

**SURFACE TRANSPORTATION BOARD
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**KEN TENN REGIONAL RAIL PARTNERS, INC. – CONSTRUCTION AND
OPERATION OF A LINE OF RAILROAD – IN FULTON COUNTY, KY AND OBION
COUNTY, TN**

Docket No. FD 36328

**NOTICE OF APPEARANCE, PETITION TO RECONSIDER, AND MOTION FOR
BRIEFING SCHEDULE TO PRESENT OPPOSITION TO KEN TENN REGIONAL
RAIL PARTNERS, INC.'S PETITION**

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Ricky and Rose Smith, individually and on
behalf of the Smith Family Trust;
Debbie Amberg, individually and on behalf of
Amberg & Son Farms;
Penny B. Hepler;
Dianne Woody, individually and on behalf of
Hope Counce Farm;
David King & Dee Anne King

Submitted to the Surface Transportation Board this the 21st day of December, 2020.

SURFACE TRANSPORTATION BOARD

**KEN TENN REGIONAL RAIL PARTNERS, INC. – CONSTRUCTION AND
OPERATION OF A LINE OF RAILROAD – IN FULTON COUNTY, KY AND OBION
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**NOTICE OF APPEARANCE, PETITION TO RECONSIDER, AND MOTION FOR
BRIEFING SCHEDULE TO PRESENT OPPOSITION TO KEN TENN REGIONAL
RAIL PARTNERS, INC.’S PETITION FOR EXEMPTION**

Come now Joshua and Allison Whitledge, Ronnie Johns, Robert Garrigan, Dee Anna Garrigan, Ricky and Rose Smith, individually and on behalf of the Smith Family Trust, Debbie Amberg, individually and on behalf of Amberg & Son Farm, Penny B. Hepler, Dianne Woody, individually and on behalf of Hope Counce Farm, and David King and Dee Anne, [hereinafter collectively “the Landowners”], by and through counsel, and hereby petition the Board to reconsider its preliminary decision exempting Ken Tenn Regional Rail Partners, Inc.’s (“Ken Tenn”) construction of 12.17 miles of new rail line from regulation under 49 U.S.C. § 10901, *et seq.*, pursuant to 49 U.S.C. § 1322(c). Ken Tenn did not provide adequate notice of the Petition to affected parties and misrepresented to the Board that the Petition is unopposed. Accordingly, the Landowners did not have the opportunity to file a statement expressing their opposition, leaving this Board with the false impression that no opposition existed. As will be amply demonstrated herein, this is not the case. In fact, the Landowners take the position that the new rail line is unnecessary, and its construction and operation would disrupt the development of a solar farm in Obion County, Tennessee, in addition to needlessly destroying the productivity and value of property owned by the Landowners and others, amounting to over 50 farms and parcels of privately owned land. It will ruin the inherently tranquil, agrarian landscape that has defined the affected area for centuries.

PETITION TO RECONSIDER

The Landowners would submit that the Board prematurely granted Ken Tenn a preliminary exemption. Under 49 U.S.C. § 10502, the Board “shall exempt” a transaction from the requirements of section 10901 when it finds the following:

- (1) the application in whole or in part of a provision of this part (1) is not necessary to carry out the transportation policy in section 10101 of this title [49 U.S.C. § 10101]; and
- (2) either—
 - (A) the transaction or service is of limited scope; or
 - (B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.

Ken Tenn and the Board discuss the transportation policies that directly address federal regulatory control, barriers to entry into the industry, alternative means of transportation, and enhanced competition. 49 U.S.C. § 10101(2), (4)–(5), (7). However, the Board must consider all policies enumerated in section 10101, and two policies not addressed in the decision are the following: “to operate transportation facilities and equipment without detriment to the public health and safety” and “to encourage honest and efficient management of railroads.” *Id.* § 10101(8)–(9).

I. Ken Tenn has handled this project in a dishonest manner, from its inception, in direct conflict with 49 U.S.C. § 10101(9).

