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By E-Filing

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

Re: STB Docket No. AB-55 (Sub-No. 794X), *CSX Transportation, Inc.—
Abandonment Exemption—In Pinellas County, Fla.*

Dear Ms. Brown:

CSX Transportation, Inc. (“CSXT”) and Georgetown & High Line Railway Company, LLC (“GHL”) filed Public and Confidential Versions of their Response to Comments on March 28, 2023. The Confidential Version contained what CSXT and GHL believed to be a commercially sensitive and confidential offer made by the City of St. Petersburg (the “City”). On March 30, 2023, counsel for the City informed CSXT and GHL that the letter containing the offer is available to the public pursuant to Florida law.

Therefore, CSXT and GHL are submitting as Appendix A to this letter a revised Public Version of their Response Comments that removes the redactions of the City’s offer in footnote 8 on page 11. The City consents to the filing of this revised Public Version of the Response Comments.

Respectfully submitted,

/s/ *Matthew J. Warren*

Matthew J. Warren

cc: Parties of Record

Appendix A

CSX Transportation, Inc.'s and Georgetown and High Line Railway Company, LLC's Response to Comments

Revised Public Version

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. AB-55 (Sub-No. 794X)

**CSX TRANSPORTATION, INC.–ABANDONMENT EXEMPTION–
IN PINELLAS COUNTY, FL**

**CSX TRANSPORTATION, INC.'S AND GEORGETOWN AND HIGH LINE
RAILWAY COMPANY, LLC's RESPONSE TO COMMENTS**

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PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. AB-55 (Sub-No. 794X)

CSX TRANSPORTATION, INC.–ABANDONMENT EXEMPTION–
PINELLAS COUNTY, FL

CSX TRANSPORTATION, INC.’S AND GEORGETOWN AND HIGH LINE
RAILWAY COMPANY, LLC’S RESPONSE TO COMMENTS

CSX Transportation, Inc. (“CSXT”) and the Georgetown and High Line Railway Company LLC (“GHL”) hereby provide a limited response to new requests for relief and arguments made in the March 8, 2023 comments filed by the City of St. Petersburg (the “City”), Rails to Trails Conservancy (“RTC”), and U.S. Department of Justice, Environment and Natural Resources Division (“ENRD”) (collectively the “Commenters”) related to the Notice of Interim Trail Use (“NITU”) granted to GHL on January 13, 2020, for the 0.86-mile rail line on CSXT’s Clearwater Subdivision, between milepost ARE 897.57 and milepost ARE 898.43, in St. Petersburg, Pinellas County, FL (the “Line”).¹

¹ The Board’s rules, 49 C.F.R. § 1104.13(c), generally prohibit a reply to a reply. However, parties may respond to new requests for relief set forth in a reply filing. *See, e.g., Pet. of Tex. Ry. Exch. LLC for Issuance of a Crossing Order Pursuant to 49 U.S.C. § 10901(d)*, Docket No. FD 36186 (Sub-No. 1), slip op. at 2–3 (STB served Apr. 4, 2019) (denying a motion to strike a filing that responded to a reply filing containing a new proposed procedural schedule). Therefore, CSXT and GHL believe that this limited response is not a “reply to a reply” prohibited by § 1104.13(c). However, to the extent that the Board deems it necessary, CSXT and GHL hereby seek leave to respond to the new arguments and requests for relief from the Commenters, in the interest of compiling a more complete record.

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The Commenters make a variety of direct and indirect criticisms of the Board's decision to grant GHL a NITU for the Line, most of which retread old ground or ask the Board to reject its prior holdings. The Commenters suggest that there is something untoward in the fact that GHL is affiliated with CSXT or that GHL hopes to eventually transfer its trail rights to a different trail sponsor. But the full Board was well aware of these exact facts when it affirmed the Director's grant of a NITU. And suggestions that GHL's trail sponsorship is a "ruse" because a trail has not been constructed in the less than two years since CSXT entered an agreement with GHL to serve as a trail sponsor completely ignore Board precedent on trail development.²

As more fully set forth below, Board precedent recognizes that successful trail development can oftentimes take time to progress—sometimes significant time. Indeed, a number of the most successful and frequented trails that exist today were many years in the making before construction commenced, and more years before construction was completed. If the law did not afford such flexibility, many trail projects could not be fully launched, and the program would not be as successful as it is. Worse, a contrary policy would open the door to opportunistic third parties who have a number of methods at their disposal to delay and make circumstances more challenging to secure a trail sponsor. Such parties, for example, could work to cloud the title of a property with the goal of delay—only to later seek an adverse

² Not to mention the global pandemic that began two months after the NITU was granted.

