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October 10, 2019

BY E-FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, DC 20024

ENTERED
Office of Proceedings
October 10, 2019
Part of
Public Record

Re: *Bessemer and Lake Erie Railroad Company – Acquisition and Operation – Certain Rail Lines of CSX Transportation, Inc. in Onondaga, Oswego, Jefferson, Saint Lawrence, and Franklin Counties, New York* (Docket No. FD 36347)

Dear Ms. Brown:

Attached for filing in the above-captioned proceeding is the Motion for Protective Order (designated as BLE-2) of Bessemer and Lake Erie Railroad Company ("B&LE").

Very truly yours,

/s/ Claire M. Maddox
Partner

Attachment

cc: The Honorable Andrew Cuomo
The Honorable John B. Howard
The Honorable Marie Therese Dominguez
The Honorable Elaine L. Chao
The Honorable William P. Barr
The Honorable Joseph J. Simons

CM:sb

EXPEDITED TREATMENT REQUESTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 36347

BESSEMER AND LAKE ERIE RAILROAD COMPANY

— ACQUISITION AND OPERATION —

**CERTAIN RAIL LINES OF CSX TRANSPORTATION, INC. IN ONONDAGA,
OSWEGO, JEFFERSON, SAINT LAWRENCE, AND FRANKLIN COUNTIES, NEW
YORK**

MOTION FOR PROTECTIVE ORDER

Sean Finn
Olivier Chouc
CN
935 de La Gauchetière Street West,
16th Floor
Montreal, Quebec H3B 2M9

Kathryn J. Gainey
CN
Suite 500, North Building
601 Pennsylvania Avenue, N.W.
Washington, DC 20004
202-347-7840

Claire M. Maddox
David A. Hirsh
James M. Guinivan
DENTONS US LLP
1900 K St., NW
Washington, DC 20006
202-496-7500
202-496-7756

Attorneys for Bessemer and Lake Erie Railroad Company

October 10, 2019

EXPEDITED TREATMENT REQUESTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 36347

BESSEMER AND LAKE ERIE RAILROAD COMPANY

— ACQUISITION AND OPERATION —

**CERTAIN RAIL LINES OF CSX TRANSPORTATION, INC. IN ONONDAGA,
OSWEGO, JEFFERSON, SAINT LAWRENCE, AND FRANKLIN COUNTIES, NEW
YORK**

MOTION FOR PROTECTIVE ORDER

Applicant Bessemer and Lake Erie Railroad Company (“B&LE”)¹ hereby requests that the Board enter a protective order, substantially in the form provided in the Appendix to this petition. Simultaneously with this motion, BL&E is filing an application (the “Application,” designated as BLE-1), pursuant to 49 U.S.C. §§ 11323-11325 and 49 C.F.R. Part 1180, seeking authority to acquire and operate certain lines of CSX Transportation, Inc. (“CSX”) between Fort

¹ B&LE is an indirect wholly owned rail carrier subsidiary of Canadian National Railway Company (“CNR”). “CN” refers to the U.S. rail operating subsidiaries, including B&LE, of CNR. B&LE and CNR’s other U.S. indirect rail carrier subsidiaries are operated as an integrated rail system, and thus are treated for STB regulatory reporting purposes by the Board as a single Class I rail carrier. *See Proposal to Require Consolidated Reporting by Commonly Controlled Railroads*, STB Ex Parte No. 634 (STB served Nov. 7, 2001). Where appropriate, the term “CN System” is used herein to refer to the rail system operated by CN in the United States and by CNR in Canada, collectively.

Abbreviations and short form not otherwise defined have the meanings set forth in the Table of Abbreviations in the Application in this proceeding (BLE-1 at iv-v).

Covington, New York and Woodard, New York known as the “U.S. Massena Lines,” as defined in the Application.

