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January 25, 2005

Re: Finance Docket 34632 – Ohio and Pennsylvania Railroad – Acquisition and
Operation Exemption – Rail Line of Columbiana County Port Authority in Mahoning and
Columbiana Counties, OH and Beaver County, PA

Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0001

ENTERED
Office of Proceedings

FEB - 8 2005

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JAN 25 2005
RECEIVED

Dear Sir:

Enclosed for filing please find the original and ten copies of the Petition by Railroad Ventures, Inc. to Revoke Notice of Exemption and Impose Protective Conditions in the above captioned proceeding. Copies of this pleading have been served on all parties of record.

Very truly yours,

VUONO & GRAY, LLC



Richard R. Wilson, Esq.

RRW/bab

xc: All Parties of Record
Railroad Ventures, Inc.

213203

Before the
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET No. 34632

THE OHIO AND PENNSYLVANIA RAILROAD – ACQUISITION AND
OPERATION EXEMPTION – RAIL LINES OF THE COLUMBIANA COUNTY
PORT AUTHORITY IN MAHONING AND COLUMBIANA COUNTIES, OH
AND BEAVER COUNTY, PA

**PETITION TO REVOKE NOTICE OF EXEMPTION
AND IMPOSE PROTECTIVE CONDITIONS**

ENTERED
Office of Proceedings

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Public Record

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Dated: January 25, 2005

Before the
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET No. 34632

THE OHIO AND PENNSYLVANIA RAILROAD – ACQUISITION AND
OPERATION EXEMPTION – RAIL LINES OF THE COLUMBIANA COUNTY
PORT AUTHORITY IN MAHONING AND COLUMBIANA COUNTIES, OH
AND BEAVER COUNTY, PA

**PETITION TO REVOKE NOTICE OF EXEMPTION
AND FOR PROTECTIVE CONDITIONS**

Railroad Ventures, Inc. ("RVI") files this Petition to Revoke Notice of Exemption and for Protective Conditions in response to the Notice of Exemption filed December 8, 2004 in Finance Docket 34632 and in response to the Board's decision of January 11, 2005 in Docket No. AB 556 (Sub No. 2X) granting the Joint Petition for Stay filed by Columbiana County Port Authority ("CCPA") and Central Columbiana and Pennsylvania Railway ("CCPR"). (Collectively "joint petitioners") In support thereof, RVI states as follows:

By its order of January 11, 2005 in AB 556 (Sub No. 2X), the Board stayed CCPA's and CCPR's obligation to repay RVI \$217,282 plus interest under the Board's December 13, 2004 order. CCPA has represented to the Board that it does not have adequate funds to pay this obligation to RVI and the Board's January 11 order cites that representation as one of the reasons for granting the stay. However, on October 26, 2004 CCPA CEO Tracy Drake recommended that the Port Authority supplement its \$400,000 cash reserve with a \$500,000 line of credit citing losses incurred by CCPA on the Y&S rail line project and the CCPA Board of Directors approved that recommendation (Exhibit A).

Thus, it appears that CCPA may have misrepresented its financial condition and ability to pay to the Board in its Petition for Stay.

Furthermore, CCPR is in bankruptcy and did not have sufficient financial resources to continue rail operations on the Youngstown, OH-Darlington, PA rail line on behalf of CCPA. As a consequence, CCPR requested the Bankruptcy Court to relieve it of its operating obligations to CCPA and CCPA agreed to transfer operating authority from CCPR to the Ohio and Pennsylvania Railroad Company ("OPRC"). While RVI has not been made privy to the final terms of this agreement, RVI understands that CCPA has granted OPRC an option to purchase CCPA's rail line in 2006 for \$1,000,000 and the assumption of CCPA's acquisition debt. See STB Finance Docket 34632, the Ohio and Pennsylvania Railroad –Acquisition and Operation Exemption – Rail Lines of Columbiana County Port Authority in Mahoning and Columbiana Counties, Ohio and Beaver County, Pennsylvania.