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abandonment in the hopes of permanently extinguishing future ability to reactivate rail service on the corridor.

CSXT's and GHL's actions with respect to the NITU and the Line are not only consistent with the Board's 2020 decisions in this docket; they are consistent with a long line of Board precedent that has been affirmed by the D.C. Circuit. CSXT, GHL, and others in the railroad industry have long relied on that well-founded precedent in structuring network and other business strategies. Neither the City, the RTC, nor ENRD address this precedent or provide any basis for the Board to depart from it. For the reasons discussed below, CSXT and GHL respectfully request that the Board not upset either its well-established precedent or its prior approval of CSXT's decision to enter into an agreement with GHL to be the trail sponsor.

I. CSXT and GHL properly invoked—and have met the only two requirements of—the Trails Act.

CSXT has been involved in multiple successful efforts to transform freight rail lines that have been approved for abandonment into interim trails, while preserving the right-of-way for future reactivation of rail service. Indeed, CSXT was the owner of the High Line in New York City (the “High Line”) that has become the most successful and most visited rail line converted into a trail in the United States. CSXT subsidiaries also owned the right-of-way of the 10.98-mile railroad line that became the Capital Crescent Trail between Georgetown in the District of Columbia and Silver Spring, MD. Since the passage of the Trails Act, CSXT has been involved in the creation of 40 trails over approximately 122 miles. And as the

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Board recognized in its June 22, 2020 denial of the City’s administrative appeal, GHL has been involved in the creation of three trails totaling approximately 17 miles, all through assigning rights initially granted under a NITU to GHL. *CSX Transp., Inc.—Aban. Exemption—In Pinellas Cnty, Fla.*, Docket No. AB-55 (Sub-No. 794X) (served June 22, 2020), slip op. at 5 n.9 (“Appeal Decision”).

Both the Trails Act and the Board’s interpretation of its role under the Act are well established, but bear repeating. The Trails Act reflects a United States “national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use.” 16 U.S.C. § 1247(d). The United States has also determined that interim use of these valuable corridors as temporary trails subject to future reactivation for rail service is in furtherance of that national policy. *Id.*

Because Congress already made this global policy judgment that preservation of rail rights-of-way is an important national goal, the Board has long described its role under the Trails Act as “ministerial.” *Iowa S. R.R.—Exemption—Aban.*, 5 I.C.C.2d 496, 502–04 (1989), *aff’d Goos v. ICC*, 911 F.2d 1283, 1295 (8th Cir. 1990); *see also Rail Abans.—Use of Rights-of-Way as Trails*, 2 I.C.C.2d 591, 608 (1986) (explaining how the Trails Act’s liability conditions “are *incentives* for railroads to enter into interim trail use agreements”); *Rail Abans.—Use of Rights-of-Way as Trails—Supplemental Trails Act Procs*, 4 I.C.C.2d 152, 156 (1987) (“We lack any discretion to decide whether rail banking and use of the right-of-way is desirable for

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a particular line; Congress has made that determination for all lines. In administering the statute, we need only be assured that the Trails Act has been properly invoked and that its requirements will be met.”). And the two requirements of the Trails Act are well established: (1) a willingness to assume legal and financial responsibility for management of the right-of-way and (2) an acknowledgement that use of the right-of-way as a trail is subject to restoration or reconstruction for railroad purposes. If those requirements are met (and the railroad agrees to negotiate), then the STB will issue an appropriate order allowing for negotiations to take place. *See, e.g., T&P Ry.—Aban. Exemption—In Shawnee, Jefferson and Atchison Cntys., KS*, 2 S.T.B. 36, 42 (1997), *pet. for review granted on other grounds sub nom. Becker v. STB*, 132 F.3d 60 (D.C. Cir. 1997).

