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February 16, 2021

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VIA E-FILING

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street SW
Washington, DC 20024

ENTERED
Office of Proceedings
February 16, 2021
Part of
Public Record

Re: STB Docket No. FD 36328
Ken Tenn Regional Rail Partners, Inc.
- Construction and Operation Exemption of a Line of Railroad -
In Fulton County, KY and Obion County, TN

Dear Ms. Brown:

Enclosed for filing in the above referenced docket is the Response of the Ken Tenn Regional Rail Partners, Inc. to Landowners' Reply entered into the record on January 26, 2021.

If you have any questions regarding this filing, please let me know.

Sincerely,



Justin J. Marks
*Counsel for Ken Tenn Regional
Rail Partners, Inc.*

Before the
SURFACE TRANSPORTATION BOARD

STB Docket No. FD 36328

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

RESPONSE TO LANDOWNERS' REPLY TO KTRRP'S REPLY

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Ken Tenn Regional Rail Partners, Inc.

Dated: February 16, 2021

Before the
SURFACE TRANSPORTATION BOARD

STB Docket No. FD 36328

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

RESPONSE TO LANDOWNERS' REPLY TO KTRRP'S REPLY

Ken Tenn Regional Rail Partners, Inc. (“KTRRP”) respectfully submits this Response in opposition to the Reply¹ to the KTRRP Reply submitted by 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 King (the “Landowners”).

Landowners seek reconsideration of the Board’s decision served in this docket on December 1, 2020² granting KTRRP a preliminarily exemption based on the transportation merits of KTRRP’s proposed rail construction project of the Proposed Rail Line³, subject to an Environmental Assessment being prepared by the Board’s Office of Environmental Analysis (“OEA”). On December 21, 2020 Landowners submitted a Notice of Appearance, Petition to Reconsider, and Motion for Briefing Schedule (“Petition for Reconsideration”). KTRRP submitted a reply on January 11, 2021 (“KTRRP Reply”). On January 26, 2021, Landowners submitted a Reply to the KTRRP reply. KTRRP respectfully requests that the Board reject the

¹ Together referred to herein as “Landowners’ Reply” or “the Reply”.

² *Ken Tenn Regional Rail Partners, Inc. – Const. and Op. Exemption of a Line of Railroad – In Fulton County, KY and Obion County, TN*, STB Finance Docket No. 36328 (served Dec. 1, 2020) (“December 1 Decision”).

³ Approximately 12.17 miles of new rail line between mile post TennKen 51.69 at the Hickman-Fulton County River Port (“the Port”) in Fulton County, KY and mile post UCT 450 near Union City, TN (the “Proposed Line”).

Landowners improper Reply to KTRRP Reply. However, if the Board were to accept the Landowners' Reply to the KTRRP Reply, KTRRP requests that the Board also accept this response in addition to the arguments KTRRP made in its January 11 reply.

I. ARGUMENT

Landowners' Reply does not meet the Board's standards for permitting a reply to a reply. Under the Board's regulations at 49 C.F.R. § 1104.13(c), a reply to a reply is not permitted. The Board will permit a reply to a reply in the interest of developing a more complete record. However, the Board will not accept a reply to a reply that merely repeats prior arguments.⁴

In addition, Landowners' Petition for Reconsideration and now its Reply to KTRRP's Reply (which is more of a revised Petition for Reconsideration) still do not present new evidence or a change in circumstances and do not demonstrate beyond unsubstantiated general allegations that the Board has committed material error.⁵

Landowners' Petition for Reconsideration and now its Reply are both predicated on the argument that KTRRP's Petition for Exemption ("KTRRP's Petition") fails to meet the Rail Transportation Policy's ("RTP") goals because - despite the Board's conclusion that KTRRP's Petition is consistent with the RTP at sections 2, 4, 5, 7, and 15 - Landowners assert that KTRRP acted dishonestly and thus inconsistently with RTP section 9. Now, following KTRRP's Reply detailing how KTRRP has followed all of the Board's regulations and precedent and has not in fact acted dishonestly, Landowners file this Reply not to develop a more complete

⁴ *Hartwell First United Methodist Church – Adverse Abandonment and Discontinuance – The Great Walton Railroad Company, Inc. in Hart County, GA.* STB Docket No. AB 1242, slip op. at 3 n.5 (served Jan. 31, 2018).

