisition and does not anticipate that any form of subsidization will be required. (Appl. 6.)

⁶ According to the application, LPPC and NLA jointly own the northern-most segment that extends from milepost 408.9 to milepost 433.0 at Lake Village, Ark. SEAEDD, a noncarrier, owns the segment between milepost 433.0 and milepost 454.8 at or near the Louisiana/Arkansas border. LPPC owns the segment between milepost 454.8 and milepost 471.0, at or near Lake Providence, East Carroll Parish, La. Finally, DSR owns the segment that extends from milepost 471.0 to approximately milepost 500 at Tallulah, La. (Appl. 6-7; but see, e.g., id. at 1 (stating that the end milepost for DSR's segment is 500.2).)

⁷ The grant was awarded by the U.S. Department of Transportation (DOT) in July 2019 and is overseen by the Federal Railroad Administration (FRA). (See Appl. 10-11.) In awarding the grant, DOT has designated the project as a "Nationally Significant Freight and Highway Project." (Id. at 10 & Ex. 7, V.S. Murphy ¶ 2.)

issue, which is currently impassable. (Appl. 2; see also id. at 4 (stating that receipt of INFRA grant funds is contingent upon a commitment to rehabilitate the entire Corridor).) LPPC asserts that it filed the application because DSR has refused to commit the funds needed to restore the Line, and that the proposed acquisition is therefore necessary to realize the goal of reopening the entire Corridor. (Appl. 2, 4-5; id. at Ex. 3, V.S. Hargrove ¶¶ 13-16; id. at Ex. 6, V.S. Gilfoil ¶¶ 13-14.)

According to the application, DSR is currently using the Line to store rail cars for third parties and it has not been used for common carrier rail service for at least three years. (Appl. 2, 4, 7-8; id. at Ex. 3, V.S. Hargrove ¶ 13; id. at Ex. 6, V.S. Gilfoil ¶ 13.) The application claims there have been multiple instances in which DSR has refused requests to interchange or accept rail cars.⁸ It includes verified statements and letters supporting the application and restoration of the full Corridor from regional business organizations and shippers as well as political leaders at the local, state, and federal levels.⁹

The application states that, following the acquisition, NLA (which currently operates all segments of the Corridor not owned by DSR)¹⁰ will seek Board authorization to operate the Line. (Appl. 5; id. at Ex. 4, V.S. Robbins ¶ 3; id. at Ex. 6, V.S. Gilfoil ¶ 2.) The application asserts that there would be no material financial impact and no operational impact on DSR, which would continue to provide service over its remaining tracks that link the Corridor to The Kansas City Southern Railway Company (KCS) and Madison Parish Port, in addition to receiving interchange revenues earned without having to fund the required rehabilitation of the 20-mile Line at issue here. (Appl. 19-22; id. at Ex. 6, V.S. Gilfoil ¶ 14.) LPPC argues that restoration of the Line would improve service for shippers by enabling both shipment over the Line itself and restoration of the Corridor, which would allow more shippers rail access to KCS service at Tallulah and Union Pacific Railroad Company service at McGehee. (Appl. 22-26.)

In a petition seeking expedited consideration, LPPC and SEAEDD argue that the grant requires restoration of the entire Corridor and “imposes time restraints on SEAEDD,” and therefore expedited consideration is warranted. (Pet. 1-4.) They claim the urgency of the application is the result of DSR’s “unexpected, unilateral decision” in August 2020 that it would not commit to rehabilitation of the Line. (Id. at 2-3, 4.) LPPC and SEAEDD further state that the development of an NLV appraisal has been impeded by the pandemic and their consultant’s prior commitments, but they anticipate that the information may be available within 45 days of the filing of the application. (Id. at 4.) Given the need to finalize arrangements pertaining to the

⁸ See Appl. 18-19 (arguing that transportation is inadequate for all shippers who wish to transport traffic over this 20-mile segment of the Corridor); id. at Ex. 4, V.S. Robbins ¶¶ 7-8; id. at Ex. 9, Angel Ltr. on behalf of Epstein Gin Co. and Epstein Transloading.