In this case, the Board has found that CSXT and GHL had properly invoked the Trails Act. Appeal Decision at 5. No Commenter argues directly that either of the two requirements of the Trails Act were not met. Rather, the Commenters suggest that the Board can reopen and revisit its decision to issue a NITU because (1) GHL has not yet constructed a trail on the line or found an alternative entity to sponsor the trail or (2) CSXT reserved certain property interests in the line in its agreement with GHL, which permit CSXT to enter into commercial leases with third parties.³ Neither argument is valid.

³ ENRD claims that CSXT and GHL “admit in their response that GHL did not intend to build a trail at the time of the NITU. And, GHL still does not intend to build a trail.” ENRD Comments at 4 (filed Mar. 8, 2023). No such statement was made by CSXT and GHL. Rather, they wrote: “CSXT and GHL agree that a trail has not been constructed in the twenty months since the Purchase and Sale Agreement was signed, and that at this time, the Line is not being used as a

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- A. There is no time limit for how quickly a trail must be developed to its intended level of use.

The Board and its predecessor have long made it clear that a trail sponsor is under no deadline to either construct a trail or find an alternative trail sponsor. For example, in *T&P Railway*, RTC challenged the T&P Railway's ("TAP") use of a holding company, American Trails Association, Inc. ("ATA"), to serve as an interim trail sponsor. 2 S.T.B. at 37. Among other things, RTC argued that the trail use agreement between TAP and ATA was a "ruse and subterfuge" because ATA had "no plans to develop a trail" in the three years since the issuance of the NITU, and allegedly was only seeking to allow TAP to retain revenues from an existing TAP tenant on the Corridor. *Id.* at 43.

The STB properly rejected those "ruse" claims. The Board noted that ATA "submitted a statement of willingness to assume financial responsibility in which it agreed to assume full responsibility for the management of and for any legal liability arising out of the transfer of the right-of-way. Moreover, it acknowledged that the right-of-way is subject to restoration or reconstruction for railroad purposes. These are the only requirements for invoking section 1247(d)." *Id.* at 45.

The Board then rejected RTC's suggestion that ATA's corporate affiliation with a for-profit salvage company somehow disqualified it from holding a NITU. The Board explained that this fact "does not demonstrate that a trail cannot be constructed or that ATA or TAP are actively discouraging trail use" because "section

recreational or historic trail. But nothing in the Trails Act requires sponsors to immediately construct trail facilities." CSXT Comments at 6 (filed Feb. 27, 2023).

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1247(d) sets no time limit for how quickly a trail must be developed to its intended level of use.” *Id.* at 46. And the Board noted that a plan by a trail sponsor to turn a trail over to a different sponsor in the future was a proper use of the Trails Act: “the NITU and ATA’s commitment to maintain and assume financial responsibility for the line assures that the right-of-way will remain available for rail banking. . . . ATA has donated other rights-of-way that it has held to public entities that subsequently have established trails.” *Id.* at 47 (denying RTC’s motion to reopen the proceeding and revoke the NITU).

T&P Railway is on all fours with the case here. Indeed, *T&P Railway* was expressly cited in the Board’s June 22, 2020 denial of the City’s administrative appeal. Appeal Decision at 6. But it was ignored entirely by the Commenters. Nor do Commenters address the consistent agency precedent establishing (1) that “the Trails Act does not require the trail to be ‘developed’ in any particular way”⁴; and (2)

