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September 15, 2023

307137

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

ENTERED
Office of Proceedings
September 15, 2023
Part of
Public Record

Re: Great Redwood Trail Agency – Adverse Abandonment – Mendocino Railway in Mendocino County, California, AB-1305 (Sub-No. 1)

Dear Ms. Brown:

Enclosed is Mendocino Railway's ("MR") Motion For Protective Order pursuant to 49 C.F.R. 1104.14(b) in the above-captioned adverse abandonment proceeding. Prior to submitting this Motion to the Surface Transportation Board, MR's counsel reached out to Great Redwood Trail Agency's ("GRTA") counsel, and GRTA had no objection to this Motion. If there are any questions concerning this e-filing, please contact me by telephone at (202) 663-7831 or by e-mail at czorbaugh@bakerandmiller.com. If I am unavailable, you may contact William A. Mullins, by telephone at (202) 663-7823 or by e-mail at wmullins@bakerandmiller.com.

Sincerely,

/s/ Crystal M. Zorbaugh

Crystal M. Zorbaugh
Attorney for Mendocino Railway

Enclosure
cc: Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

AB-1305 (Sub-No. 1)

**GREAT REDWOOD TRAIL AGENCY
– ADVERSE ABANDONMENT –
MENDOCINO RAILWAY IN MENDOCINO COUNTY, CALIFORNIA**

MOTION FOR PROTECTIVE ORDER

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September 15, 2023

Attorneys for Mendocino Railway

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

AB-1305 (Sub-No. 1)

**GREAT REDWOOD TRAIL AGENCY
– ADVERSE ABANDONMENT –
MENDOCINO RAILWAY IN MENDOCINO COUNTY, CALIFORNIA**

**MOTION FOR PROTECTIVE ORDER
EXPEDITED CONSIDERATION REQUESTED**

Pursuant to 49 C.F.R. 1104.14(b), Mendocino Railway (“MR”) respectfully requests that the Surface Transportation Board (the “Board”) enter a protective order in the above-referenced proceeding, in the form provided in Appendix A to this Motion. The proposed order will facilitate the disclosure of information that the Board has required MR to provide to the Great Redwood Trail Agency (“GRTA”) pursuant to its August 21, 2023, decision.¹ In its Waiver Decision, the Board granted exemptions from certain statutory provisions and waived certain regulatory requirements but retained others to allow the Board to evaluate any proposed adverse abandonment application filed.² Specifically, the Board denied GRTA’s request for waivers of the requirements with respect to Service of Notice on Significant Users, Line Attributes, Service Performed on the Line, Revenue and Cost Data, and Rural and Community Impact.³

¹ See Great Redwood Trail Agency—Adverse Abandonment—Mendocino Railway In Mendocino County, Cal., AB 1305 (Sub-No. 1), slip opinion at 3-8 (STB served August 21, 2023) (“Waiver Decision”).

² See Waiver Petition at 1 (GRTA filed a petition seeking exemptions from certain statutory provisions and waivers of certain regulatory requirements in connection with GRTA’s anticipated filing of a third-party, or “adverse,” application for abandonment of an approximately 40-mile rail line (the “Line”) owned by MR).

³ Id. at 3-8; citing 49 C.F.R. § 1152.20(a)(2)(i), 49 C.F.R. 1152.22(b), 49 C.F.R. 1152.22(c), 49 C.F.R. 1152.22(d), and 49 C.F.R. 1152.22(e)(2)-(3).

To assist GRTA in complying with and fulfilling the requirements related to its proposed adverse abandonment, the Board in its Waiver Decision directed MR to provide GRTA with service data, revenue and cost data, and shipper and traffic data in its possession as well as provide the identity of current users on the Line to GRTA by October 5, 2023.⁴ To facilitate MR providing such data and information to GRTA, which would include the production of “confidential” and “highly confidential” financial and proprietary information, a protective order is necessary to prevent to guard against public disclosure of such information.

Accordingly, MR requests that the Board issue a protective order in accordance with 49 C.F.R. 1104.14(b) consistent with orders that have been approved in prior adverse abandonment proceedings. See Alloy Property Company, LLC—Adverse Abandonment—Chicago Terminal Railroad In Chicago, IL, AB 1258 (STB served August 3, 2017); see also Paulsboro Refining Company LLC – Adverse Abandonment – in Gloucester County, N.J., AB 1095 (Sub-No. 1) (STB served July 24, 2012). Issuance of a protective order on or before October 5, 2023, is necessary to facilitate the exchange of facts and other supporting information while ensuring that confidential and highly confidential information or otherwise detrimental information be used only in connection with this proceeding and not for any other business or commercial use. As stated above, a suggested protective order form is attached as an Appendix to this Motion.

