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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: FD No. 36398, *Brookhaven Rail LLC – Construction and
Operation Exemption – Suffolk County, New York*

Dear Ms. Brown:

This letter is submitted on behalf of Brookhaven Rail LLC (“Brookhaven Rail”) in order to briefly respond in opposition to the “CCE Request for Leave and Response to BHR Reply in Opposition to Appeal” (“Reply to Reply”) filed by Citizens Campaign for the Environment (“CCE”) in this docket on October 26, 2021.

The Reply to Reply is prohibited by 49 C.F.R. §1104.13(c) and there is no cause to accept it. It merely makes arguments that CCE should have made in its 97-page Appeal document concerning the appropriate rules and standards that should apply to its Appeal, and CCE also simply recasts, restates, and expands on arguments it makes in its Appeal and has repeated previously in its correspondence and filings in this docket. The Reply to Reply does not establish a more complete record in this proceeding. It therefore should be rejected.

If the Board accepts the Reply to Reply, Brookhaven Rail addresses two aspects of it. First, the Board should reject CCE’s novel and obviously wrong argument that the Board’s *Tongue River R.R.*¹ decision does not apply to make CCE’s Appeal untimely filed. In that case, not only did the appellants believe that their appeals were covered by a 10-day appeal period and so therefore they sought leave to late-file, *the decision expressly referenced “the 10-day appeal period” and Board granted their motions to late-file.* This is a very strong indicator that appellants were right. The

¹ STB Finance Docket No. 30186 (Sub-No. 3) *Tongue River R.R. Co. – Construction and Operation – Western Alignment* (STB served April 16, 1998).

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Board made no statement or inference in that decision that the appellants “merely assumed, incorrectly, that the 10-day period applied,”² on which CCE could base its decision to ignore precedent from perhaps the only other instance where appeals “of right” of an SEA/OEA decision were made pursuant to 49 C.F.R. §1105.2. CCE adopted this interpretation at its peril, and its appeal was untimely filed.

Second, the remainder of the Reply to Reply is largely an exercise in CCE seizing upon Brookhaven Rail’s Reply to simply recast, re argue, and expand on the flawed and erroneous claims in its prior submissions, all of which Brookhaven Rail has already adequately responded to and OEA was correct to either ignore or decline to accept. However, Brookhaven Rail notes that there is nothing in the Board’s regulations or policies concerning environmental review or the use of third-party consultants that requires decisions of the Director of OEA, or any appeals thereof, to be based solely on a defined administrative record, as if the Director was an administrative law judge overseeing a formal adjudication. Nor is there any requirement that the Director’s decisions regarding third-party consultants must be in a certain form. CCE’s attempt to apply such rigid adjudicatory standards to the Acting Director’s decision regarding HDR is accompanied by no authority that supports, let alone mandates, that approach. There is also no agency precedent requiring it since, to Brookhaven Rail’s knowledge, this is the first time a party has challenged the OEA’s selection of a third-party consultant.

In conclusion, despite CCE’s increasingly desperate attempts to cloud and distort the actual facts and circumstances, and to attack the process used by OEA, when all of the actual facts and circumstances are considered, (which include but are certainly not limited to the fact that the Board’s Office of General Counsel reviewed the issues involving HDR’s prior involvement in the projects and approved HDR’s retention as the third-party consultant) there is absolutely no basis for overturning the Acting Director’s decision to deny CCE’s request to have HDR disqualified as the third-party consultant to assist OEA in its review of the Projects.

The undersigned certifies that all parties of record on the official service list of this proceeding have been served a copy of this letter by email.

Please do not hesitate to contact the undersigned if you have any questions.

Sincerely,



Thomas W. Wilcox

Attorney for Brookhaven Rail LLC

² Reply to Reply at 2, note 2.