⁵ Under 49 CFR §1115.3(b), The Board will grant petitions for reconsideration "only upon a showing of one or more of the following: (1) The prior action will be affected materially because of new evidence or changed circumstances. (2) The prior action involves material error. "[I]n a petition alleging material error, a party must do more than simply make a general allegation; it must substantiate its claim of material error." *Norfolk Southern Ry Co. – Acquisition & Operation – Certain Rail Lines of the Del. & Hudson Ry. Co., Inc.* STB Finance Docket No. 35873, slip op. at 7 (served Oct. 18, 2016).

record, but to repeat and re-shape its prior failed arguments under the section 1115.3(b) standards.

- A. Landowners attempt to repackage its previous arguments asserting KTRRP duplicity does not support the criteria permitting a Reply to a Reply nor does it demonstrate new evidence.

Landowners' Petition for Reconsideration and now its Reply argue that KTRRP has been dishonest contrary to RTP section 9. Landowners argue that KTRRP has been dishonest because KTRRP "did not provide adequate notice of the Petition to affected parties and misrepresented to the Board that the Petition is unopposed."⁶ Landowners do not cite to the KTRRP Petition for Exemption where KTRRP "misrepresented" that the Petition is unopposed because it cannot. KTRRP made no representation to the Board that the Proposed Line is unopposed. KTRRP argued that the Proposed Line meets the Board's standards for granting an exemption and KTRRP explained the widespread support the project, but nowhere does KTRRP claim that the Proposed Line is unopposed.

Landowners' Reply argues that KTRRP deceived the Board because no parties filed in opposition to KTRRP's Petition for Exemption.⁷ Landowners' apparent argument is that KTRRP failed to notify all potential parties on the Proposed Line and any alternatives lines in order to deceive the Board into assuming that there was no opposition to the Petition for Exemption. But Landowners cannot support this assertion, and cite no STB regulatory provision or case law in either of its filings to define what would constitute adequate notice, or how the notice provided by KTRRP was inadequate or failed to satisfy the Board's notice requirements. Prior to submitting the Petition for Exemption, KTRRP had in fact conducted community outreach and as stated in the KTRRP Reply, its public outreach is ongoing. Further, as KTRRP

⁶ Landowners' Petition for Reconsideration at 2.

⁷ Landowners' Reply at 6,10, 11.

stated in its Petition for Exemption, it is working with OEA to develop the environmental data to support the preparation of the Environmental Assessment.⁸ Developing the Environmental Assessment includes public outreach meetings to potentially impacted parties, including the Landowners.

Landowners assert that KTRRP's (undefined) lack of notice is "new evidence" to justify both a reply to a reply and its Petition for Reconsideration. Clearly however, Landowners have no "new evidence" to justify a Petition for Reconsideration. It bases its argument on repeated and unfounded assertions of KTRRP's dishonesty that do not support a petition for reconsideration as new evidence or a reply to a reply.

In its Petition for Reconsideration, Landowners attempt to support its dishonesty argument by asserting that KTRRP "approached Landowners under false pretenses—indicating that they were conducting an archaeological study to begin the initial application process— and misrepresented material facts."⁹ In its Reply, KTRRP clearly described how the Right of Entry Agreement explained KTRRP's proposed project and as such, KTRRP did not in fact misrepresent material facts.¹⁰

Now, in its Reply, Landowners' jettison the archaeological study "false pretenses" argument and instead present as "new evidence" that "KTRRP inexplicably relies on the Right of Entry ("ROE") agreements as proof of adequate notice."¹¹ That of course is another misrepresentation. KTRRP's Reply does not state that KTRRP is relying on the agreements as proof of adequate notice. KTRRP instead was rebutting Landowners' previous argument that KTRRP misrepresented material facts about the archeological studies and KTRRP presented to

⁸ KTRRP Petition for Exemption at 5.