Ken Tenn did not provide Landowners notice of its plans, concealed facts from the Board about the area affected, and attempted to fast track this project through to final approval without ever allowing its opponents the opportunity to voice their opposition to the Board. Ken Tenn has manipulated these proceedings to that end.

As evidenced in the record, Ken Tenn requested its first waiver of the six months’ pre-filing notice requirement to the Office of Environmental Analysis under 49 CFR § 1105.10(a)(1) on July 8, 2019. Ken Tenn then requested the waiver of the Environmental Impact Statement

requirement, proposing that an Environmental Assessment would be sufficient, on May 29, 2020, which was granted on June 9, 2020. Ken Tenn is clearly attempting to prevent the Board from discovering the private sector solar farm project by pushing for a less-than-thorough review of this project. Most recently, on September 2, 2020, Ken Tenn requested an exemption from the procedure outlined in 49 U.S.C. § 10901 altogether. These requests indicate that Ken Tenn is highly motivated to circumvent the procedures enacted to protect the affected land to gain approval from the Board as quickly as possible.

Landowners find further support for this conclusion in Ken Tenn's submissions to the Board. The Petition for Exemption notably fails to acknowledge that this proposed rail line will cut through operating farmland, stating that the new line "will traverse a combination of rural and industrial properties." (Pet. for Exemption at p. 10.) Not once does Ken Tenn mention that the proposed route cuts through over 50 farms. This omission allowed Ken Tenn to avoid discussion of the way in which it has misled the Landowners—and the community at large—and concealed the true nature of its plan. The Board's decision granting the preliminary exemption on December 4, 2020, is the first time these plans appear in the Federal Register. Although the Union City Daily Messenger has sporadically covered the development of railways in Northwest Tennessee,¹ Ken Tenn has put forth no effort to provide affected parties with actual notice of its plans. For a project of this scope, it is unreasonable to expect landowners in two counties to predict the specific parcels

¹ See Donna Ryder, Proposed rail line would improve safety of area, Union Cty. Daily Messenger, Mar. 20, 2020, at 1 (reporting Ken Tenn's intent to file a petition with the Board and vaguely mentioning the "new right-of-way to the north and south of the abandoned segment"); Donna Ryder, Rail service plans expected to boost area economy, Union Cty. Daily Messenger, May 8, 2019, at 1 (reporting that Bedford Dunavant of the Union City Industrial Development Board appeared before the Union City Council to inform them of a \$350,000 grant from the state of Tennessee related to this project but that "about 6.2 miles of new line will have to be installed" for a cost of \$7.44 million). Chris Menses, Proposed regional project would create railroad loop serving 2 states, 5 counties, Union Cty. Daily Messenger, Oct. 2, 2018, at 1 (reporting that Chuck Doss from DT Multimodal told the Obion County Budget Committee of a proposed railroad project in which "the majority of the work will involve rail rehabilitation" and briefly mentioning that they would build new railway between Hickman and Union City).

of land through which a railroad will run given vague descriptions reported in a local newspaper. Ken Tenn made no effort to conduct a town hall meeting on its plans or even go door to door to discuss these plans with individual landowners.

Ken Tenn then approached Landowners under false pretenses—indicating that they were conducting an archaeological study to begin the initial application process—and misrepresented material facts. Specifically, Ken Tenn represented to Landowners that the project would solely seek to rehabilitate existing tracks and rights of way, rather than embark on the construction of a new rail line. Landowners were not aware of the plan to construct this new railway through their farms until well after Ken Tenn filed its Petition for Exemption on September 2, 2020. Before Landowners were able to ascertain what had occurred and how to react effectively to defend their interests, the Board granted the Petition. In sum, Ken Tenn’s actions do not warrant an exemption from the procedures put in place to ensure the United States railroad industry operates in an honest manner.

II. The construction of a railway through the farmland of Northwestern Tennessee and Southwestern Kentucky presents a great threat to public health and safety.