⁹ See generally Appl. at Exs. 3, 4, 6, 7, 8, 9, & 10 (support for application and Corridor restoration to improve and expand service and access to national rail network); see also id. at Ex. 1, App. B (support for grant and restoration of Corridor for same reasons).

¹⁰ (See id. at 3 (stating that NLA is the operator over the segment owned by LPPC), id. at 6 (stating that NLA is the operator over SEAEDD’s segment).)

grant with the FRA, they request that the Board begin review of the application prior to the submission of the NLV information. (Id. at 2, 5.)

In its reply to the petition seeking expedited consideration, DSR asserts that LPPC and SEAEDD provide no justification for the Board to accept an incomplete application or otherwise grant expedited consideration. (DSR Reply 1.) DSR argues that it would be prejudiced if the time period for responding to the application were shortened. (Id. at 1-2, 5.) DSR also states that, in addition to failing to include information on the NLV and GCV, the application is missing other elements, including dates for operation, an operating plan, and proof of liability coverage. (Id. at 4.) DSR also contests LPPC's characterization of the status of the Line, claiming that the only service requests it has received in the last several years have been for service over the portion of its line south of the section LPPC seeks to acquire. (Id. at 2.)

On December 4, 2020, LPPC sought leave to respond to DSR's reply and to clarify the record on various points. LPPC's response addresses DSR's assertions and clarifies the record on various points. (LPPC Mot. 1-4.)¹¹

DISCUSSION AND CONCLUSIONS

A feeder line application must include the information set forth at 49 C.F.R. § 1151.3(a). Under 49 C.F.R. § 1151.2(b), the Board must accept a complete feeder line application or reject one that is incomplete no later than 30 days after the application is filed. An application is complete if it has been properly served and contains substantially all the information required by § 1151.3, except as modified by advance waiver. 49 C.F.R. § 1151.2(b)(1). Notice of an acceptance must be published in the Federal Register and provide a procedural schedule for the proceeding. Id.¹²

Basis for the Application and PC&N (§ 1151.3(a)(11)).

An application under the PC&N standard must contain detailed evidence that permits the Board, in accordance with 49 U.S.C. § 10907(c), to make the findings specified in 49 C.F.R. § 1151.3(a)(11)(i). The Board finds that Applicant has made a sufficient showing of the PC&N criteria to entertain the application.¹³

¹¹ Although "replies to replies" are not generally permitted, see 49 C.F.R. § 1104.13(c), in the interest of having a more complete record, the Board will grant LPPC's motion and accept the response.

¹² The acceptance or rejection of a feeder line application is usually issued by the Director of the Office of Proceedings. As discussed below, the Board finds that it is appropriate to conditionally accept the application and will waive certain provisions that would otherwise require the application to be rejected.

¹³ It is noted that DSR contests LPPC's characterization of the status of the Line. (DSR Reply 2.)

Estimate of the NLV and GCV (§ 1151.3(a)(4)).

With respect to the valuation criterion, § 1151.3(a)(4) requires an estimate of the NLV and the GCV of the line and evidence in support of these estimates. However, where, as here, an applicant asserts that the GCV of a line is \$0 because the owning carrier provides no service, only NLV information has been required. See KCVN, LLC—Feeder Line Appl.—Line of V&S Ry. Located in Crowley, Pueblo, Otero & Kiowa Cntys., Colo., FD 36005, slip op. at 2-3 (STB served Apr. 15, 2016); accord Keokuk Junction Ry.—Feeder Line Acquis.—Line of Toledo Peoria & W. Ry. Between La Harpe & Hollis, Ill., FD 34335, slip op. at 3-4 (STB served May 9, 2003) (rejecting application that did not include GCV for a segment of a line that had a GCV). The Board therefore finds that a GCV appraisal is not needed for purposes of making the application complete.¹⁴

