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December 9, 2022

VIA E-FILING

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

RE: Norfolk Southern Railway Company – Abandonment Exemption – In the City of
Evansville, IN, AB-290 (Sub-No. 411X)

**Response to City of Evansville Late-Filed Request for a Public Use Condition
and Notice of Interim Trail Use.**

**Combined Notice of Consummation and Reply in Opposition to the City's
December 7th Request**

Expedited Consideration Requested

Dear Ms. Brown:

Pursuant to this letter, Norfolk Southern Railway Company ("NSR") hereby requests that the Surface Transportation Board ("STB" or "Board") expeditiously reject the City of Evansville's untimely, and improperly filed request for a Public Use Condition and Notice of Interim Trail Use in the above-referenced case. NSR is just one week away from completing a sale of the property at issue to Southern Indiana Gas and Electric Company, Inc., a subsidiary of Vectren – CenterPoint Energy ("SIGEC") to support power distribution throughout the region. The plans for the property will support a public use and NSR will not consent to a NITU in this instance. Accordingly, NSR requests that the Board issue a decision confirming it accepts this Consummation Notice and denying the City's late-filed request for a Public Use Condition and NITU by December 15, 2022.

On September 29, 2022, NSR filed a verified notice of exemption pursuant to 49 C.F.R. part 1152, subpart F-Exempt Abandonments to abandon an approximately 0.24-mile rail line extending from milepost +/- 0.00 EB to milepost +/- 0.24 EB in the City of Evansville, IN (the

“Line”). Notice of the exemption was served and published in the Federal Register on October 19, 2022 (87 Fed. Reg. 63569) (“Oct. 19th Decision”). Per the Oct. 19th Decision, requests for interim trail use/rail banking under 49 C.F.R. § 1152.29 were due on October 31, 2022, and Public Use Conditions under 49 C.F.R. § 1152.28 were due on November 8, 2022. In a subsequent decision served on November 15, 2022, the Board imposed two salvaging conditions: (1) NSR was directed to consult and coordinate with the City of Evansville regarding the City’s plans for street improvements to avoid potential work conflicts; and (2) the Board imposed a salvaging condition that would only take effect if any unanticipated archaeological sites, human remains, funerary items or associated artifacts were discovered during NSR’s abandonment-related salvage activities that would necessitate mitigation measures.

On December 7, 2022, the City of Evansville (“City”) sent an email requesting that the Board accept a letter dated October 25 that was unknowingly held and did not get mailed as instructed by the Mayor’s Office as timely filed, which untimely seeks a public use condition and establishment of a Notice of Interim Trail Use (“NITU”) for the Line (“December 7th Request”). As explained herein, the City has offered no good cause for why the Board should accept the City’s late-filed request. The City’s only justification from the City’s email appears to be that the request “was unknowingly held and did not get mailed.” Moreover, despite sending an email, it does not appear that the letter was electronically filed, nor is there any indication that the City paid the required filing fee of \$350.00 as set forth in 49 C.F.R. §§ 1002.2(f)(27)(i). In fact, the Board has yet to accept the City’s filing. Either way, acceptance of the City’s late-filed request by the Board would be highly prejudicial to NSR for the reasons explained herein. As such, NSR is today filing a Combined Notice of Consummation and Reply in Opposition to the City’s December 7th Request (“Notice of Consummation and Opposition”).

In 2017, NSR began communicating publicly that it was evaluating whether the property was necessary for continued rail operations and exploring whether there was an interest in alternative use of the property. Indeed, a public “for sale” sign was affixed to the property beginning in 2017 indicating its willingness to entertain offers for the property. To facilitate alternative use and/or terminate its common carrier obligation for the Line, NSR chose to seek abandonment authority. As the Board is aware the first step in any abandonment is to distribute a copy of NSR’s Consolidated Environmental and Historic Report (“E&HR”) to required consulting agencies, including the City (the Mayor’s Office). The City received the E&HR on August 23, 2022. At no point between August 23, 2022 (or since 2017 for that matter) and December 7, 2022, was NSR contacted by the City about the potential for using the corridor for trails. The only communication from the City was a request that NSR be directed to coordinate with the City on a street paving project scheduled for the end of 2022. NSR has complied with this condition and confirmed yesterday that the City has completed paving the east side of North Governor Street as of December 2, 2022, and that the west side would be completed when warmer weather returns.

After STB authorization of the abandonment on November 15, 2022, NSR finalized an agreement with SIGEC, to sell the Line to SIGEC to support power distribution service throughout the region. NSR is scheduled to close on that sale, which will benefit the greater region, on December 16, 2022. The Line is critically located near SIGEC’s substation and as

such the sale will greatly benefit the public at large. NSR is filing today its Notice of Consummation and Opposition in furtherance of that objective and respectfully requests that the Board issue a decision in this matter no later than December 15, 2022, so that closing may proceed on-time.

