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ATTORNEYS AT LAW

July 30, 2021

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VIA ELECTRONIC FILING

Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423

ENTERED
Office of Proceedings
July 30, 2021
Part of
Public Record

Re: Docket No. AB 1314X, The Elk River Railroad, Inc. –
Abandonment Exemption – In Kanawha & Clay Counties, WV

Dear Ms. Brown:

Between July 23 and 29, 2021, The Elk River Railroad, Inc. (“TERRI”) received email copies of eight (8) letters from Mr. J. David Morgan on behalf of himself and six (6) other commenters¹ in response to TERRI’s Verified Notice of Exemption for Abandonment pursuant to 49 C.F.R. § 1152.50 (“Notice of Exemption”), filed with the Surface Transportation Board (“STB” or “Board”) on July 2, 2021. As copies of the comments were only served via email by Mr. Morgan to TERRI’s counsel, TERRI assumes Mr. Morgan represents the commenters, and thus, hereby submits this reply comment in response to all eight (8) letters from Mr. Morgan and his associates (hereinafter referred to as “Civilian Comments” or “Comments”).²

None of the issues raised in the Comments justify further delay in this proceeding. TERRI has properly fulfilled all requirements under the Board’s regulations governing abandonment exemption proceedings – including providing proper notice to all requisite agencies, local and regional government authorities, and the public – and there is no question that the Line is clearly within the STB’s jurisdiction and, therefore, subject to its railbanking

¹ In addition to the two comments submitted under Mr. Morgan’s name, comments were filed for the following individuals: Tawney Mangus, Katherine Stephenson, Pam Miller Street, Ken and Vivian Lowe (joint comment), Amanda June Volpenhein, and John Walker.

² It is TERRI’s understanding that Mr. Morgan represents the commenters as members of the Facebook group “Queen and King Shoals, Elkhurst/Hartland Save Our Road (access)” (formerly, “Queen and King Shoals, Elkhurst Save Our Road (access),” “Queen and King Shoals Save Our Road (access),” and listed under Mr. Morgan’s July 23, 2021 comment as “Queen and King Shoals Save Our Access (road)”). All individuals are members of the public online group created and managed by Mr. Morgan, and copies of the comments were served on TERRI’s counsel via email by Mr. Morgan.

authority. Thus, TERRI requests that the Board reject Mr. Morgan's requests for delay to allow additional comments and public hearings, and instead, urges the Board to publish notice in the Federal Register in accordance with 49 C.F.R. § 1152.50(d)(3) so the Board's Office of Environmental Analysis (OEA) can conduct the proper review and issue its determinations.

TERRI properly filed its Notice of Exemption pursuant to 49 C.F.R. § 1152.50, as no traffic has moved over the Line in over 20 years. As required by the Board's environmental rules, TERRI submitted its Combined Environmental and Historic Report ("CEHR") after notifying and requesting comments from all appropriate agencies, including the WV Department of Highways. *See* Notice of Exemption, Ex. F. Furthermore, TERRI provided the requisite advance notice of the proposed abandonment to the necessary government entities and agencies (*see id.*, Ex. C), and properly published notice in two newspapers of general circulation in Kanawha and Clay Counties – *The Charleston Gazette-Mail* and the *Clay County Free Press* – on June 23 and June 24, 2021, respectively (*see id.*, Ex. D).³

TERRI's Notice of Exemption does not raise any significant factual or legal issues that would require "considerable scrutiny" by the Board, as it is clear from the record that the Line is subject to the STB's jurisdiction as part of the interstate rail network, and is owned in its entirety by TERRI.⁴ As explained in its Notice of Exemption, in 1989, TERRI acquired the upper portion of the Line, from Hartland (MP 67.2) to south of Duck (MP 43.6), as part of a larger line acquisition from CSX Transportation, Inc. ("CSXT"), extending from Hartland (MP 67.2) to Gilmer (MP 6.2).⁵ In 1997, TERRI acquired the lower portion of the Line, between Hartland (MP 67.2) and Clendenin (MP 96.0), from CSXT after TERRI was granted authority from the STB and its predecessor, the Interstate Commerce Commission, to construct and operate the rail line, effective September 16, 1996.⁶ Upon doing so, the Line once again became subject to the Board's jurisdiction.⁷

³ *See Nat'l Trails Sys. Act & R.R. Rights-of-Way*, EP 702, at 13-14 (STB served Apr. 30, 2012) (noting STB and ICC previously declined to require abandoning railroads to give actual notice to adjacent landowners and holding requisite notice methods would not be augmented).

⁴ *See, e.g., Norfolk S. Ry. – Abandonment Exemption – In the City of Fort Wayne, Ind.*, Docket No. AB 290 (Sub-No. 403X), at 2 (STB served Oct. 22, 2019) (rejecting notice of exemption for abandonment where railroad was uncertain as to the type of rail line it sought to abandon and had sold portions of the line to different entities and therefore no longer had ownership of the line it sought to abandon).