In connection with the Application, B&LE, CSX, and their affiliates may find it necessary to exchange information that includes (or is based on) proprietary and commercially sensitive information, including shipper-specific traffic data that is normally protected against public disclosure pursuant to 49 U.S.C. § 11094. Further, the Application itself contains proprietary and commercially sensitive information that could prejudice B&LE if placed on the public record. In addition, during the course of this proceeding, B&LE and other parties may file evidence that includes (or is based on) proprietary and commercially sensitive information.

The proposed protective order is consistent with other protective orders previously issued by the Board. Issuance of a protective order at the outset of this proceeding, as the Board has routinely done in similar cases,² will establish appropriate procedures for the submission of filings containing proprietary and commercially sensitive information, while protecting such information from unnecessary public disclosure.

² See, e.g., *Cando Rail Servs., Inc.—Acquisition & Operation Exemption—Georgia-Pac. Consumer Operations, LLC*, Docket No. FD 36313 (STB served Aug. 2, 2019) (stamp decision); *Ohio River Partners, LLC—Acquisition & Operation Exemption—Hannibal Dev., LLC*, Docket No. FD 35984 (STB served Jan. 13, 2016) (stamp decision); *Western Washington R.R.—Operation Exemption—Port of Chehalis*, Docket No. FD 35922 (STB served Aug. 12, 2015); *Joliet Bulk Barge & Rail, LLC—Acquisition & Operation Exemption—Centerpoint Props.*, Docket No. FD 35875 (STB served Jan. 5, 2015) (stamp decision); *Norfolk Southern Ry.—Acquisition & Operation—Certain Rail Lines of Delaware & Hudson Ry.*, Docket No. FD 35873 (STB served Dec. 17, 2014); *CSX Transportation, Inc.—Joint Use—Louisville & Indiana R.R.*, Docket No. FD 35523 (STB served July 11, 2013).

B&LE respectfully requests that a protective order be entered in substantially the form provided in the Appendix hereto, including the forms of confidentiality undertakings that accompany it.

Respectfully submitted,

Sean Finn
Olivier Chouc
CN
935 de La Gauchetière Street West, 16th
Floor
Montreal, Quebec H3B 2M9

Kathryn J. Gainey
CN
Suite 500, North Building
601 Pennsylvania Avenue, N.W.
Washington, DC 20004
202-347-7840

/s/ Claire M. Maddox

Claire M. Maddox
David A. Hirsh
James M. Guinivan
DENTONS US LLP
1900 K St., NW
Washington, DC 20006
202-496-7500
202-496-7756

Attorneys for Bessemer and Lake Erie Railroad Company

October 10, 2019

APPENDIX

PROTECTIVE ORDER

1. For purposes of this Protective Order:

(a) “Confidential Documents” means documents and other tangible materials containing or reflecting Confidential Information.

(b) “Confidential Information” means traffic data (including but not limited to waybills, abstracts, study movement sheets, and any documents or computer tapes containing data derived from waybills, abstracts, study movement sheets, or other data bases, and cost work papers), the identification of shippers and receivers in conjunction with shipper-specific or other traffic data, the confidential terms of contracts with shippers, or carriers, confidential financial and cost data, purchase and sale agreements, and other confidential or proprietary business or personal information.

(c) “Designated Material” means any documents designated or stamped as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” in accordance with paragraph 6 or 7 of this Protective Order, and any Confidential Information contained in such materials.

(d) “Proceedings” means those proceedings before the Surface Transportation Board (“Board”) concerning the application in STB Docket No. FD 36347, and any related proceedings before the Board, and any judicial review proceedings arising from these proceedings or from any related proceedings before the Board.

(e) References to Bessemer and Lake Erie Railroad Company (“B&LE”) and CSX Transportation, Inc. (“CSX”) shall include their affiliates.

2. Confidential Information shall be provided to any party only pursuant to this Protective Order and only upon execution and delivery to B&LE of the applicable Undertaking,

forms of which are attached as Exhibits A, B, and C to this Protective Order. Confidential Information shall be used solely for the purpose of the Proceedings, and not for any other business, commercial, or competitive purpose.

