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November 13, 2017

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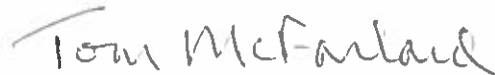
Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20024

Re: Finance Docket No. 36137, *City of Fishers, City of Noblesville, and Hamilton County, Indiana -- Petition for Partial Revocation of Exemption*

Dear Ms. Brown:

Hereby transmitted is a Joint Petition For Leave To File Supplemental Comments And Tendered Supplemental Comments for filing with the Board in the above referenced matter.

Very truly yours,



Thomas F. McFarland
Attorney for Joint Petitioners

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cc: All parties of record

BEFORE THE
SURFACE TRANSPORTATION BOARD

CITY OF FISHERS, CITY OF	)	
NOBLESVILLE, AND HAMILTON	)	FINANCE DOCKET
COUNTY, INDIANA -- PETITION FOR	)	NO. 36137
PARTIAL REVOCATION OF	)	
EXEMPTION	)	

**JOINT PETITION FOR LEAVE TO FILE SUPPLEMENTAL COMMENTS
AND TENDERED SUPPLEMENTAL COMMENTS**

US RAIL CORPORATION
7846 West Central Avenue
Toledo, OH 43617

INDIANA TRANSPORTATION MUSEUM
P.O. Box 83
Noblesville, IN 46060

Joint Petitioners

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Attorney for Joint Petitioners

DATE FILED: November 13, 2017

BEFORE THE
SURFACE TRANSPORTATION BOARD

CITY OF FISHERS, CITY OF	)	
NOBLESVILLE, AND HAMILTON	)	FINANCE DOCKET
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**JOINT PETITION FOR LEAVE TO FILE SUPPLEMENTAL COMMENTS
AND TENDERED SUPPLEMENTAL COMMENTS**

Pursuant to 49 C.F.R. § 1117.1, US RAIL CORPORATION (USR) and INDIANA TRANSPORTATION MUSEUM (ITM) hereby jointly petition for leave to file Supplemental Comments directed to a Petition filed by the City of Fishers, et al. for Partial Revocation of Exemption (Owners' Petition). Supplemental Comments are tendered with this Petition.

GOOD CAUSE FOR LEAVE TO FILE SUPPLEMENTAL COMMENTS

The officers and directors of ITM are not sophisticated in railroad transportation law, nor are they versed in STB procedural matters. As a result, Comments filed by ITM on September 15, 2017 were not responsive to the issues raised in the Owners' Petition.

Representatives of ITM contacted the undersigned to file Supplemental Comments that address the issues raised in the Owners' Petition. However, that contact was not made until October 30, 2017, whereas in a procedural decision served on September 22, 2017, the Board provided that Comments in reply to the Owners' Petition were to be filed on or before October 12, 2017.

USR recently agreed to join ITM in filing Supplemental Comments.

Joint Petitioners respectfully submit that good cause exists for the Board to accept Supplemental Comments for the following reasons:

- (1) the Owners would not be unduly prejudiced by the short delay occasioned by filing of Joint Supplemental Comments. The Owners did not attempt to railbank the rail line for interim trail use until after they had owned the line in an approved-for-abandonment state for over 20 years. A short delay resulting from the filing of Supplemental Comments would not be material in relation to that lengthy period of inaction;
- (2) the Board should exercise its discretion to effectively lengthen the comment period for Joint Petitioners in view of ITM's absence of expertise in rail transportation matters, and the fact that prior ineffective Comments did not serve ITM's interests; and
- (3) Joint Supplemental Comments would aid the Board and the parties to the proceeding by effectively addressing the legal issues raised by the Owners' Petition.