In the December 7th Request, the City asks the Board to accept its letter dated October 25, 2022, seeking the Establishment of a NITU and a Public Use Condition. NSR is writing to confirm for the Board that it does not consent to the requested NITU and as this Board recognized earlier this year in Protect Sudbury Inc. – Petition for Declaratory Order, FD 36493 (STB served Feb. 2, 2022) (“Sudbury”), the Board cannot issue a NITU without railroad consent. See Sudbury at 6; citing 49 C.F.R. § 1152.29(c); Citizens Against Rails-to-Trails v. STB, 267 F.3d 1144, 1152 (D.C. Cir. 2001), and explaining that 16 U.S.C. § 1247(d) (the Trails Act) does not permit the Board to compel conversion to a trail where the abandoning railroad does not consent). While the City requests both a Public Use Condition and a NITU, its grounds for a Public Use Condition are that the property is suitable for other public use, **specifically trail use**. See December 7th Request at 1 (*emphasis added*). Multiple times in its request the City emphasizes the only public use envisioned is a trail, which NSR does not consent to establish. The City erroneously suggests that “the rail corridor in question is adjacent to the North Main Street Trail that connects to the Greenway Trail System and will connect a public park to residential neighborhoods as well as providing access to clinic and hospital areas and provide active transportation options and access to downtown.” Id. The City’s claim is peculiar because NSR has consulted the City of Evansville Trail Map and this publicly available map confirms that the Line is not adjacent to the North Main Street Trail. In fact, the Line, which is adjacent to a SIGEC substation is a block to the east at the southern end of the trail. Regardless, no NITU can be issued because NSR does not consent.

NSR is aware that the Board retained the policy of accepting late-filed requests for NITUs and public use conditions after the due date when good cause is shown and accepting such requests will not prejudice any party. See CSX Transportation, Inc. – Abandonment Exemption – In Dickinson County, VA, AB-55 (Sub-No. 799X) (STB served July 24, 2020); see also Abandonment & Discontinuance of Rail Lines & Transportation Under 49 U.S.C. 10903, 1 S.T.B. 894, 900 (1996), recons. denied 2 S.T.B. 311 (1997).¹ A public use condition can be imposed for various uses including but not limited to trails, irrespective of a railroad’s objection because the imposition of a public use condition does not require the carrier’s consent. The fact that the Public Use Condition appears entirely directed at trails alone supports rejecting the late-filed request. Moreover, where a railroad, such as NSR here, would be prejudiced by the late request for a Public Use Condition, the Board has authority to deny the request. See Boston and Maine Corporation – Abandonment Exemption – In Hartford County, CT, AB-32 (Sub-No. 101X) (STB served April 3, 2008).

As noted above, NSR complied fully with the Board’s requirements, and only after it received approval for the abandonment on November 15, 2022, NSR finalized arrangements to

¹ A public use condition is not imposed for the benefit of any one potential purchaser but rather to provide an opportunity for any interested person to acquire the right-of-way that has been found suitable for public purposes.

sell the Line to SIGEC to support power distribution service (utility service), which serves residential, commercial, and industrial customers in the region and the greater United States. One of the reasons the transaction has not closed yet was NSR was waiting to comply with the Board's requirement to consult and coordinate with the City's plans for street improvements to avoid potential work conflicts. Now just when NSR is prepared to consummate its abandonment and close this important transaction with significant public interest considerations, the City offers nothing more than "we forgot." NSR, on the other hand, has in this response established that imposing a public use condition here would be inappropriate and would delay developments necessary to support utility service to the greater public. Given that NSR has established it would be prejudiced by acceptance of the December 7th Request, NSR respectfully requests that the Board issue a decision confirming it accepts NSR Consummation Notice and denying the City's late-filed request for a Public Use Condition and NITU by December 15, 2022.

If there are any questions concerning this notice of intent, please contact me, NSR's representative, by mail at: Crystal Zorbaugh, Baker & Miller, PLLC, 2401 Pennsylvania Avenue, NW, Suite 300, Washington, DC 20037; by FAX: (202) 663-7849; by e-mail: czorbaugh@bakerandmiller.com; or by telephone: (202) 663-7831. If I am not available, you may also contact William Mullins, who can be reached at (202) 663-7820 or by e-mail at wmullins@bakerandmiller.com.

Sincerely,

/s/ ***Crystal M. Zorbaugh***

Crystal M. Zorbaugh
Counsel for Norfolk Southern Railway Company

cc: Hanna Chouest
Parties of Record