3. Personnel of B&LE and the US rail operating affiliates of Canadian National Railway Company, and of CSX, including their outside consultants and attorneys (representatives), may exchange Confidential Information for the purpose of participating in the Proceedings, but not for any other business, commercial, or other competitive purpose, except to the extent they would have been properly able to exchange such information apart from this order.

4. To the extent that any meetings, conferences, exchanges of data, communications or other cooperative efforts between representatives of B&LE and CSX, or their affiliates are held and carried out for purposes of these Proceedings, such meetings, conferences, exchanges of data, and other cooperative efforts are deemed essential for the conduct and disposition of such proceedings and will not be deemed a violation of 49 U.S.C. §§ 11323 or 11904, or any other relevant provision of the ICC Termination Act of 1995.

5. If the Application is disapproved by the Board, then all Confidential Documents, other than file copies of pleadings and other documents filed with the Board and retained by outside counsel for a party to these Proceedings and except as provided elsewhere in this Order, that are exchanged between B&LE and CSX, but which are not otherwise available to them as a result of their existing affiliation and pursuant to their reporting responsibilities for securities, tax, and other purposes, must be destroyed, with certification that such destruction has been completed. With respect to parties other than B&LE and CSX, if the Application is disapproved by the Board, or if the Application is approved but Applicant announces that it will not

consummate the acquisition of the U.S. Massena Lines, then all Confidential Documents, other than file copies of pleadings and other documents filed with the Board and retained by outside counsel for a party to these proceedings, must be destroyed.

6. If any party to these Proceedings determines that any part of a document it submits, discovery request it propounds, discovery response it produces, transcript of a deposition or hearing in which it participates, or of a pleading or other paper to be submitted, filed, or served in these Proceedings contains Confidential Information or consists of Confidential Documents, then that party may designate and stamp such Confidential Information and Confidential Documents as “CONFIDENTIAL.” Any information or documents designated or stamped as “CONFIDENTIAL” by any party shall be handled by all parties as provided for hereinafter, except that no prohibition in any subsequent paragraph is applicable to an exchange of information pursuant to paragraphs 3 and 4 of this Protective Order.

7. If any party to these Proceedings determines that any part of a document it submits, discovery request it propounds, or a discovery response it produces, or a transcript of a deposition or hearing in which it participates, or pleading or other paper to be submitted, filed or served in these Proceedings contains shipper-specific rate or cost data; division of rates, trackage rights compensation levels, other compensation between carriers; details from purchase and sales agreements, other transactional agreements or records; or other competitively sensitive or proprietary information, then that party may designate and stamp such Confidential Information and Confidential Documents as “HIGHLY CONFIDENTIAL.” Any information or documents so designated or stamped as “HIGHLY CONFIDENTIAL” by any party shall be handled by all parties as provided for hereinafter, except that no prohibition in any subsequent paragraph is applicable to an exchange of information pursuant to paragraphs 3 and 4 of this Protective Order.

8. Information and documents designated or stamped as “CONFIDENTIAL” may not be disclosed in any way, directly or indirectly, to any person or entity except to an employee, counsel, consultant, or agent of a party to these Proceedings, or any employee of such counsel, consultant, or agent, who, before receiving access to such information or documents, has been given and has read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form set forth as Exhibit A to this Protective Order.

9. Information and documents designated or stamped as “HIGHLY CONFIDENTIAL” may not be disclosed in any way, directly or indirectly, to any employee of a party to these Proceedings, or to any other person or entity except to an outside counsel or outside consultant to a party to these Proceedings, or to an employee of such outside counsel or outside consultant, who, before receiving access to such information or documents, has been given and has read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form set forth as Exhibit B to this Protective Order.