JOINT SUPPLEMENTAL COMMENTS

The Owners' Petition does not support partial revocation of their exemption that would allow them to directly invoke the interim trails provisions of 16 U.S.C. § 1247(d). The Petition does not establish that trail use can be ordered without an underlying rail abandonment proceeding. At page 10 of the Petition, the Owners cite a decision in *Common Carrier Status of States, State Agencies*, 363 I.C.C. 132 (1980), at 134, but nowhere on that page nor anywhere else in that decision, did the Interstate Commerce Commission (ICC) find, nor even hint, that railbanking and interim trail use can be implemented without an underlying abandonment

proceeding. The Owners do not identify a statute that could be revoked to permit them to apply directly for trail use. Instead, the focus of the Petition is on partial revocation to permit institution of an abandonment proceeding, recognizing that such a proceeding is an essential element of railbanking and interim trail use under 16 U.S.C. § 1247(d).

The Board should partially revoke the Owners' blanket exemption from 49 U.S.C. Subtitle IV to allow the Owners to seek Board authority for abandonment of the rail line under 49 U.S.C. § 10903, thereby making the line potentially eligible for railbanking and interim trail use under 16 U.S.C. § 1247(d), **BUT ONLY IF** the Board simultaneously revokes the blanket exemption to permit the filing of Offers of Financial Assistance (OFAs) under 49 U.S.C. § 10904 for purchase of the line for the provision of freight and passenger service.

1. An Abandonment Proceeding Is Necessary For The Owners To Invoke Railbanking And Interim Trail Use

In Caldwell Railroad Commission - Exemption from 49 USC Subtitle IV, 2015 WL 5241134 at *2 (Docket No. FD 32659 [Sub-No. 2], decision served September 8, 2015), the Board and the State-Owned Rail Carrier recognized that an abandonment proceeding is necessary for railbanking and interim trail use of a state-owned rail line that is subject to a blanket exemption from 49 U.S.C. Subtitle IV, and which is not being operated under a modified certificate of public convenience and necessity or otherwise, viz. at *2:

... To preserve the Line for future rail use through railbanking, Caldwell states that it intends to initiate an abandonment proceeding pursuant to 49 C.F.R. § 1152.50, and, accordingly, requests partial revocation of its Subtitle IV exemption over the relevant track in order to do so.

* * *

We find that revoking the exemption to allow Caldwell to pursue abandonment authority—and, thus, the possibility of railbanking—would preserve the rail corridor for potential future use if a railbanking agreement is reached and would reduce barriers to entry in furtherance of the RTP.

The Owners cited the *Caldwell* decision with favor (Owners' Petition at 10-11).

As shown by the following from pages 8-9 of the Owners' Petition, the Owners virtually concede that an abandonment proceeding is necessary for the Owners to invoke the railbanking and interim trail use provisions (emphasis added):

The Owners understand the basic concepts of rail line abandonment and railbanking under the Trails Act provisions. Critically, they also understand that, in order for a railroad right-of-way to be railbanked, *there may first need to be an abandonment proceeding usually initiated by the filing of a petition or notice of exempt abandonment . . .*

Accordingly, the Board should revoke the Owners' blanket exemption from 49 U.S.C. Subtitle IV to permit the Owners to pursue abandonment authority under 49 U.S.C. § 10903, to enable potential railbanking and interim trail use of the rail line right-of-way under 16 U.S.C. § 1247(d), **BUT ONLY IF** the filing of OFAs is permitted in the abandonment proceeding.

2. The Partial Revocation Should Permit The Filing Of OFAs Under 49 U.S.C. § 10904 For The Provision Of Rail Freight And Passenger Service

The Owners seek continuation of an exemption from the OFA provisions of 49 U.S.C. § 10904 in conjunction with an abandonment proceeding they would file if their blanket exemption were to be partially revoked, viz. (Owners' Petition at 5):

. . . If the Board concludes that an abandonment proceeding is a necessary prerequisite to interim trail use, then the Owners request that the partial revocation extend only so far as is necessary to facilitate the Owners' objectives. Specifically, the Owners request that, if at all possible, the Owners should remain exempt from the Board's jurisdiction for purposes of - (a) 49 U.S.C. § 10904 (offers of financial assistance) and the corresponding Board regulations at 49 C.F.R. § 1152.27 . . .