Further, the Board finds that the request by LPPC and SEAEDD that the Board begin review of the application prior to the submission of the NLV information is reasonable based on the circumstances described in the petition. (See Pet. 2, 4, 5.) Accordingly, the Board will waive the regulations at 49 C.F.R. § 1151.2(d)¹⁵ and conditionally accept the application¹⁶ which, as discussed, the Board otherwise finds is substantially complete, upon applicant's submission of the specified information concerning the NLV by December 28, 2020. Upon receipt of the valuation evidence by the specified date, the Board will publish notice of its acceptance of the application and a procedural schedule in the Federal Register. Because the Board will not set a procedural schedule until LPPC submits the NLV evidence, DSR will not be prejudiced by the Board's decision.

Other Criteria Listed in § 1151.3(a).

With respect to the other criteria listed in § 1151.3(a), the Board finds that the application is substantially complete.

DSR argues that the application lacks dates for operation, an operating plan, and proof of liability coverage. (DSR Reply 4.) Although § 1151.3(a)(6) requires dates for the proposed

¹⁴ The Board notes that if LPPC submits information on NLV by the specified deadline and the application is accepted, DSR would have the opportunity to provide evidence and argument to counter LPPC's claim that the 20-mile segment at issue has no GCV. The Board also notes that LPPC has offered to buy the Line for the CMV as determined by the Board. (Appl. 4.)

¹⁵ The Board may waive its regulations, see 49 C.F.R. § 1110.9, and has done so on its own motion in various contexts. See BNSF Ry.—Terminal Trackage Rights—Kan. City S. Ry., FD 32760 (Sub-No. 46), slip op. at 2 n.3 (STB served July 3, 2019) (citing examples).

¹⁶ Under 49 C.F.R. § 1151.2(d), an incomplete application can be conditionally accepted when the missing information is primarily or exclusively within the knowledge of the owning carrier and the application is accompanied by a request for discovery to obtain the needed information. Here, although neither of these specific conditions is present, the Board concludes that the circumstances presented warrant conditional acceptance.

period of operation, LPPC explains that the precise date that operations would start could not yet be determined, (see Appl. 4-5); this explanation is sufficient under the circumstances. Regarding the operating plan, see § 1151.3(a)(7), LPPC has identified its proposed operator, NLA, (see Appl. 5), which is sufficient at this point in the proceeding. See KCVN, LLC—Feeder Line Appl.—Line of Union Pac. R.R. in Pueblo, Fremont, Chaffee, Lake, & Eagle Cntys., Colo., FD 36386, slip op. at 7 (STB served Mar. 13, 2020) (stating that an applicant is not required “at this stage to have selected an operator”).¹⁷ Finally, regarding proof of liability coverage, see § 1151.3(a)(8), LPPC has submitted proof of liability insurance to supplement the information provided in the application, (see Appl. 5; LPPC Mot. 3 & attachment), which is sufficient for present purposes. See KCVN, LLC—Feeder Line Appl.—Line of V&S Ry. Located in Crowley, Pueblo, Otero & Kiowa Cntys., Colo., FD 36005, slip op. at 4.

It is ordered:

1. Applicant’s petition requesting that the Board expedite consideration and accept its application prior to submitting CMV information about the property is resolved as discussed above.
2. LPPC’s motion for leave to respond to DSR’s reply to the petition is granted and LPPC’s response is accepted into the record.
3. The limitations on granting conditional acceptance of incomplete applications specified in 49 C.F.R. § 1151.2(d) are waived as discussed above.
4. The application is conditionally accepted and notice of the application will be published upon Applicant’s filing of the valuation information specified above by December 28, 2020.
5. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, and Oberman.

¹⁷ LPPC has also provided some general details on the expected operation of the Line but states that it is premature to provide an operating plan. (See LPPC Mot. 3.) LPPC should submit a copy of any contract with NLA pertaining to the Line as soon as the parties reach an agreement.