10. Any party producing in discovery railroad data or information that has been designated Sensitive Security Information (“SSI”) by the United States Department of Transportation (“DOT”) or the United States Department of Homeland Security (“DHS”) shall produce such material in accordance with governing DOT and DHS regulations, rules, and policies, including but not necessarily limited to 49 C.F.R. parts 15 and 1520, the terms and conditions set forth in the FRA Administrator’s “Authorization to Share Sensitive Security Information (SSI) With Complainants and Other Parties Involved in Surface Transportation Board (STB) Administrative Proceedings,” (July 29, 2011), and SSI Order 2011-06-FRA-01

(July 29, 2011).¹ SSI produced in discovery shall be designated and stamped as “HIGHLY CONFIDENTIAL” in accordance with paragraph 6, above. In addition to other applicable conditions and requirements, SSI shall be produced only to those outside counsel or consultants to a party who, prior to production, have reviewed and executed an undertaking substantially in the form set forth at Exhibit C to this Order. Executed copies of undertakings substantially in the form set forth at Exhibit C must be signed and available for review before SSI Material is distributed to representatives of a requesting party.

11. All parties must file simultaneously a public version of any Highly Confidential or Confidential submission filed with the Board. When filing a Highly Confidential version, the filing party does not need to file a Confidential version with the Board, but must make available (simultaneously with the party’s submission to the Board of its Highly Confidential version) a Confidential version reviewable by any other party’s in-house counsel. The Confidential version may be served on other parties in electronic format only. In lieu of preparing a Confidential version, the filing party may (simultaneously with the party’s submission to the Board of its Highly Confidential version) make available to outside counsel for any other party a list of all information designated as Highly Confidential that must be redacted from its Highly Confidential version prior to review by in-house personnel who have signed the undertaking at Exhibit A, and outside counsel for any other party must then redact that material from the Highly

¹ A party producing rail traffic information containing or constituting SSI in discovery or submitting such material in pleadings must also comply with other applicable requirements of DOT and DHS SSI regulations governing the use and handling of SSI, including the SSI marking requirements set forth in 49 C.F.R. § 15.13 or, if that is not practicable, the marking requirements of the July 29, 2011 memorandum from Federal Railroad Administration Administrator Joseph C. Szabo titled “Authorization to Share Sensitive Security Information (SSI) With Complainants and Other Parties Involved in Surface Transportation Board (STB) Administrative Proceedings.”

Confidential version before permitting any clients to review the submission.

12. Each undertaking in accordance with this Protective Order shall be kept on file for the duration of this Proceeding by counsel for the party on whose behalf the undertaking is executed, which counsel shall provide a copy of such undertaking upon the request of any party producing or providing information subject to such undertaking.

13. Any party to these Proceedings may challenge the designation by any other party of information or documents as “CONFIDENTIAL” or as “HIGHLY CONFIDENTIAL” by filing a motion with the Board.

14. Designated Material may not be used for any purposes, including without limitation any business, commercial or competitive purposes, other than the preparation and presentation of evidence and argument in the application filed in FD 36347 and any related proceedings before the Surface Transportation Board, and/or any judicial review proceedings in connection with FD 36347 and/or with any related proceedings.

15. Any party who receives Designated Material in discovery shall destroy such materials and any notes or documents reflecting such materials (other than file copies of pleadings or other documents filed with the Board and retained by outside counsel for a party to these Proceedings, provided that such retention does not conflict with DOT or DHS regulations, rules, or policies relating to SSI) at the earlier of: (1) such time as the party receiving the materials withdraws from these Proceedings, or (2) the completion of these Proceedings, including any petitions for reconsideration, appeals, or remands.

16. No party may include Designated Material in any pleading, brief, or other document submitted physically to the Board, unless the pleading or other document is submitted under seal, in a package clearly marked on the outside as “Confidential Materials Subject to

Protective Order.” *See* 49 CFR § 1104.14. No party may include Designated Material in any pleading, brief, or other document submitted to the Board electronically, under the e-filing option provided in 49 C.F.R. § 1104.1(e), unless the filing party submits the pleading or other document as “Confidential” under such options as are provided on the Board’s Web site for electronic filing of documents. All pleadings and other documents submitted pursuant to the terms of this paragraph and containing information designated as “CONFIDENTIAL” or as “HIGHLY CONFIDENTIAL” shall bear a prominent designation as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL,” as appropriate, on their first pages and every page containing such information. All such pleadings and documents shall be kept confidential by the Board and shall not be placed in the public docket in these Proceedings except by order of the Board.