The industrialization and globalization of our economy has already worn the “social fabric of rural communities” so thin that forging an unnecessary steel corridor through undisturbed, productive, and sustainable farms in Fulton County, Kentucky and Obion County, Tennessee, might tear this one in half. *See Nat’l Fam. Farm Coalition v. U.S. Environmental Protection Agency*, 960 F.3d 1120, 1143 (9th Cir. 2020). The Ninth Circuit Court of Appeals specifically discussed the Environmental Protection Agency’s failure to consider “the enormous social cost to farming communities where use of dicamba herbicides had turned farmer against farmer, and neighbor against neighbor” when vacating their decision to approve the use of Dicamba, a controversial herbicide. *Id.* at 1144. Disturbing the rural character of Fulton County, Kentucky,

and Obion County, Tennessee, by building this new railway would not only forever alter the agricultural landscape but also permanently divide the farming community that has endured for centuries.

This project seeks to complete a loop through Fulton and Hickman counties in Kentucky and Dyer, Lake, and Obion counties in Tennessee. However, the portion of new rail line sought in the instant application is unnecessary and will not be able to secure adequate funding. Existing railway connects Union City to Hickman Port. The Board approved the NW TN Regional Port Authority Rail Line to connect Cates Port to Union City and to Hickman Port in FD 35802. This creates a perfectly navigable route from Hickman Port to Union City and from Cates Port to Union City, alleviating concern about available intermodal transportation routes. Rehabilitation of existing railroad tracks renders this second route redundant. Bottom line, this area's industrial economy is not in the dire state that Ken Tenn would have this Board believe, and 12.17 miles of new railway are not going to boost this area's economy to the hyperbolic levels that Ken Tenn would have the Board believe.

Moreover, Ken Tenn has not shown the requisite ability to fund this project. Ken Tenn plans to fund this project "through a combination of state, local, and potentially federal funds." (Pet. for Exemption at p. 5.) Ken Tenn cannot claim to have secured any private or local funds, and they certainly will not successfully secure any federal funds. This project will likely cost in the range of \$25,000,000 to \$30,000,000, which is a large sum for any state-financed project. Considering the many competing infrastructure needs in Tennessee and Kentucky, this project will not garner any significant attention to secure it the priority needed to move forward, as evidenced by the paltry \$700,000 received at the state level—\$350,000 from Kentucky and \$350,000 from Tennessee. This sum will only cover the cost of the preliminary groundwork that will carry Ken

Tenn through proceedings before this Board. For a project where the claimed private sector benefits are so high, the fact that Ken Tenn is unable to show any serious financial commitment from the private sector industries that will supposedly benefit again places into question the need for this new railway. Respectfully, that is shaky ground upon which to premise granting and exemption to regulations intended to regulate the building of a railroad.

MOTION FOR BRIEFING SCHEDULE

An extension under 49 C.F.R. § 1104.7 was no longer possible when the Landowners retained counsel. This matter presents unique circumstances in which the Landowners are just now—after a preliminary grant of an exemption—coming up to speed with a plan that significantly affects their livelihood. The Landowners have not had the opportunity to mount a collective opposition. As such, the Landowners would respectfully request that the board set a briefing schedule to allow the Landowners to present to the Board their full opposition to any exemption. We expect additional landowners to join and additional evidence to include specifics regarding the property and businesses affected, including a privately negotiated solar farm that would provide solar energy to the area that the construction of this new railway would disrupt. The Landowners propose the following schedule:

Deadline for the Landowner's Comment in Opposition:	February 4, 2021
Deadline for the Ken Tenn Regional Rail Partners' Response:	February 24, 2021
Deadline for the Landowner's Reply:	March 10, 2021

CONCLUSION

For these reasons, and within this context, Landowners now urgently petition the Board to reconsider its decision to preliminarily grant Ken Tenn an exemption from the procedures outlined in 49 U.S.C. § 10901, *et seq.*

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this pleading or document was served upon all parties of record by mailing postage prepaid, by delivery to the person or office of such counsel, or by electronic means, as follows:

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