⁵ *See Elk River R.R. – Lease, Operation & Acquisition Exemption – Line of CSX Transp., Inc.*, FD 31497 (ICC served July 26, 1989) (not printed).

⁶ *See Elk River R.R. – Construction & Operation Exemption – Clay & Kanawha Counties, WV*, FD 31989 (STB served Sept. 5, 1996). As noted in TERRI's Notice of Exemption, 1.05-miles of Conrail right-of-way was included in TERRI's 1992 petition but was never acquired by TERRI. It is not included in the proposed abandonment.

⁷ *Rutherford R.R. Dev. Corp. – Abandonment Exemption – In Rutherford Cnty., NC*, Docket No. AB 567 (Sub-No. 1X), at 2 (STB served Aug. 22, 2000) (finding "even if previously

The Comments do not challenge the STB's proper jurisdiction or its authority to railbank the Line. Rather, the Comments appear centered around *how* the trail would be managed in the event the Board issued a Notice of Interim Trail Use. Namely, the Civilian Comments express concerns regarding restricted trail access for motorized vehicles and a desire to use the railbed as a "road" to access properties along the right-of-way after it has been converted to a trail.⁸

First, requests to the STB to permit motorized vehicular use on the trail are beyond the scope of the Board's "ministerial" and "limited" role in railbanking proceedings, as the Board does not "analyze, approve, or set the terms of railbanking/interim trail use agreements." *Lake State Ry. – Abandonment Exemption – Rail Line in Otsego Cnty., MI*, Docket No. AB 534 (Sub-No. 1X), at 1-2 (STB served Nov. 5, 1999) (denying private landowner's request that the Board find a rail line was not suitable for interim trail use/railbanking, due to concerns about converting the right-of-way to a snowmobile trail). The Board also "does not regulate activities over the actual trail and has no involvement in the type, level, or condition of the trail." *Nat'l Trails Sys. Act & R.R. Rights-of-Way*, at 7 (internal quotation omitted).

Second, with the exception of those few that entered into leases with TERRI, the adjacent landowners' past and present use of the railroad's railbed as a "road," as described in the Comments, is unlawful. Indeed, many of the Comments themselves recognize the right-of-way as railroad property. As such, regardless of whether the Line is railbanked and converted to a trail, or whether there is rail service, the position of adjacent landowners remains unchanged since 1997 when TERRI acquired the right-of-way from CSXT and received the necessary regulatory authority to construct and operate the Line. Any lease or permissible use of the right-of-way authorized by TERRI is inherently conditional, as the STB has recognized that any line may be reactivated for future rail service.⁹

It is important to note that the trail would only prohibit *unauthorized* motorized vehicle access, which would not include access to provide essential services, such as repair and maintenance work by utility companies, or emergency services. As is the case in many state parks, ambulances and other emergency services would have full access to the right-of-way in the event of an emergency. Moreover, TERRI has met with concerned landowners to discuss

authorized for abandonment," a rail line "again became a railroad line subject to the Board's jurisdiction" when purchased and another rail carrier "leased it and undertook to operate it").

⁸ Other concerns, such as a potential increase in crime or decrease in property values as a result of the trail, have previously been dismissed by the Board as beyond its regulatory scope and should be raised with the appropriate state, regional, or local entities. *See, e.g., Rutherford*, AB 567 (Sub-No. 1X), at 2; *see also Iowa S. R.R. – Exemption – Aban. In Pottawattamie, Mills, Fremont & Page Cntys., Iowa*, 5 I.C.C.2d 496, 501 (1989), *aff'd*, *Goos v. ICC*, 911 F.2d 1283 (8th Cir. 1990) (STB environmental review of abandonments is limited to diversion of traffic to other rail lines/transportation modes and consequences of removing track and related structures).

⁹ *See, e.g., Jie Ao & Xin Zhou—Pet. for Declaratory Order*, FD 35539, at 6-7 (STB served June 6, 2012) (and cases cited therein).

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providing reasonable authorized access for those with residences located on the right-of-way and will continue to do so.

To the extent the Civilian Comments raise “environmental concerns,” these issues will be appropriately addressed as part of the environmental and historic review conducted by the OEA and any conditions that may be imposed as a result thereof. Agencies and the public will also have an opportunity to review and comment on the OEA’s Environmental Assessment; thus, concerns regarding insufficient time to investigate and comment on the proposed project are unfounded and do not justify further delay.

As TERRI has complied with the necessary regulatory requirements, and there is no question that the STB’s jurisdiction is proper and the Board has authority to railbank the Line, TERRI respectfully requests that the Board continue expeditiously advancing this proceeding by publishing notice in the Federal Register, consistent with the Board’s regulations.

Please do not hesitate to contact the undersigned if you have any questions regarding this Reply Comment. Thank you for your attention to this matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "AR Williams", written in a cursive style.

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cc: All Parties of Record