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Via E-Filing

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

ENTERED
Office of Proceedings
December 22, 2021
Part of
Public Record

Re: FD 36398, *Brookhaven Rail LLC – Constr. & Op. Exemption – in Suffolk County, N.Y.*; FD 36399 (Undocketed), *Application for a Land-Use Exemption Under 49 U.S.C. § 10909*; FD 35141, *U S Rail Corp. – Constr. & Op. Exemption – Brookhaven Rail Terminal*; FD 35819, *Brookhaven Rail Terminal & Brookhaven Rail, LLC – Pet. for Decl. Order*; FD 36376, *Spectrum RR Holdings, LLC – Operation Exemption – R.R. Line in the Town of Brookhaven, NY*; FD 36384, *Sills Road Realty LLC – Acquisition Exemption – R.R. Line in the Town of Brookhaven, NY*; FD 36385, *Spectrum RR Holdings, LLC – Acquisition & Op. Exemption – Line of Sills Road Realty LLC, in the Town of Brookhaven, N.Y.*

Dear Ms. Brown:

The Citizens Campaign for the Environment (“CCE”) hereby responds to the Reply (“Reply”) that Brookhaven Rail LLC (“BHR”) submitted on December 13, 2021, in reply to the Petition for a Declaratory Order and/or for an Order to Show Cause and Suspend (the “Petition” or “Pet.”) that CCE submitted on November 23, 2021.

CCE respectfully submits that good cause exists for accepting this surreply. BHR’s Reply materially misstates the facts and the record and introduces new evidence not previously submitted, to which CCE should have an opportunity to respond in the interests of fairness and assembling a complete record. *E.g. Michigan Air-Line Ry. Co. – Abandonment Exemption – in Oakland Cnty., Mich.*, AB 1053 (Sub-No. 1X) (STB served May 18, 2011), at 1 (accepting surreply that “addresses allegations first asserted on [] reply, and because it establishes a more complete record”); *Otter Tail Power Co. v. Burlington N. & Santa Fe Ry. Co.*, No. 42071 (STB served Nov. 15, 2002) (surreply authorized to address “alleged mischaracterization” and to provide a more complete record)

First, BHR insists that the Petition is somehow “flaw[ed]” because it rests on the “erroneous premises” that BHR is an “affiliate” of NP/Winters Long Island Industrial LLC (“NP/Winters”), the owner of the involved Parcels B and C and a portion of the so-called “Winters Rail Terminal” on Parcel D, the land on which new rail line construction is

planned. BHR's claim is both irrelevant and wrong. First, the Petition does not hinge on any such formal corporate affiliation. Second, BHR is directly intertwined and affiliated with NP/Winters. BHR is a subsidiary of and under the full control of Winter Bros. Waste Systems of Long Island, LLC, which has designated its subsidiary/affiliate, Winters Bros. Industrial Park Realty LLC (collectively "Winters Bros."), to own and control the southern portion of Parcel D (approximately 50 acres), where BHR/Winters plans to construct and operate a new solid waste rail transfer facility ("SWRTF"). Winters Bros. is a principal shareholder of NP/Winters, as confirmed by the Application for Financial Assistance that NP/Winters filed with Brookhaven Industrial Development Agency ("Brookhaven IDA") to develop four rail-served warehouses totaling 2.5 million square feet on the three interconnected Parcels (<https://brookhavenida.org/files/NP%20Winters/Application.pdf>). Winters Bros. has actively participated in initial OEA meetings on the Project and in meetings before Brookhaven IDA, including through its representatives, who have stated that they also represent BHR and that BHR plans to serve all four warehouses. Accordingly, BHR's attempts to disassociate itself from its clear connection with NP/Winters in an attempt to escape responsibility and culpability for its and its partners' actions are simply unavailing.

Second, BHR boasts that Brookhaven IDA recently approved substantial financial assistance for the four planned rail-served warehouses as a whole, including substantial portions of Parcel D, where BHR is seeking to construct and operate new rail lines. Reply at 4-5. Yet, BHR continues to maintain that this combined large-scale development is completely divorced from its FD 36398 exemption petition and the FD 36399 (Sub-No. 1) undocketed Section 10909 application, and that CCE unfairly "tries to expand the scope of Brookhaven Rail's 'Project.'" *Id.* However, CCE's Petition demonstrated how all of the development is clearly interconnected, and even BHR admits in its Reply that it will be the sole rail operator serving all of the new rail served facilities, including in Parcels B and C, where it says it has secured "certain contractual rights to be the rail operator of tracks" to be constructed on those Parcels. Reply at 6.