⁴ See, e.g., *Wheeler—Pet. for Dec. Ord.—Rail Line in Erie Cnty., Pa.*, Docket No. FD 35082, slip op. at 8 (STB served Aug. 27, 2008) (“Petitioners contend that MR violated the trail use condition by failing to create a trail after it had been authorized to acquire the right-of-way for interim trail use/rail banking. However, the Trails Act does not require that a trail be developed in any particular way, and there is no time limit for how quickly a trail must be developed to its intended level of use. Thus, the Board does not become involved in determining whether the trail type or level of development is adequate.” (citations omitted)); *Chelsea Prop. Owners—Aban.—Portion of the Consol. Rail Corp.’s W. 30th St. Secondary Track in New York, N.Y.*, Docket No. AB 167 (Sub-No. 1094A), slip op. at 6 (STB served June 13, 2005) (“We are not involved in the type, level, or condition of the trail. Nor are we authorized to regulate activities over the actual trail, and there is no time limit governing when a trail must be developed.”); *Idaho N. & Pac. R.R.—Aban. & Discontinuance Exemption—In Washington & Adams Cntys., Idaho*, 3 S.T.B. 50, 59 (1998) (“[T]he Trails Act does not require the trail to be ‘developed’ in any particular way. There can be differing types or levels of trail use, and the agency has never become involved in determining the type or level of trail for a specific right-of-way.”); *CSX Transp., Inc.—Aban. Exemption—in Monroe & Owen Cntys., Ind.*,

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that “there is no time limit for how quickly a trail must be developed to its intended level of use.”⁵ And this robust line of agency precedent has been affirmed by the D.C. Circuit. *See Jost v. Surface Transp. Bd.*, 194 F.3d 79, 90 (D.C. Cir. 1999) (finding nothing unlawful in the agency’s interpretation that the Trails Act “does not require a trail to be ‘developed’ in any particular way” and “there is no absolute time limit for how quickly a trail must be developed to its intended level of use”).

ENRD does not acknowledge this precedent. Instead, it cites *Jackson Cnty, MO.—Acquisition and Operation Exemption—Union Pac. R.R.*, Docket No. FD 35982 (STB served November 7, 2019) (“*Jackson County*”) at 3, for the proposition that “the Board ‘has discretion to take actions that are ‘legitimate, reasonable, and

Docket No. AB 55 (Sub-No. 514X), slip op. 2 (STB served Sept. 30, 1997) (“It is important to note that there is no requirement under section 1247(d) that the trail be ‘developed’ in any particular way for recreational use. There can be differing types or levels of trail use, and we will not become involved in determining the type or level of trail use for a particular right-of-way.”); *Mo. Pac. R.R.—Aban. in Okmulgee, Okfuskee, Hughes, Pontotoc, Coal, Johnston, Atoka, & Bryan Ctys., Okla.*, Docket No. AB 3 (Sub-No. 63), slip op. at 3 (ICC served Jan. 4, 1991) (“There can be differing types or levels of trail use, and we will not become involved in determining the type or level of trail for a particular right-of-way.”).

⁵ *See, e.g., Wheeler*, Docket No. FD 35082, slip op. at 8 (“there is no time limit for how quickly a trail must be developed to its intended level of use”); *Kan. E. R.R.—Aban. Exemption—In Butler & Greenwood Cntys., Kan.*, Docket No. AB 563 (Sub-No. 1X), slip op. at 3 (STB served June 2, 2006) (“Furthermore, there is no time limit on how quickly a trail must be developed to its intended level of use. Trail sponsors have been allowed to continue trail use negotiations when they did not have funds immediately available to develop a trail for advanced recreational uses.”); *Idaho N. & Pac. R.R.*, 3 S.T.B. at 59 (“there is no time limit for how quickly a trail must be developed to its intended level of use”); *CSX Transp., Inc.*, Docket No. AB 55 (Sub-No. 514X), slip op. at 2 (“there is no time limit on how quickly a trail must be developed to its intended level of use”); *Mo. Pac. R.R.*, Docket No. AB 3 (Sub-No. 63), slip op. at 3 (“there is no time limit on how quickly a trail must be developed to its intended level of use”).