RVI therefore requests that the Board revoke the exemption notice in Finance Docket 34632, conduct a detailed review the terms of this transaction and impose a condition on that transaction requiring CCPA and the OPRC or other purchaser to obtain RVI's consent to any transfer transaction and to satisfy any outstanding escrow refund obligation due to RVI prior to CCPA's conveyance of title to the rail line as a condition of that acquisition under 49 U.S.C. §10902. The Board has broad authority to condition rail transactions in circumstances such as these where it is necessary to the public interest for full disclosure of and compliance with statutory requirements. 49 U.S.C §10902(c).¹

¹ In this connection, it should be noted that both CCPA and OPRC were fully aware of the outstanding claims by RVI regarding the escrow account refund but RVI was not served with a copy of the acquisition and operation exemption notice in Finance Docket No. 34632. Moreover, the Board's December 13, 2003 order was entered five days after the filing of the OPRC exemption notice on December 8, 2004.

The escrow fund entrusted to CCPA was withheld from RVI's proceeds of sale and accordingly the Board has not yet finally determined RVI's compensation payable by CCPA for acquisition of the line. CCPA's payment to RVI has been rendered aleatory by the Board's January 11, 2005 stay of its December 13, 2004 order, and substantial questions exist under 49 USC §10905(f)(4) as to when CCPA can transfer any interest to OPRC or even if there has been a consummation of the RVI-CCPA sale transaction for purposes of the running of the five year prohibition on transfers to third parties under 49 USC §10905(f)(4). Moreover, RVI believes that the CCPA-OPRC Operating Agreement/Option Agreement was structured solely to circumvent the five (5) year prohibition on resale of OFA lines under Section 10905(f)(4) thereby directly violating the Board's well established policy against circumvention of its regulatory authority. These issues require a full and careful STB review of the transactional, financial and operational details of CCPA's attempt to transfer the rail line to OPRC given the unique circumstances surrounding this proceeding.

Under the licensing provisions of 49 U.S.C. §10902, a carrier (such as OPRC) may file an application to acquire and operate an additional rail line. For an application to be granted, the proposed transaction must be found not to be inconsistent with the "public convenience and necessity". Under 49 U.S.C. §10502 and 49 C.F.R. §1121, however, a party may file a petition for exemption from the formal application procedures of §10902 on the grounds that (1) full regulatory scrutiny is not necessary to carry out the rail transportation policy, and (2) either the exemption is limited in scope or regulation is not needed to protect shippers from an abuse of market power. There are some situations in which approval is so routine and non-controversial that there is an expedited exemption

procedure allowing parties to obtain Board authorization subject only to an after-the-fact Board review if objections are received. Thus, under 49 C.F.R. Part 1150.42, a carrier, under certain circumstances, can obtain authority to acquire and operate a line of railroad within seven days. That authority can be revoked later under 49 U.S.C. §10502(d) should such action be necessary to carry out the transportation policy of 49 U.S.C. §10101. Alternatively, the exemption notice may be treated as void ab initio and rejected if it contains false or misleading information. The Board has held that the informal, streamlined, class exemption process is unsuited for cases in which the record reveals that a more searching review of the proposed transaction would be appropriate. See, e.g., James Riffin d/b/a The Northern Central Railroad – Acquisition and Operation Exemption – In York County, PA and Baltimore County, MD, STB Finance Docket No. 34484 (STB served April 20, 2004); Riverview Trenton Railroad Company – Acquisition and Operation Exemption – Crown Enterprises, Inc., STB Finance Docket No. 33980 (STB served February 15, 2002).

RVI believes that a “more searching review” is warranted in Finance Docket 34632. The Petition for Exemption filed on behalf of OPRC makes no mention of the fact that CCPA has yet to fully compensate RVI for its acquisition of the rail line under the terms and conditions established by the STB in Docket AB 556 (Sub No. 2X). In its application, OPRC noted that its acquisition “was related” to proceedings in AB 556 (Sub-No. 2X) but it did not advise the Board that its operation and acquisition exemption was also subject to the application of the five year prohibition on third party transfers contained in 49 U.S.C. §10905(f)(4). This is a material omission because under Section 10502, Section 10905(f)(4) restrictions are not exemptable except in proceedings which involve

intracorporate transactions which do not pertain to the CCPA-OPRC transfer. See Finance Docket 30508, Huntsville and Madison County Railroad Authority-Exemption from 49 U.S.C Subtitle IV, served August 2, 1984, ISS – Exemption from 49 U.S.C. Subtitle IV, 1985 ICC Lexis 177; SF&L Railway – Abandonment Exemption- In Ellis and Hill Counties, TX (OFA), Docket AB 448 (Sub No. 1X) 1996 Lexis 345.