⁹ Landowners' Petition for Reconsideration at 5.

¹⁰ KTRRP Reply at 15-16.

¹¹ Landowners' Reply at 5.

the Board the Right of Entry agreements to demonstrate the transparent process KTRRP is utilizing for this project. Landowners do not rebut KTRRP's clearly supported explanation. Instead, the Landowners' Reply shifts gears to claim that these agreements prove that KTRRP provided a lack of notice.

Landowners' new argument does not present new evidence to either justify a Reply to a Reply or to support a petition for reconsideration because it has no bearing on the Landowners' fundamental argument. Landowners' argument is that KTRRP is dishonest and that dishonesty is contrary to RTP section 9. But KTRRP has demonstrated, with support, that it has not acted dishonestly. And the fact that KTRRP is conducting the archeological study (in collaboration with OEA) necessitating the Right of Entry agreements and has done so following its Petition for Exemption, is not new evidence justifying a petition for reconsideration. It is merely evidence that KTRRP is openly and honestly following all of the Board's rules and regulations for seeking approval to construct a rail line.

In its Petition for Reconsideration Landowners' also sought to demonstrate that KTRRP was acting dishonestly contrary to RTP section 9 by noting that certain potentially impacted landowners had signed a solar energy ground lease and that KTRRP was hiding the solar ground lease from the Board. Landowners stated: "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."¹² KTRRP's Reply explained how KTRRP alerted OEA soon after discovering the solar energy ground lease.¹³

In its Reply, Landowners do not rebut KTRRP's clear evidence that it informed OEA as soon as it learned of the solar ground lease. Instead, Landowners' now claim that KTRRP's

¹² Landowners' Petition for Reconsideration at 4.

¹³ KTRRP Reply at 12-13.

discovery of the solar energy ground lease is new evidence demonstrating insufficient notice. As this was raised in the Petition for Reconsideration, Landowners' have not demonstrated how this discovery is "new evidence" that would support a petition for reconsideration of the transportation merits of KTRRP's proposal. Any impact of the Proposed Line will be analyzed in the Environmental Assessment. Further, neither Landowners' Petition for Reconsideration nor their Reply explain why a rail line and a solar power facility cannot coexist considering that domestically and internationally solar power facilities can be found adjacent to transportation infrastructure.¹⁴

Landowners' Reply asserts that KTRRP favored Gray Farms because KTRRP revised its preferred route and that the new "preferred route no longer affects Gray Farms."¹⁵ Landowners' Reply would leave the Board to believe that KTRRP routed the Preferred Line away from Gray Farms' property due to a family connection to Clay Billingsley. But Landowners fail to explain that another parcel of land farmed by the Gray family will be potentially impacted by the Preferred Line. Gray Farms is a father-son farming operation that raises poultry for Tyson Foods, Inc. and cultivates row crops in Obion County, Tennessee. The son, Mr. Billingsley's brother-in-law, owns the poultry barns on the original preferred route. The father, who has a professional relationship with Mr. Billingsley, owns barns on the revised Preferred Line.

Whereas, the original preferred route was revised to minimize impacts to the Tyson Foods, Inc.