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directly adjunct to the [agency’s] explicit statutory power.” ENRD Comments at 3. However, *Jackson County* presented a wholly distinct fact pattern in which a rail line was acquired by Jackson County under 49 U.S.C. § 10901, but Jackson County did not continue to provide rail service. Instead, Jackson County removed the track without abandonment authority and began to build a trail, violating the common carrier obligation it undertook when it acquired the unabandoned railroad line. There, the Board certainly had the ability to address actions directly contrary to the authority that it granted. Here, in contrast, CSXT and GHL have done exactly what they told the Board they would do—*i.e.*, GHL is serving as a “placeholder” for a future potential third-party trail sponsor—and they acted completely in accordance with Board precedent. No Commenter has shown anything different.

- B. Railroads can reserve property interests in a railbanked line so long as they do not interfere with the trail or the ability to reinstate freight service.

Contrary to ENRD’s unsupported assertion, the Trails Act does not prohibit a carrier from reserving property interests in a railbanked corridor, so long as those reserved interests do not conflict with the use of the line as a trail or the ability to reinstate service. *See, e.g., Wheeler*, Docket No. FD 35082, slip op. at 9–10 (“[T]he Board’s chief concern is that ‘nothing occur that would preclude a railroad’s right to reassert control over the right-of-way at some future time to revive active service.’”). Indeed, the STB regularly allows a railbanked right-of-way to be used for utility and broadband transmission lines, which can provide “a ready source of funds for maintenance of the right-of-way.” *T&P Ry.*, 2 S.T.B. at 43, 46 n.16, 47 (declining to revoke a NITU where a utility’s transmission lines would remain in the corridor);

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see also Kan. E. R.R., Docket No. AB 563 (Sub-No. 1X), slip op. at 3 (STB served June 2, 2006) (concluding that “plans for the dual use of the right-of-way as both a trail and a utility corridor . . . are not inconsistent with the Trails Act” where “the utility corridor will not interfere with any trail use and future rail use”).

No party has presented any evidence that the reservation of the property interests between CSXT and GHL in any way conflicts with the ability of CSXT to reinstate the Line or conflicts with the ability of GHL (or another sponsor) to create a trail.⁶ Absent evidence of that sort, the STB properly refuses to inject itself into the negotiations between the railroad and the trail sponsor. *See, e.g., CSX Transp., Inc.*, Docket No. AB 55 (Sub-No. 514X), slip op. 2 (“There can be differing types or levels of trail use, and we will not become involved in determining the type or level of trail use for a particular right-of-way.”). Indeed, as a practical matter, a railroad’s ability to reserve certain rights to itself when negotiating with a trail sponsor is an important way to reduce the price that a trail sponsor can pay for trail rights, as well as facilitate the transaction by avoiding complications with existing agreements governing subgrade utilities and broadband fiber installations located on a line.⁷ ENRD’s implicit suggestion that railroads must terminate or assign all

⁶ Indeed, no such evidence exists. Although ENRD references a lease between CSXT and a local sports bar partially encroaching on the Line, ENRD fails to disclose that the lease agreement is terminable at will upon 30 days’ notice by CSXT for any reason or no reason at all. As such, nothing in the lease agreement is remotely inconsistent with future trail use and/or reactivation of rail service.

⁷ ENRD’s suggestion that CSXT “cannot properly lease” its interests in the Line is irrelevant to the Trails Act questions before the Board. ENRD Comments at 5. The validity of any lease on portions of the Line is a matter of state real property law.

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existing non-conflicting occupancies upon obtaining a NITU would have a chilling effect on railroads' willingness to enter into trail use agreements, thereby undermining the Trail Act's policy of encouraging temporary trails subject to future reactivation for rail service.

* * *

In sum, Commenters offer no compelling reasons to upset a successful regulatory regime simply because GHL has not yet constructed a trail or found an alternative trail sponsor for the now railbanked line, or because CSXT has reserved certain property interests that do not interfere with either the use of the Line as a trail or the ability to reinstate freight-rail service.

II. CSXT and GHL are working diligently to either secure a suitable sponsor for the Line or to create a trail themselves.

