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Ms. Cynthia T. Brown,
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423-0001

Re: *Docket Nos. FD 36398 and FD 36399 **Appeal** by Citizens Campaign for the Environment ("CCE") and **Reply** by Brookhaven Rail LLC ("Brookhaven") regarding potential conflict of interest resulting from the Surface Transportation Board's Office of Environmental Analysis ("OEA") approval of Henningson, Durham & Richardson Architecture and Engineering P.C. ("HDR") as third party contractor for project environmental review*

Dear Ms. Brown:

We are writing on behalf of our client, the New York State NAACP, which has acted in conjunction with the Brookhaven NAACP, in connection with the above-referenced matter. NAACP has appeared previously in these proceedings and, representing otherwise voiceless residents affected by the Brookhaven's proceedings and projects, respectfully requests to comment on the above referenced CCE Appeal and Brookhaven Reply.

The Brookhaven NAACP remains adamantly opposed to the Surface Transportation Board's involvement in this project. The proposed project represents the largest waste transfer station in New York State history and is located in a potential Environmental Justice Area as determined by the New York State Department of Environmental Conservation. Any decisions regarding this project must be left to the local and state governments, including any changes to the uses of the land under local zoning. The STB should not waive any local zoning or allow this project to move forward outside the local land use and zoning process.

However, given that the STB continues to involve itself in this local matter, this letter is written in support of the outcome sought by CCE in its Appeal. We are aware that by order served October 20, 2021 the Surface Transportation Board ("STB") has suspended environmental review of the projects associated with Docket Nos. FD 36398 and 36399 pending resolution of CCE's Appeal filed on October 6, 2021. This pause is welcome. Prudent and measured assessment of the situation compels us to urge an outcome that HDR not be approved as the third party contractor for environmental review.

CCE in its Appeal, and Brookhaven in its Reply, have articulated their respective legal arguments, factual rationales supporting their respective positions, the proper standard of review on appeal and evaluated the irregular history leading to OEA's approval of HDR. We do

not repeat these technical points and counter-points. As noted, NAACP finds CCE's articulations appropriate and persuasive on the legal and procedural details. We write now to voice a different perspective.

This is the perspective of residents entitled to a safe, healthy environment, the voices of persons entitled to comment on critical developments deeply affecting the character of the community in which they live, raise their families, attend schools and religious services and use for recreation and sports. Traffic, odors, noise and, conversely, the mitigation or elimination thereof, are critical. We write to highlight for the STB that, while fair and impartial application of the law comprises the bedrock of our government, context matters. In this case the concerns of local community members are not only relevant, but inform on the legal determinations as to whether retention of HDR's represents an unlawful and/or unethical conflict of interest for the environmental review needed for Docket Nos. FD 36398 and FD 36399. Perceptions matter. Objectively reasonable perceptions germinating from the affected community should be considered.

Here is what NAACP sees. First, to our knowledge, and at least based on the parties to these dockets, no local citizens' groups or deeply rooted civic organizations representing people who live in the immediate area and will be affected and or harmed by the transfer station formally have joined Brookhaven in its positions. Brookhaven Township is a vibrant and diverse community, with many voices. But no voices organized at a grass roots level--ordinary residents and not politicians or direct economic beneficiaries--seem raised in support of Brookhaven and its methods, approaches, positions and projects. In fact, the Brookhaven NAACP has marshalled the support of more than 20 key local stakeholder civic organizations to oppose Winters Bros. project and continues to work with them to stop Winters Bros. in its attempt to avoid a local zoning process. That bears notice.

Second, Brookhaven over time has taken measures to avoid routine local permitting and zoning processes. Brookhaven has sought to override and preempt state and local land use and zoning laws by seeking "exemptions" and shortened timetables. Brookhaven also conducted a lengthy non-public mediation. Other non-public meetings have been held. Brookhaven's motivations are its own; but the public record of what has transpired does not document transparency and acceptance of public scrutiny at each stage of the various projects at issue here. This understandably causes concern—deep concern—that local input is unwelcome. The people of Brookhaven Township are not a nuisance to be circumvented, or boxed into limited roles, to be heard only after key decisions have been made. They seek to be vital partners entitled to participate in the evaluation of a massive solid waste transfer station and new rail line projects transecting the heart of their community. The upshot is that trust in Brookhaven and the entire projects process has eroded. Once too often, they have resorted to secrecy and shortcuts that has undermined public confidence.

The foregoing matters because CCE's Appeal spotlights a circumstance where, once again, public trust is compromised. Our government requires informed citizens, competence in our public officials, transparency, fulsome disclosure of facts of public concern, especially concerning public infrastructure, as well as civility, an opportunity to air views and trust. Trust is key.

Here, it is undisputed that HDR previously provided services on the projects Brookhaven is advancing. CCE and Brookhaven dispute the degree, importance and consequences of the services HDR provided in the past, but there is universal agreement HDR has prior experience with the projects. Quite simply, the public interest requires the third party environmental review contractor be independent and disinterested. Other contractors without any prior ties are

available. The appearance of impropriety—and possibly actual conflict if CCE’s arguments prevail—dictates a different contractor would better restore public trust.

This is not a circumstance where time, money, work-product would be lost or disruption would be material; we are at the inception of the environmental review. NAACP suggests that public trust and confidence require a fresh start. Given the law *permits* a new contractor here, the fundamental precepts of good government, and public trust, compel HDR be replaced. By insisting HDR is competent and unbiased, Brookhaven has created a problem unnecessary for any legitimate project need. Why not simply employ another consultant who is competent and unbiased, before more time and money is lost? We strain to think of a legitimate reason another contractor cannot be employed, one with no prior link to the projects, unless HDR is “special” for some reason advantageous to Brookhaven. Brookhaven’s resistance to a fresh reviewer merely adds to the list of “short cuts” or “exceptions” snowballing in concern as these projects advance.

In closing, we continue to oppose the STB’s involvement in this local issue and believe this is an issue that must be decided by the local community through the local process – not the STB process. That said, we strongly urge the STB to disqualify HDR as a matter of law, as CCE urges in its appeal. Additionally, we note that what constitutes a conflict of interest is a matter of law and fact, but that determination is informed by an understanding of the context in which the question arises. Here, the public trust and mission of the STB is best served with a fresh start, so that residents can *both perceive and be confident* their comments matter and are subjected to unbiased consideration. Allowing HDR to remain unnecessarily undermines the public trust, is objectively unnecessary, and merely adds to a growing list of irregularities in these projects.

Sincerely,



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Partner

JDR/jtd

cc: Hazel N. Dukes, President
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Honorable Steven Englebright - engles@assembly.state.ny.us

CERTIFICATE OF SERVICE

I hereby certify that I have this 26th day of October, 2021, caused a copy of the foregoing letter filing to be served by U.S. Mail, postage prepaid or by more expedited means upon all parties of record in both Docket No. 36398 and Docket No. 36399.

/s/ Juan Reyes, III

CERTIFICATE OF SERVICE:

I hereby certify that, on this 26th day of October, 2021, I served copies of the foregoing letter electronically (via email) upon each the following parties of record:

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