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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 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 June 11, 2021 letter filed by Citizens Campaign for the Environment (“CCE”) in this docket. The letter, while purportedly proffered as a reply to the “Petition/Request for Immediate Public Disclosure of Outcome of Mediation by and Between Brookhaven Rail LLC and Town of Brookhaven, NY,” filed by the NAACP New York State Conference (“NAACP NY”), is really primarily a reply to BHR’s Reply to NAACP NY. Moreover, CCE’s letter contains reckless, false accusations leveled at BHR which demand a corrective response, and BHR therefore submits that good cause exists to accept this letter into the record of this proceeding in the interests of having a complete record.

Most prominent of the letter’s outrageous claims is that “BHR has engaged in selective disclosure of critical aspects of the mediation [in this proceeding] in a clear attempt to secure favor with the Board’s Office of Environmental Analysis and its third-party contractor (collectively “OEA”).” CCE Letter at 1. CCE also disingenuously and falsely asserts that the supposed hidden purposes of the mediation were “to attempt to breach or terminate the conservation agreement [establishing an Open Space Conservation easement] in favor of development . . .,” and to somehow limit OEA’s review of the environmental impacts of the proposed project under the National Environmental Policy Act (“NEPA”).

Unfortunately, CCE has demonstrated in past filings in this proceeding and Docket No. FD 36369 that it has no qualms about advancing serious misstatements of fact and baseless conspiracy theories in order to advance CCE’s crusade to stop the rail construction and solid waste rail transfer facility projects being diligently and responsibly pursued by BHR and its

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affiliated companies. In this latest instance, CCE's reckless allegation that BHR engaged in "selective disclosure" of "critical aspects" of the mediation in order to "secure favor" with OEA is demonstrably false for numerous reasons. First, CCE's unequivocal assertion that the agendas and minutes of the monthly conference calls between OEA and BHR held at OEA's request "all prominently discuss the mediation or matters supposedly resolved therein" is flatly contradicted by the plain language of those documents. Only the minutes of the April 6, 2021 call reference a brief discussion of a single issue that was offered in response to OEA's request to BHR for an update from the mediation session, which had occurred on March 15, 2021. These minutes reflect that BHR informed OEA that BHR and the Town were discussing the possibility of agreeing to certain mediation topics that might be disclosed to OEA to potentially assist it in its NEPA review process.¹ As to the topic that BHR provided preliminary feedback on to OEA, the fact that the rail line alignment proposed in BHR's Petition for Exemption will require an adjustment to the aforementioned 62-acre Open Space Conservation Easement on Parcel D, and that the adjustment would entail the release of three acres on one parcel making up the easement area and the addition of six acres onto the other parcel, had been public knowledge for nearly a year. Indeed, as BHR pointed out in its Reply to NAACP NY, CCE's Executive Director was personally informed of this plan in writing by the Town in August, 2020 and it has been discussed in the public filings in this docket and in Docket No. FD 36399. *See* BHR Reply to NAACP NY at 4, footnote 10. In the August 28, 2020 letter² counsel for the Town explained to CCE's director:

Finally, we note that under the 2016 Stipulation, the Town acquired a 62-acre Open Space Conservation Easement on Parcel D (already zoned for L1 light industrial use) and that the current owners, rather than excavating Parcel D for purposes of a tunnel access, are proposing a short direct track spur onto Parcel D from the existing Long Island Railroad Tracks. In the event the STB determines to exercise its pre-emptive authority over the proposed development of Parcel D, the Conservation and Easement and Open Space will continue with the minor exception that the approximately 3-acre corner portion which will be traversed by the spur track will be exchanged for twice the acreage incomparable [sic] open space property elsewhere on Parcel D.

CCE's June 11 letter completely ignores this part of BHR's Reply to NAACP NY in CCE's zeal to disparage BHR. For CCE to ignore these facts and to now assert that the plan for reconfiguration of Conservation Easement acreage was first hatched in secret in the mediation between BHR and the Town in order to breach an agreement, and then "selectively disclosed" by BHR to "secure favor with" OEA would be laughable if it was not being offered to support a

¹ See 5 U.S.C. §474(b)(2), which permits parties to mediations to disclose information from the mediation by mutual agreement.

² This letter is Attachment C to *BHR's Reply to Reply in Opposition to the Citizen's Campaign for the Environment*, filed in Docket No. FD 36399, *Brookhaven Rail LLC – Petition for Exemption from Requirements of 49 U.S.C. 10909* on October 5, 2020.

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specious accusation of a violation of the Board's mediation rules, which BHR and its counsel take very seriously.

