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October 19, 2022

VIA E-FILING

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

Re: North Coast Railroad Authority – Abandonment Exemption – In
Mendocino, Trinity, and Humboldt Counties, Cal., AB-1305X.

Dear Ms. Brown:

Mendocino Railway (“MR”) has been served with two substantially large—but substantively small—filings, consisting largely of improper or irrelevant materials and arguments. The first filing is by the Great Redwood Trail Agency (formerly the North Coast Railroad Authority) (collectively “GRTA/NCRA”). The second filing is a joint filing by the California Coastal Commission (“CCC”), represented by Mr. Justin Lee, Deputy Attorney General, and by the Friends of the Eel River (“Friends” and, collectively with CCC, “CCC/Friends”). Both filings vociferously attack MR’s OFA with improper evidence, misleading claims, and baseless attacks on MR’s business and reputation that are unrelated to the Board’s OFA process. The CCC/Friends filing should be stricken in its entirety. The substantial majority of the GRTA/NCRA filing should likewise be stricken as well.¹

The primary basis for striking the materials from the record is because both filings directly violate the Director’s June 24th Decision in this proceeding. In that decision, the

¹ Specifically, any discussion and argument related to the Market Analysis Of Transportation Alternatives For Major Commodities Between “Longvale” And The Cities Of Fort Bragg And/Or Willits,” (“Study”), and the actual Study itself, submitted as an Exhibit. Only a small portion of the GRTA/NCRA filing legally and properly seeks redesignation of certain materials that MR has designated Highly Confidential, and MR will respond that portion of the filing in accordance with 49 CFR §1104.13.

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Director specifically rejected GRTA/NCRA's request to file a reply to any filed OFA, noting that Congress's enactment of strict time limits for the OFA process do not provide for replies to the filing of an OFA. Citing 49 C.F.R. § 1152.27(c)(1); and Lassen Valley Ry.—Aban. Exemption—in Washoe Cnty., Nev. & Lassen Cnty., Cal., AB 1074X, slip op. at 1 (STB served Sept. 7, 2011).² Yet, that is precisely what GRTA/NCRA has done with respect to the Study and arguments not related to the protective order. The CCC/Friends have likewise, under the guise of a motion to dismiss, also attempted to reply to the OFA and to submit new evidence. These replies (although disguised as “motions”) violate both the spirit and the content of the Director's order.

This Director's order, and the policy behind it, make sense. Given the strict timeframes of the OFA process, once an OFA is filed in a notice of exemption proceeding, the Director has only five days to accept or reject the OFA. There is not enough time in such a short timeframe for the filing of motions to dismiss, consideration of new evidence (as GRTA/NCRA would have the Director do with respect to the Study, or as the CCC/Friends would have the Director do with respect to numerous allegations and arguments), and then effective replies by a potential offeror. Indeed, allowing the Study and the CCC/Friends filings to be part of the record without sufficient time for MR to reply would be severely prejudicial to MR, especially in an abandonment proceeding. See The Burlington Northern and Santa Fe Railway Company – Abandonment of Chicago Area Trackage in Cook County, IL, AB-6 (Sub-No. 382X), 1999 STB Lexis 553 (ICC served Sept. 21, 1999)(explaining that because replies to motions and other pleadings are due within 20 days of their filing, accepting any filing or motion into the record where the deadline for any reply or rebuttal would be beyond the deadline for the Board or the Director to act under the abandonment statute would prejudice the party who has a right to reply); see also, Connecticut Trust for Historic Preservation v. ICC, 841 F.2d 479, 484 (2d Cir. 1988)(noting that the Board does not have to accept new evidence whenever a party wishes to try out a new theory or finds new information at a late stage in the process); Sunbelt Chlor Alkali Partnership v. Norfolk S. Ry. Co., NOR 42130, slip op. at 9-10 (STB served July 20, 2014)(Parties should not be rewarded for holding back evidence that was relevant and then filing such evidence in rebuttal with no opportunity for the other side to address such arguments).

The GRTA/NCRA and CCC/Friends filings, under the guise of motions, are in essence, attempted replies to MR's OFA. Allowing these “motions” to remain in the record would be

² The Director's order was fully consistent with precedent as well. See The Baltimore and Ohio Railroad Company – Exemption – Abandonment in Harrison, Doddridge, Ritchie and Wood Counties, WV In The Matter of an Offer of Financial Assistance, AB-19 (Sub-No. 125X) 1987 ICC Lexis 206 (ICC served July 27, 1987) (explaining that the financial assistance procedures do not provide for the filing of replies to offers of financial assistance and giving no consideration to arguments regarding whether the offeror is financially responsible or whether it has made a reasonable offer.).

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contrary to the Director's June 24th Decision and numerous prior precedents of the Board. As such, they should be stricken.

It should be noted that the GRTA/NCRA filing, in attempting to submit the Study under the cover of a motion for redesignation, is particularly egregious. It is clearly another attempt to prejudice MR. The filing continues GRTA/NCRA's pattern of obstruction in refusing to provide MR with relevant information and evidence that is in GRTA/NCRA's possession. This pattern goes back to GRTA/NCRA's refusal to comply with MR's informational requests, sent on May 31, 2022 pursuant to 49 CFR §1152.27(a), which refusal was noted in MR's August 18, 2022 letter. To this day, GRTA/NCRA has refused to provide MR with any of the relevant information it has requested and which GRTA/NCRA is obligated to provide, including deeds in its possession. Submitting an "appraisal," while partially responsive to MR's May 31st letter, did not constitute a complete response and did not include much of the previously requested information. Furthermore, as the Study was completed September 30, 2022, it should have been provided to MR in compliance with 49 CFR §1152.27(a) so that MR could at least partially have addressed it in its OFA. The Study was not provided to MR in a timely fashion. While striking the Study certainly cures GRTA/NCRA's non-compliance with respect to the Study, it does not cure GRTA/NCRA's previous failures to comply with MR's lawful requests for information.

In the end, MR remains perplexed as to why there is such opposition to MR's OFA, except as retaliation against MR for unrelated actions (such as seeking a RRIF loan to repair one of its tunnels and thereby restore freight service, or by using eminent domain to develop a transload yard for the movement of grain, all actions opposed by the CCC, GRTA/NCRA, and Friends). The simple fact of the matter is that neither CCC, GRTA/NCRA, nor the Friends value rail service over, or even alongside, a trail. While that is their right, their beef should be with Congress and the Congressional statute which favors rail service over a trail and not with MR. This is especially the case given that MR has proposed a solution that allows for both rails *and* trails, with GRTA/NCRA and its cohorts all oddly seem to oppose. If MR's OFA is successful, which it should be, MR recommits to discussion with the shipper and the trail proponents to try and accomplish both objectives.

If there are any questions concerning this e-filing, please contact me by telephone at (202) 663-7823 or by e-mail at wmullins@bakerandmiller.com. If I am unavailable, you may contact Crystal Zorbaugh at czorbaugh@bakerandmiller.com or (202) 663-7831.

Sincerely,

/s/ William A. Mullins

Attorney for Mendocino Railway

cc: Parties of Record