Third, BHR suggests that the Petition is unnecessary or moot with respect to the planned new line construction on Parcels B and C because "the Board has already issued a declaratory order concerning the jurisdictional status of rail tracks to be constructed and operated on Parcels B and C in STB Docket No. FD 35819." Reply at 6. While BHR also contends that CCE "barely mentions" the prior FD 35819 decision, that decision is a central component of the Petition.¹ Additionally, BHR barely disputes that the 2016 decision rested on incomplete, misleading, or no longer operative facts. BHR's own Reply includes additional facts demonstrating substantially changed circumstances that compel reopening of FD 35819. Those facts include, but are not limited to: (i) the lines will not be constructed by any of the parties that filed the original FD 35819 petition (BHR and Brookhaven Rail Terminal ("BRT")), but instead by NP/Winters, (Reply at 6, 10); (ii) the new rail line design submitted to OEA and to Brookhaven IDA departs materially from the BHR's Track Plans

¹ BHR failed to list FD 35819 in the caption of its Reply and also failed to file its Reply in STB Docket No. FD 35819. CCE assumes this was an oversight.

considered in FD 35819 (*see* Exhibit A to Reply Exhibit A); (iii) the new track was previously intended to expand the existing BRT facility operations,² but the new plan is to serve multiple rail-served shippers to be located in two large warehouses owned by NP/Winters. Reply at 10. Even the BRT owners appear to confess that the facts relied on in FD 35819 and in the connected proceedings were erroneous and misleading in stating that: “Sills Road . . . may have erred by relying exclusively on regulatory counsel for US Rail Corp., who did not at the time of the FD 35141 proceeding disclose Sills Road’s role in the construction and ownership of the [BRT].” Letter of Sills Road, *et al.*, to STB dated Dec. 14, 2021 (at 2) (“Sills Road Letter”).³ The owners of BRT also confirm that they “[no] longer have any ownership or possessory interest in, or claim to, Parcels B, C and D,” are “no longer developing, or seeking to develop, any facilities on Parcels A, B, C, or D,” and do not have “any plans for additional railroad line construction on Parcel A (the only Parcel of the four in which Sills Road still has an interest).” Sills Road Letter at 2.

While BHR pretends that the new project development plans and construction of rail lines on Parcels B and C are the same as previously considered in FD 35819 in 2016, the lines and intended recipients of rail service have changed substantially, and the scope of the intended construction and operation has expanded significantly. BHR’s and Sill’s Road’s Reply filings only serve to reinforce the need for the Board to reopen and reconsider the involved proceedings, including its FD 35819 decision.

Fourth, BHR stresses that it has worked with Winters Bros. to ensure that NP/Winters’ forest and tree clearing plans are limited and do not affect areas where rail construction is planned, such that prior Board approval or oversight might be required. Reply at 14-17. However, the clear cutting plans are hardly so limited. After setting aside the portions of Parcel D that are designated conservation easements, well **over one-half** of the total remaining area on Parcel D would be clear cut, including areas where rail line construction is planned. Also, BHR and its partners now seek to construct an access road with a 150-foot right-of-way (“ROW”), **2.5 times** what BHR told OEA was necessary to serve the SWRTF. *See* EI-30665 (proposing a 40-foot access road, with a 60 foot ROW). Additionally, BHR newly claims that a prior land sale agreement (portions included in Reply Exhibit E) requires the access road be built from Horseblock Road, but that is false. That agreement, at Section 4.3, instead contemplates a connection from the East from Glover

² BHR contends that the prior line construction plans considered in FD 35819 were not made to further the expansion of the BRT’s existing operations. Reply at 9. However, the “Description of Action,” provided in the 2017 Negative Declaration included in BHR’s Reply Exhibit B, clearly states that “[t]he proposed action involves the *expansion* of the existing Brookhaven Rail Terminal (BRT) facility,” including for the relocation/expansion of an existing BRT rebar transloading facility and development of a fuel cell project (emphasis added).

³ Sills Road and BHR each ask that the Board not take any action to enjoin existing rail operations in the BRT on Parcel A. CCE’s Petition made clear that such action is not sought at this time. Pet. at 1 n.1.

Avenue, which access point completely eliminates the need for **any** present clearcutting of any portion of Shamrock/Winters' tract to the South. BHR's contention that the clearcutting is limited and "nowhere near the proposed rail lines covered by Docket No. FD 36398" is simply wrong.

Finally, BHR claims that the Petition is "patently unfair" and should not be granted because "the current owners of Brookhaven Rail's membership shares had nothing to do with the actions of the prior owner of Parcel A that were the subject of proceedings and decisions" and "[t]he prior owner of Brookhaven Rail were also represented by different counsel." Two responses are in order. There is nothing "patently unfair" in detailing how BHR and its owners, affiliates, and partners continue to use and abuse the Board's prior decisions to advance their private interests in seeking to evade local as well as federal review of their rail line construction and operation activities. Second, BHR and its owners, affiliates, and partners certainly knew, or should have known through their due diligence when acquiring the parcels and the rail carrier with such a sordid history of all the attendant acquisition and regulatory risks, especially given the long record of litigation over the development of the four parcels, before both the courts and the STB.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 22nd day of December, 2021, caused a copy of the foregoing filing to be served by U.S. Mail, postage prepaid or by more expedited means upon all parties of record in the above-referenced dockets.

/s/

Katherine F. Waring