Far from intentionally disclosing this single aspect of the mediation (not multiple "aspects" or "matters" as CCE also falsely asserts) to OEA for some unspecified "favor," BHR was providing confirmation to OEA of an aspect of the project that BHR believed in good faith had previously been made public and therefore was exempt from the mediation disclosure restrictions.³ This topic was "selected" because it was the only mediation topic BHR believed it could discuss with OEA at that time. Even then, BHR only provided a very general confirmation of the contemplated reconfiguration. Similarly, there was no intent or purpose to somehow try to alter or restrict the OEA's review of potential environmental impacts, as CCE also baselessly speculates. As the Board explained in the January 6, 2021 decision initiating mediation in this proceeding, nothing in the mediation can "limit or otherwise affect any necessary environmental review, which OEA will conduct in full regardless of the outcome of mediation."⁴ Consequently, to the extent BHR and the Town reach agreement on certain issues that they believe might clarify aspects of this complicated development project for OEA to assist its work, BHR is well aware of the fact that OEA is free to accept or reject any input from the applicant of a project before the Board and/or a local entity, such as the Town, while OEA conducts its environmental review "in full."⁵

Finally, CCE vaguely asserts that because there are issues to resolve regarding the Conservation Easement acreage in order to accommodate the proposed routing of BHR's new rail line, that this "implicates aspects of the ultimate merits of its proposal" and that this "is an improper use of mediation in a licensing proceeding." CCE Letter at 3. Both statements are simply wrong. In the first instance, land rights issues are not typically a consideration when reviewing the merits of a rail line construction petition. As the Board affirmed in a relatively recent decision, "it is well settled that, because the Board's authority is permissive, the Board may grant authority to construct a line even if all outstanding issues related to the proposed construction, such as financing, have not yet been resolved or if factors beyond the Board's control might ultimately prevent consummation of authority for a proposed construction."⁶

³ See 5 U.S.C. §474(b)(3). Moreover, CCE's own letter acknowledges that contemporaneously with BHR providing OEA with the update on the conservation easement plan, public efforts were being made to introduce legislation in the New York Legislature to accomplish the contemplated acreage reconfiguration. CCE Letter at 2, note 2.

⁴ Docket No. FD 36398, *Brookhaven Rail LLC – Construction and Operation Exemption – In Suffolk County, NY* (served January 6, 2021) at 4 ("Mediation Decision").

⁵ CCE's weak assertion at page 3 of its letter that the proposed solid waste rail transfer facility that will be the subject of an application for land-use exemption permit in a separate docket was also part of the mediation simply because the Environmental Impact Statement being prepared by OEA is analyzing both the construction project and the solid waste rail transfer facility should be summary rejected.

⁶ Docket No. FD 36284, *Seven County Infrastructure Coalition – Rail Construction & Operation Exemption – In Utah, Carbon, Duchesne, and Uintah Counties, Utah* (served January 5, 2021) at 6. See also, Docket No. FD 36168, *Oakland Global Rail Enterprise – Petition for Declaratory Order* (served June 20, 2019) at 6 citing, *Star Lake R.R.—Rail Constr. & Operation*

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Consequently, CCE's assertion that discussing the Conservation Easement acreage reconfiguration in the mediation was an improper use of mediation is wrong. But even if this topic did implicate the merits of BHR's construction proposal, the Board's decision initiating mediation accounted for this, stating that "[s]hould Brookhaven Rail and the Town reach resolution on any issues that have bearing on the merits of the Construction Petition, they would need to provide such information to the Board for consideration, and CCE and the Sills Parties would have an opportunity to reply at that time."⁷

In conclusion, CCE's allegations regarding BHR's actions regarding the mediation process are false, reckless and offensive, and yet another example of CCE manifesting its opposition to the rail construction project proposed in this docket through arguments that are neither based in nor supported by facts or applicable law. BHR categorically denies CCE's baseless allegations of misconduct on the part of BHR and, by extension, its counsel. There are zero grounds for the Board to undertake any "further investigation" of CCE's allegations as CCE suggests. CCE Letter at 3. For the Board to do so would play into CCE's overarching strategy of throwing as many roadblocks in front BHR, OEA, and the Board as possible, no matter how baseless.

Respectfully submitted,



Thomas W. Wilcox

Attorney for Brookhaven Rail LLC

in McKinley Cty., N.M., FD 28272, slip op. at 5 (ICC served Apr. 20, 1987) (where the Interstate Commerce Commission declined to revoke a grant of construction authority on the basis that an easement needed to construct the line was terminated and stating that "authorization is permissive; applicants will have to obtain the easement or make some other acceptable arrangement before they can construct the line.").

⁷ *Mediation Decision at 4.*

CERTIFICATE OF SERVICE

I hereby certify that, on this 15th day of June, 2021, a copy of the foregoing Letter was served by email on all parties on the official Service List for this Proceeding.



Thomas W. Wilcox