Respectfully Submitted,

/s/ Crystal M. Zorbaugh

Crystal M. Zorbaugh
Attorney for Mendocino Railway

⁴ Id. at 5,7.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of Mendocino Railway's Petition for a Protective Order in the above-captioned proceeding was served by first-class mail, postage prepaid, or by a more expeditious manner, this 15th day of September 2023, on all Parties of Record.

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

Crystal M. Zorbaugh

Attorney for Mendocino Railway

APPENDIX A

PROTECTIVE ORDER

1. Any party producing information, data, documents, or other material (hereinafter collectively referred to as “material”) in discovery to another party to this proceeding, or submitting material in pleadings, that the party in good faith believes reflects proprietary or confidential information, may designate and stamp such material as “CONFIDENTIAL,” and such material must be treated as confidential. Such material, any copies, and any data or notes derived therefrom:
 - a. Shall be used solely for the purpose of this proceeding and any judicial review proceeding arising therefrom, and not for any other business, commercial, or competitive purpose or use in any other judicial or administrative proceeding.
 - b. May be disclosed only to employees, counsel, or agents of the party requesting such material who have a need to know, handle, or review the material for purposes of this proceeding and any judicial review proceeding arising therefrom, and only where such employee, counsel, or agent has been given and has read a copy of this Protective Order, agrees to be bound by its terms, and executes the attached Undertaking for Confidential Material prior to receiving access to such materials, and provides a copy of the executed Undertaking to counsel for party providing the CONFIDENTIAL material.
 - c. Must be destroyed by the requesting party, its employees, counsel, and agents, at the completion of this proceeding and any judicial review proceeding arising therefrom. However, counsel and consultants for a party are permitted to retain file copies of all pleadings, which they are authorized to review under this Protective Order provided; however, that any such retained documents that are subject to this Protective Order remain subject to this Protective Order until destroyed.
 - d. If contained in any pleading filed with the Board, shall, in order to be kept confidential, be filed only in pleadings submitted in a package clearly marked on the outside “Confidential Materials Subject to Protective Order.” *See* 49 C.F.R. § 1104.14.
 - e. If any party wishes to challenge such designation, the party may bring such matter to the attention of the Board.
 - f. Any party producing material in discovery to another party to this proceeding, or submitting material in pleadings may in good faith designate and stamp particular material, such as material containing shipper-specific rate or cost data, or other competitively sensitive material, including any future plans for the line and right of way, solicitation of potential customers, appraisals and related valuation data, as “HIGHLY CONFIDENTIAL.” Material that is so designated may be disclosed only to outside counsel or outside consultants of the party requesting such materials who have a need to know, handle, or review the materials for purposes of this proceeding and any judicial review proceeding

arising therefrom, provided that such outside counsel or outside consultants have been given and have read a copy of this Protective Order, agree to be bound by its terms, execute the attached Undertaking for Highly Confidential Material prior to receiving access to such materials, and provide a copy of the executed undertaking to counsel for the party providing the “HIGHLY CONFIDENTIAL” material. Material designated as “HIGHLY CONFIDENTIAL” and produced in discovery under this provision shall be subject to all of the other provisions of this Protective Order, including without limitation Paragraph 1(a), (c), (d), and (e).

2. In the event that a party produces material, which should have been designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” and inadvertently fails to designate the material as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL,” the producing party may notify the other party in writing within 5 days of discovery of its inadvertent failure to make the confidentiality designation. The party who received the material without the confidentiality designation will return the non-designated portion (including any and all copies) or destroy it, as directed by the producing party, or take such other steps as the parties agree to in writing. The producing party will promptly furnish the receiving party with properly designated material.
3. In the event that a party inadvertently produces material that is protected by the attorney-client privilege, work product doctrine, or any other privilege, the producing party may make a written request within a reasonable time after the producing party discovers the inadvertent disclosure that the other party returns the inadvertently produced privileged document. The party who received the inadvertently produced document will either return the document to the producing party or destroy the document immediately upon receipt of the written request, as directed by the producing party. By returning or destroying the document, the receiving party is not conceding that the document is privileged and is not waiving its right to later challenge the substantive privilege claim, provided that it may not challenge the privilege claim by arguing that the inadvertent production waived the privilege.
4. If any party intends to use “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material at hearings in this proceeding, or in any judicial review proceeding arising here from, the party so intending shall submit any proposed exhibits or other documents setting forth or revealing such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material to the Board, or the court, as appropriate, with a written request that the Board or the court: (a) restrict attendance at the hearings during discussion of such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material, and (b) restrict access to the portion of the record or briefs reflecting discussion of such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material in accordance with the terms of this Protective Order.
5. If any party intends to use “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material in the course of any deposition in this proceeding, the party so intending shall so advise counsel for the party producing the materials, counsel for the deponent, and all other counsel attending the deposition, and all portions of the deposition at which any such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material is used shall be restricted to persons who may review the material under this Protective Order. All

portions of deposition transcripts and/or exhibits that consist of or disclose “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material shall be kept under seal and treated as “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material in accordance with the terms of this Protective Order.