As RVI has previously stated in its December 21, 2004 filing in the CCPR bankruptcy proceeding (copy of which was served on the Board), it has no objection to the emergency transfer of current rail operations on the CCPA line to OPRC to preserve rail service but RVI does object to CCPA's transfer and OPRC's acquisition of any present or future interest in the rail line without adequate protection for RVI's receipt of full compensation for that line from CCPA and for its statutory repurchase rights under Section 10905(f)(4). Furthermore, this proceeding presents a case of first impression to the Board on whether there has been a consummation of the RVI-CCPA sale transaction given that the Board has yet to make a final determination as to the amount of compensation to which RVI is due under the terms of the escrow fund established by the Board and entrusted to CCPA in the AB-556 (Sub No. 2X) OFA proceeding. In order to adequately address these issues, it is necessary for the public interest that the Board undertake a more careful review of the CCPA-OPRC operation and acquisition transaction to determine precisely what transactional, financial and operational functions and interests have been transferred to OPRC and whether transfer of these interests are precluded by the application of 49 U.S.C. §10905(f)(4) under the facts and circumstances presented by the on going RVI-CCPA transaction. Given these novel and complex issues, the informal, streamlined class exemption process is unsuited for the CCPA-OPRC operation and acquisition transaction,

and that transaction requires full regulatory review by the Board as well as the imposition of protective conditions on behalf of RVI.

Accordingly, RVI respectfully requests that the Board revoke the exemption in Finance Docket No. 34632, review the proposed transaction in greater detail and impose protective conditions sought by RVI.

Respectfully submitted,

VUONO & GRAY, LLC

By: 

Richard R. Wilson, Esq.
Attorney for Railroad Ventures, Inc.

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Dated: January 25, 2005

10/26/04

Port authority cushions with credit line

By TOM GIAMBRO

Journal Staff Writer

EAST LIVERPOOL — The county Port Authority is running a little low on cash so it decided to borrow \$500,000 should a major economic development opportunity present itself.

The port authority board Monday agreed to obtain a line of credit of up to \$500,000 from First National Community Bank in the event it is needed.

"It's just if something comes along that's big -- we want to be able to jump on it," said port fiscal officer Steve Cooper.

Port Authority Chief Executive Officer Tracy Drake recommended the action because their cash reserve, the seed money used for economic development projects, had dropped to the point where he was concerned they would be unable to take on a major project should one arise.

The port authority originally had \$5 million to work with after selling 20 acres of its land to Waste Technologies Industries in 1993. Drake set about spending the money on

various economic development projects.

"As a board you directed me not to sit on the money but spend it" to create jobs, he said.

Eleven years later, Cooper said the pot of money is down to a little more than \$400,000, which is why Drake recommended they obtain the line of credit.

"We may never draw down on this, but it gives us a comfort level," he said.

The money was used on projects with the expectation it would be recouped in some fashion by way of contractual payments. In a way, Drake said they were a victim of their own success, spreading the money around a number of projects.

The problem is some of the projects funded with the seed money have failed to work out, leaving the port authority without a way to recover its investment.

Drake cited two failed projects in particular. The first was Probex Corp., which was to build an oil recycling business at the port authority's industrial park in Wellsville. Probex eventually filed bankruptcy before

ever breaking ground.

Drake said they spent \$1.2 million on site acquisition and improvements to the industrial park which benefit other tenants, but they were counting on Probex money to help pay for the investment.

The purchase of the old Youngstown & Southern Railroad was another example, he said. The port spent close to \$1 million to purchase the railroad and for improvements, and the company operating the rail line filed bankruptcy earlier this year. Drake expects a new railroad company to step in and assume the operating lease before the end of the year.

The port authority also has many successes over the past 10 years, such as the Mitsubishi Heavy Industries of America Inc. and General Extrusions Inc. plants located at port authority facilities in Leclona.

During that period port assets have jumped from \$6 million to \$19 million, and Drake said they were able to use the money as leverage to obtain \$15 million in state and federal grants to fund improvements.

tgianbroad@morjournal.com

CERTIFICATE OF SERVICE

I hereby certify that I have this 25th day of January, 2005 served a copy of the Petition to Revoke Notice of Exemption and for Protective Conditions upon the following by first class United States Mail, postage prepaid:

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