17. No party may include Designated Material in any pleading, brief, discovery request or response, or other document submitted to any forum other than this Board in these Proceedings unless: (1) the pleading or other document is submitted under seal in accordance with a protective order that requires the pleading or other document to be kept confidential by that tribunal and not be placed in the public docket in the proceeding, or (2) the pleading or other document is submitted in a sealed package clearly marked, “Confidential Materials Subject to Request for Protective Order,” and is accompanied by a motion to that tribunal requesting issuance of a protective order that would require the pleading or other document be kept confidential and not be placed in the public docket in the proceeding, and requesting that, if the motion for protective order is not issued by that tribunal, the pleading or other document be returned to the filing party.

18. No party may present or otherwise use any Designated Material at a Board hearing in these Proceedings, unless that party has previously submitted, under seal, all proposed

exhibits and other documents containing or reflecting such Designated Material to the Board, and has accompanied such submission with a written request that the Board (a) restrict attendance at the hearing during any discussion of such Designated Material, and (b) restrict access to any portion of the record or briefs reflecting discussion of such Designated Material in accordance with this Protective Order.

19. If any party intends to use any Designated Material in the course of any deposition in these Proceedings, that party shall so advise counsel for the party producing the Designated Material, counsel for the deponent, and all other counsel attending the deposition. Attendance at any portion of the deposition at which any Designated Material is used or discussed shall be restricted to persons who may review that material under the terms of this Protective Order. All portions of deposition transcripts or exhibits that consist of, refer to, or otherwise disclose Designated Material shall be filed under seal and be otherwise handled as provided in paragraph 17 of this Protective Order.

20. To the extent that materials reflecting Confidential Information are produced by a party in these Proceedings, and are held and/or used by the receiving person in compliance with this Protective Order, such production, disclosure, holding, and use of the materials and of the data that the materials contain are deemed essential for the disposition of this and any related proceedings, and will not be deemed a violation of 49 U.S.C. §§ 11323 or 11904 or of any other relevant provision of the ICC Termination Act of 1995.

21. All parties must comply with all of the provisions of this Protective Order unless the Board determines that good cause has been shown warranting suspension of any of the provisions herein.

22. Nothing in this Protective Order restricts the right of any party to disclose

voluntarily any Confidential Information originated by that party, or to disclose voluntarily any Confidential Documents originated by that party, if such Confidential Information or Confidential Documents do not contain or reflect any Confidential Information originated by any other party, unless that party has consented in writing to the disclosure.

Exhibit A

UNDERTAKING FOR CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order served on _____, 2019, governing the production and use of Confidential Information and Confidential Documents in STB Docket No. FD 36347 and in related proceedings, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any Confidential Information or Confidential Documents obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in STB Docket No. FD 36347 and in related proceedings before the Surface Transportation Board, and/or any judicial review proceedings in connection with any of those proceedings. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed Undertakings in the form hereof, and that at the conclusion of this proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting materials designated or stamped as “CONFIDENTIAL,” other than file copies, kept by outside counsel, of pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that applicants or other parties producing Confidential Information or Confidential Documents shall be entitled to specific performance and injunctive and/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 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: _____

Exhibit B

UNDERTAKING FOR HIGHLY CONFIDENTIAL MATERIAL

I, _____, am outside counsel or an outside consultant for _____, for whom I am acting in this proceeding. I have read the Protective Order served on _____, 2019, governing the production and use of Confidential Information and Confidential Documents in STB Docket No. FD 36347 and in related proceedings, understand the same, and agree to be bound by its terms. I agree not to use or to permit the use of any Confidential Information or Confidential Documents obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in STB Docket No. FD 36347 and in related proceedings before the Surface Transportation Board, or any judicial review proceedings in connection with any of those proceedings. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed Undertakings in the form hereof.