¹⁴ Indeed, not only can solar power be found adjacent to transportation infrastructure, as it is in Tennessee along I40, but solar power is placed near railroad rights-of-way for powering railroad facilities. *See examples:* West Tennessee Solar Farm on I40, <https://solarfarm.tennessee.edu/about/>; Jillian Ambrose, *Rail Line in Hampshire is world's first to be powered by solar farm*, THE GUARDIAN, Aug. 22, 2019, <https://www.theguardian.com/business/2019/aug/22/rail-line-in-hampshire-is-worlds-first-to-be-powered-by-solar-farm>; *NCDOT installs solar-powered railroad crossing signals*, METRO MAGAZINE, Apr. 30, 2010, <https://www.metro-magazine.com/10026063/ncdot-installs-solar-powered-railroad-crossing-signals>; In India, the U.S. government is placing solar power adjacent to rail lines on train stations. Mary Jane Maxwell, *Asia's largest rail network goes solar with U.S. help*, SHAREAMERICA.GOV, Aug. 23, 2018, <https://share.america.gov/asias-largest-rail-network-goes-solar-with-u-s-help/>.

¹⁵ Landowners' Reply at 10-11.

poultry operation, property farmed by the Gray family remains potentially impacted by this project.

Landowners' assertion that KTRRP misrepresented to the Board that its Petition for Exemption was unopposed is false. Landowners' assertion that KTRRP deceived Landowners about the archeological study is false. Landowners' assertion that KTRRP hid the solar power ground lease from the Board is false. The Board should reject Landowners' Petition for Reconsideration and its Reply because Landowners' false statements accusing KTRRP of dishonesty do not represent "new evidence" to support a finding that the KTRRP Petition for Exemption fails to meet the goals of the RTP.

In addition to its false assertions, Landowners' also complain that KTRRP did not provide them a venue at KTRRP's most recent Board meeting to ask questions.¹⁶ KTRRP denies that there was anything improper about the recent Board meeting; however, such questions are clearly ones of State law and not for the Board to determine. Of more significance, Landowners do not explain why the public meetings being held under the NEPA process, as well as the comment period are insufficient for the Board to properly evaluate the potential impacts of the Proposed Line in preparing its environmental assessment.

- B. The Board did not commit material error in approving KTRRP's Petition for Exemption and Landowners' Reply is merely a repeat of its previous arguments.

Landowners' Reply does not provide any substantiated support that the Board committed material error justifying reconsideration and is merely a repeat of its previous attack on the economic analysis KTRRP submitted with its Petition for Exemption. Landowners' Reply fails to demonstrate material error for two reasons. First, the Board did not rely on the Verified Statement of Lana Suite to reach its decision. And second, even if the Board did adopt Ms.

¹⁶ Landowners' Reply at 7-8.

Suite's Verified Statement or the Rail Expansion Project Economic Impact Analysis as a basis for reaching its decision, Landowners' Reply offers no credible rebuttal to the study.¹⁷

Landowners' Reply states that "[T]he Board rested its decision, in part, upon the economic impact projected in the study."¹⁸ However, in its Reply, Landowners fail to cite where the Board actually "rested its decision" on KTRRP's economic assertions because the Board did not. What the Board did state is that the "record here shows that the proposed Line would provide enhanced rail service to and from the Port and surrounding area."¹⁹ That is so, the Board went on, because "[c]urrently, the primary transportation option for shippers east of the Port is via trucks."²⁰ Landowners' do not argue that the Board erred in these conclusions. The Board continues, "[t]he connection through Union City would provide local industrial facilities access to the interstate rail network and allow traffic to utilize grain elevators and to transport outbound dried distillers' grain."²¹ Again, Landowners do not dispute the Board's reasoning.

The Board further supports its decision stating, that the "proposed Line would enhance competition by providing shippers in the area with an additional and more cost-effective freight option and foster sound economic conditions, consistent with 49 U.S.C. § 10101(4) and (5)."