6. To the extent that “CONFIDENTIAL” material is produced by a party in this or any related proceedings, and is held and used by the receiving person in compliance with the terms of this Protective Order, such production, disclosure, and use of the material and of the data that the material contains will be deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. § 11904 or any other relevant provision of the ICC Termination Act of 1995.
7. Except for this proceeding, the parties agree that if a party is required by law or order of a governmental or judicial body to release “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” material produced by the other party or copies or notes thereof as to which it obtained access pursuant to this Protective Order, the party so required shall notify the producing party in writing within 3 working days of the determination that the “CONFIDENTIAL” material, “HIGHLY CONFIDENTIAL” material, or copies or notes are to be released, or within 3 working days prior to such release, whichever is soonest, to permit the producing party the opportunity to contest the release.
8. Each party has a right to view its own data, information, and documentation (i.e., information originally generated or compiled by or for that party), even if that data, information, and documentation has been designated as “HIGHLY CONFIDENTIAL” by a producing party, without securing prior permission from the producing party. If a party (the “filing party”) files and serves upon the other party (the “reviewing party”) a pleading or evidence containing “HIGHLY CONFIDENTIAL” material of the filing party, the filing party shall also contemporaneously provide to outside counsel for the reviewing party a list of the “HIGHLY CONFIDENTIAL” information of the filing party contained in the pleading that must be redacted from the “HIGHLY CONFIDENTIAL” version prior to review by the in-house personnel of the reviewing party.
9. Nothing in this Protective Order restricts the right of any party to disclose voluntarily any “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” material originated by that party if such material does not contain or reflect any “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” material originated by any other party.
10. Any party filing with the Board a “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” pleading in this proceeding should simultaneously file a public version of the pleading.

UNDERTAKING

CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order served on _____, 2023, governing the production of confidential documents in AB 1305 (Sub-No. 1), understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any data or information obtained under this Undertaking, or to use or permit the use of any techniques disclosed or information learned as a result of receiving such data or information, for any purposes other than the preparation and presentation of evidence and argument in AB 1305 (Sub-No. 1) or any judicial review proceeding arising therefrom. I further agree not to disclose any data or information obtained under this Protective Order to any person who has not executed an Undertaking in the form hereof. At the conclusion of this proceeding and any judicial review proceeding arising therefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that counsel and consultants may retain copies of pleadings which they were authorized to review under the Protective Order.

I understand and agree that monetary damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such a remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Dated: _____

UNDERTAKING

HIGHLY CONFIDENTIAL MATERIAL

As outside [counsel] [consultant] for _____, for which I am acting in this proceeding, I, _____, have read the Protective Order served on _____, 2023, governing the production of highly confidential documents in AB 1305 (Sub-No. 1), understand the same, and agree to be bound by its terms. I further agree not to disclose any data, information, or material designated “HIGHLY CONFIDENTIAL” to any person or entity who: (i) is not eligible for access to “HIGHLY CONFIDENTIAL” material under the terms of the Protective Order, or (ii) has not executed an Undertaking for Highly Confidential Material in the form hereof. I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any documents designated “HIGHLY CONFIDENTIAL” that I will limit my use of those documents and the information they contain to this proceeding and any judicial review proceeding arising therefrom; that I will take all necessary steps to assure that said documents and information will be kept on a confidential basis by any outside counsel or outside consultants working with me; that under no circumstances will I permit access to said documents or information by personnel of my client, its subsidiaries, affiliates, or owners; and that at the conclusion of this proceeding and any judicial review proceeding arising therefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel and consultants may retain file copies of pleadings filed with the Board. I further understand that I must destroy all notes or other documents containing “HIGHLY CONFIDENTIAL” information in compliance with the terms of the Protective Order. Under no circumstances will I permit access to documents designated “HIGHLY CONFIDENTIAL” by, or disclose any information contained therein to, any persons or entities for which I am not acting in this proceeding.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such a remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

OUTSIDE [COUNSEL] [CONSULTANT] TO

[Party Name]

Dated: _____