Commenters also suggest that GHL has failed to negotiate in good faith with the City or any other potential trail sponsor. These allegations are both immaterial and untrue. While CSXT and GHL will not reveal the details of negotiations that either has had with the City or other parties, they can say that CSXT received multiple serious offers to acquire the Line for trail purposes, all of which were many factors greater than the nominal sum offered by the City.⁸ When the City learned of these competing offers, it sued CSXT in federal court, thereby discouraging potential third parties from entering into a trail use agreement. *See* Complaint,

⁸ CSXT and other railroads regularly sell railbanked property at market rates to trail sponsors. This practice is entirely consistent with the policy aims of the Trails Act. The City's last offer of \$100 to purchase the Line was received by CSXT on May 28, 2020.

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City of St. Petersburg v. CSX Transp., Inc., No. 8:19-cv-1541 (M.D. Fla. filed June 26, 2019). Although the City later dismissed the lawsuit without prejudice, the threat that the City may re-file, combined with the pandemic and recent unfavorable economic conditions and high interest rates, have further discouraged third party interest in the Line. In short, any purported delay in identifying a third-party trail sponsor is attributable to the City's own litigation and negotiation tactics—not CSXT.

GHL continues to seek trail users so that the property may be retained for future rail use, consistent with the Trails Act and STB precedent. It is more than willing to re-start failed negotiations with the City on reasonable terms. It is also considering hiring a third party to operate the trail, especially in light of significant use the trail may receive if the Tampa Bay Rays build their new baseball stadium in the vicinity of the trail. But much like the successful High Line in New York City, the interests of the Trails Act often require time and patience to develop new trails for local communities while preserving these unique rail corridors for future freight service.⁹

⁹ The first application to abandon the High Line was filed in 1984, *see Chelsea Prop. Owners—Abandonment—Portion of the Consol. Rail Corp.'s W. 30th St. Secondary Track in New York, NY*, 8 I.C.C.2d 773, 776 n.7 (1992); the first portion of the High Line trail did not open until 2009. *See High Line*, “History,” <https://www.thehighline.org/history/> (last visited Mar. 28, 2023). CSXT transferred ownership of the final portion of the High Line to the City of New York in 2012. *See Mayor Bloomberg, Speaker Quinn And Friends Of The High Line Announce The City's Acquisition Of The Third Section Of The High Line From CSX*, Press Release, Mayor of the City of New York (July 24, 2012), <https://tinyurl.com/CSXTHighLine>. New York City highlighted the Trail Use Agreement pursuant to the federal “Rails to Trails” program as a key action in the preservation of the High Line park. *Id.*

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III. There is no legal basis to permit the City to have discovery of CSXT or GHL in order to craft an undisclosed petition for rulemaking.

Finally, the City requests eight months of discovery to build a record in order to “file an appropriate petition for rulemaking or one or more motions in” this proceeding. City Comments at 8 (filed Mar. 8, 2023). There are no grounds to permit discovery in this proceeding. This proceeding began on July 13, 2019, when CSXT filed and served pre-filing notices. The Notice of Exemption was filed on September 9, 2019. The City now asks for discovery three and one-half years later *on facts that are not relevant to the Trails Act decision*. The Board’s rules provide that discovery through interrogatories and requests for admissions be made 20 days before the commencement of hearings or filing of opening statements. 49 C.F.R. §§ 1114.26(c), 1114.27(c). Moreover, as noted above there are only two issues that the STB reviews before it performs its otherwise ministerial function under the Trails Act. As there is no indication that those requirements have not been met—and as discovery of anything else would be immaterial—the request for discovery must be denied.

CONCLUSION

There is no question that the two requirements to invoke the Trails Act have been met. CSXT and GHL have both fully complied with all of the Board’s regulations under 49 C.F.R. § 1152.29. Well-established precedent places no deadline on GHL to either create a trail or find an alternative sponsor. And CSXT and GHL would happily re-start negotiations with the City, if the City is prepared to make a commercially reasonable offer to become the trail sponsor. In these

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circumstances, the STB should not disturb its prior orders and permit the parties the time needed to advance the interests of the Trails Act.

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of March, 2023, a copy of the foregoing Response to Comments was served by email upon all parties of record in this proceeding.

/s/ Raymond A. Atkins
Raymond A. Atkins