Here, Landowners' do raise an objection. Landowners' Reply states: "If the existing industries

¹⁷ Landowners' Reply states that it obtained the economic impact study, "only after submitting an Open Records Request." See Landowners' Reply at 12. This statement implies that KTRRP was in fact hiding this report. But, like Landowners' other demonstrably false statements (supra Section I.A.), this is another example of Landowners' attempt to disparage KTRRP before the Board. As can be found at Landowners' Reply Exhibit J, Landowners made a public records request to KTRRP seeking KTRRP's Board minutes citing Tennessee Code. Landowners also requested the Economic Impact Study. Landowners provided no authority for why KTRRP should provide the study, but KTRRP produced it without hesitation. Landowners do not provide exhibits showing that KTRRP denied any previous request for the report. Landowners also could have read the report when KTRRP filed its Reply considering that it was included as Exhibit 16. The Board should reject Landowners' false statements accusing KTRRP of dishonesty and its implied statements of KTRRP's duplicity by rejecting the Petition for Reconsideration.

¹⁸ Landowners' Reply at 11.

¹⁹ December 1 Decision, slip op. at 4.

²⁰ *Id.*

²¹ *Id.*

would allegedly benefit from gaining direct access to rail transportation, why have they not committed any funds to the Project?”²² However, Landowners do not cite any Board regulations or case law to support its contention that a requirement for winning Board preliminary approval for a Petition for Exemption is that local industry has to provide capital for a rail project. Further, Landowners ignore the support the project has at the federal, state, and local level.

Landowners’ Reply is a repeat of its attack on the Verified Statement of Lana Suite in its Petition for Reconsideration and the Board should accordingly reject the Landowners’ Reply. Further, Landowners’ material error argument repeats the same attack that KTRRP will not be able to generate sufficient funding for the project. Not only is this a repetition of its prior argument, Landowners’ Reply does not even rebut the case law KTRRP provided stating that the availability of funds is not relevant in a construction proceeding because the Board’s authority is permissive.²³

Landowners’ Reply and the Petition for Reconsideration present no support that the Board committed material error because first, the Board did not cite anywhere in its decision that it was relying on the Verified Statement of Lana Suite and even if it had done so, Landowners’ Reply does nothing more than make unsupported criticisms of the verified statement.

CONCLUSION

In conclusion, KTRRP respectfully requests that the Board reject the Landowners’ Reply as duplicative and not justifiable as an exception to the general prohibition to replies to a reply. Moreover, even if the Board accepts the Landowners’ Reply, it should deny the Petition for Reconsideration and Reply to a Reply because Landowners have presented no actual new evidence beyond unsupported and refuted allegations of dishonesty. Further, Landowners have

²² Landowners’ Reply at 12.

²³ KTRRP Reply at 19.

not supported their claim that the Board committed material error by relying on the Verified Statement of Ms. Lana Suite because the Board did not in fact base its decision on Ms. Suite's Verified Statement, and in any event, they have not presented any evidence to contradict the Verified Statement.

Respectfully submitted,



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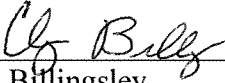
*Counsel for Ken Tenn Regional Rail Partners,
Inc.*

Dated: February 16, 2021

VERIFICATION

I hereby verify on behalf of Ken Tenn Regional Rail Partners, Inc. under penalty of perjury, that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verification.

Executed on February 15, 2021.

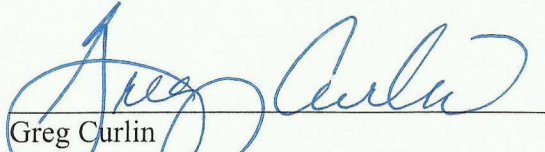


Clay Billingsley
Vice Chairman, Ken Tenn Regional Rail Partners, Inc.

VERIFICATION

I hereby verify on behalf of Ken Tenn Regional Rail Partners, Inc. under penalty of perjury, that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verification.

Executed on February 15, 2021.

A handwritten signature in blue ink, appearing to read "Greg Curlin", written over a horizontal line.

Greg Curlin
Chairman, Ken Tenn Regional Rail Partners, Inc.

2/16/2021

CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the foregoing Reply was served by email on the following persons:

Mr. Russell E. Reviere
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Justin J. Marks

Dated: February 16, 2021