I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any information or documents designated or stamped as “HIGHLY CONFIDENTIAL,” that I will take all necessary steps to assure that said information or documents 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 materials or information by employees of my client or its subsidiaries, affiliates, or owners, and that at the conclusion of this proceeding (including any proceeding on administrative review, judicial review, or remand), I

will promptly destroy any documents containing or reflecting information or documents designated or stamped as “HIGHLY CONFIDENTIAL,” other than file copies, kept by outside counsel, of pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that applicants or other parties producing Confidential Information or Confidential Documents shall be entitled to specific performance and injunctive and/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 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]

Dated: _____

Exhibit C

UNDERTAKING FOR SENSITIVE SECURITY INFORMATION AND MATERIAL

I, _____, am outside counsel or an outside consultant for _____, for which I am acting in STB Docket No. FD 36347. I have read FRA Order 2011-06-FRA-01 designating certain railroad traffic information as Sensitive Security Information (“SSI”), and the July 29, 2011 memorandum from FRA Administrator Joseph C. Szabo titled “Authorization to Share Sensitive Security Information (SSI) With Complainants and Other Parties Involved in Surface Transportation Board (STB) Administrative Proceedings” (hereafter “July 29 Memorandum”). I agree to be bound by the terms of FRA Order 2011-06-FRA-01 and the July 29 Memorandum for SSI produced in discovery or submitted as evidence (including evidence or materials derived or compiled from SSI produced in this proceeding) in STB Docket No. FD 36347. I have also executed an “Undertaking for Highly Confidential Material” under the Protective Order served in STB Docket No. FD 36347 on _____, 2019, and acknowledge that all SSI produced in this proceeding is also designated HIGHLY CONFIDENTIAL under that Protective Order and is subject to all of the requirements and limitations of that Order that apply to HIGHLY CONFIDENTIAL material, as well as the additional requirements set forth in this Undertaking.

I have been advised and hereby acknowledge that the conditional disclosure of SSI in STB Docket No. FD 36347, in accordance with FRA Order 2011-06-FRA-01 and the July 29 Memorandum, by any party other than my client in STB Docket No. FD 36347, makes me a “covered person” within the meaning of 49 C.F.R. §§ 15.7(m) and 1520.7 as to any such SSI I receive, access, review, and/or use. I understand my duties and responsibilities as a “covered person” under federal law and applicable regulations (including but not limited to 49 C.F.R.

Parts 15 and 1520), and will comply with those responsibilities. I understand that unauthorized disclosure of SSI may result in civil penalty or other action. Pursuant to 49 C.F.R. §§ 15.19 and 1520.19, I agree to destroy all SSI in my possession, custody, or control after the conclusion of STB Docket No. FD 36347, including any proceeding for enforcement of an order or ruling entered in that proceeding, any judicial review proceeding arising therefrom, any appeals of such proceedings, and/or any proceeding on remand from such judicial review proceeding.

OUTSIDE [COUNSEL] [CONSULTANT]

Print:_____

Dated:_____

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing Motion for Protective Order (BLE-2) to be served upon the following parties by the means indicated:

By Hand Delivery:

The Honorable William P. Barr
Office of the Attorney General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

By First-Class Mail:

The Honorable Andrew Cuomo
Office of the Governor
State of New York
State Street and Washington Avenue
Albany, NY 12224

By E-mail:

The Honorable Elaine L. Chao
Secretary of Transportation
Office of the Secretary
United States Department of Transportation
1200 New Jersey Ave., SE, 9th Floor
Washington, DC 20590
elaine.l.chao@dot.gov

The Honorable John B. Howard
Commissioner
Public Service Commission
State of New York
Three Empire State Plaza
Albany, NY 12223
john.howard@dps.ny.gov

The Honorable Marie Therese Dominguez
Commissioner
New York State Department of Transportation
Officer of the Governor
State of New York
50 Wolf Road
Albany, NY 12232
marie.dominguez@dot.ny.gov

The Honorable Joseph J. Simons
Office of the Chairman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
secretary@ftc.gov

/s/ James M. Guinivan