Joint Petitioners strongly oppose that request. In abandonment proceedings, OFAs for rail service take precedence over railbanking and interim trail use. That is evident from the following statement of the Board's predecessor, the ICC, in *Rail Abandonments -- Use of Rights-of-Way as Trails*, 2 I.C.C.2d 591 (1986) at 608:

... Offers of financial assistance to acquire rail lines ... under section 10905 (now 10904) take priority over ... interim trail use ... because retention of existing rail service is mandatory ... (where agreement is reached or where the offeror accepts the terms and conditions fixed by the Commission) whereas ... section 1247(d) trail use (is) voluntary.

The Board grants exemptions from 49 U.S.C. § 10904 only where the record shows that the rail line right-of-way is needed for a valid public purpose and there is no overriding public need for continued rail service. *Dakota, M & E RR -- Aband. Exempt. -- in Olmstead County, MN*, 2017 WL 2981878 at *3 (Docket No. AB-337 [Sub-No. 8X], decision served July 12, 2017).

It is questionable whether railbanking and interim trail use qualifies as a public purpose. Even if it does, Joint Petitioners should have an opportunity to prove in an abandonment-OFA proceeding that there is an overriding public need for rail service over the line. Prospective rail shippers Crown Technology, Inc. (Crown) and The Quikrete Companies (Quikrete) have come forward in the present case to express a need and desire for rail service over the line. Those expressions are credible. Both are former rail shippers over the line. Crown has a private sidetrack to enable rail transportation. Quikrete has buildings on both sides of the rail line. US Rail Corporation is ready, willing, and able to operate the rail line. A respected shipper in the area, Kokomo Grain Co., Inc., has stated on the record that based on its knowledge of the local market, the rail line can generate as many as 1,900 carloads of grain per year.

Clearly, on the basis of the foregoing, Joint Petitioners should be given an opportunity to provide support for a finding that there is a public need for rail freight and passenger transportation over the line that overrides railbanking and interim trail use of the right-of-way. Thus, 49 U.S.C. § 10904 should be applicable to any proceeding for abandonment of the rail line.

CONCLUSION AND REQUESTED RELIEF

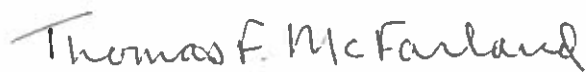
WHEREFORE, for the reasons stated, the Board should find that the Owners' blanket exemption from 49 U.S.C. Subtitle IV should be partially revoked to allow the Owners to seek Board authority for abandonment of the rail line under 49 U.S.C. § 10903, thereby making the line potentially eligible for railbanking and interim trail use under 16 U.S.C. § 1247(d), **BUT ONLY IF** the Board also partially revokes the blanket exemption to permit the filing of Offers of Financial Assistance (OFAs) under 49 U.S.C. § 10904 for purchase of the line for the provision of freight and passenger service.

Respectfully submitted,

US RAIL CORPORATION
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Noblesville, IN 46060

Joint Petitioners



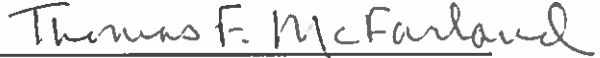
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Attorney for Joint Petitioners

DATE FILED: November 13, 2017

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2017, the foregoing document, Joint Petition For Leave To File Supplement Comments And Tendered Supplemental Comments, was served by e-mail on the attorney for City of Fishers, et al., Robert A. Wimbish, Fletcher & Sippel, LLC, 29 North Wacker Drive, Suite 920, Chicago, IL 60606-2832, rwimbish@fletcher-sippel.com, and by e-mail or first-class, U.S. mail, postage prepaid, on all parties of record as listed in the STB's service list in Finance Docket No. 36137.



Thomas F. McFarland