

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 34905

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VILLAGE OF CROTON-ON-HUDSON, NEW YORK

v.

BUFFALO SOUTHERN RAILROAD, INC., et al.

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PETITION OF BUFFALO SOUTHERN RAILROAD, INC.  
TO HOLD PROCEEDINGS IN ABEYANCE AND MOTION  
FOR PROTECTIVE CONDITIONS CONCERNING DISCOVERY

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ENTERED  
Office of Proceedings

JUL 20 2006

Part of  
Public Record

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Attorneys for Buffalo Southern  
Railroad, Inc.

Dated: July 19, 2006



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SURFACE TRANSPORTATION BOARD

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In accordance with 49 CFR 1117.1 and 1114.21(c), Buffalo Southern Railroad, Inc. ("BSOR") hereby requests the Board to enter orders holding this proceeding in abeyance generally and, in the event that discovery is eventually permitted, setting forth certain protective conditions in connection with the "Village of Croton-on-Hudson, New York's First Discovery Requests to Buffalo Southern Railroad, Inc." (the "Discovery Requests"), which were served by the Village of Croton-on-Hudson (the "Village") on July 10, 2006, and any other discovery that might be sought by the Village. For the reasons stated below, further proceedings in general and discovery in particular are premature pending a decision by the Board concerning procedural issues in connection with the earlier-filed Verified Notice of Exempt Transaction (the "Notice") and the motion of BSOR to dismiss the Notice (the "Motion") in Finance Docket No. 34903. All

activity in this proceeding should be deferred until the Board determines procedurally how it will resolve the question whether the line operated by BSOR in Croton on Hudson, New York (the "Croton Track ") is a line of railroad or, as BSOR contends, an excepted track within the meaning of 49 U.S.C. 10906.

### BACKGROUND

On June 29, 2006, BSOR filed the Notice in Finance Docket No. 34903, thereby invoking the class exemption procedure by which Class III carriers may obtain authorization from the Board to operate additional lines. In the Notice, BSOR noted that the Croton Track is an excepted track and that it intended to move to dismiss the Notice. On the next day, June 30, 2006, BSOR filed the Motion, thereby squarely framing the line-excepted track issue.

In response, on June 30, 2006, the Village filed the "Petition of the Village of Croton-on-Hudson to Reject Notice of Exemption or, in the Alternative, for Stay of Effectiveness and for Consolidation" (the "Petition"). The Petition requested the Board to consolidate the Complaint, which was also filed on June 30, 2006, with the Notice in the event that the Notice is not rejected. On July 3, 2006, the Board entered a "housekeeping stay" of the effectiveness of the Notice.

On July 7, 2006, BSOR submitted its opposition to the Petition as well as a procedural suggestion for handling the various issues raised by the pleadings filed in the two proceedings. Specifically, BSOR suggested that the fundamental underlying issue that should be decided first, while other issues are held in abeyance, is whether the Croton Track is a line or an excepted track. If the Croton Track is an excepted track within the meaning of section 10906, no further proceedings would be required or

appropriate with respect to the Notice, the Petition or the Complaint, all of which would be moot. If the Croton Track is, on the other hand, a line, then the Board would be required to determine whether BSOR should be authorized to operate the Croton Track and whether, as requested in the Complaint, any fines should be imposed. As of this time, the Board has taken no further action.

## ARGUMENT

### I. Holding This Proceeding in Abeyance is Appropriate Pending Procedural Decisions.

As outlined above, the fundamental, underlying issue that is common to the Notice and the Complaint is whether the Croton Track is a line of railroad or an excepted track within the meaning of section 10906. That issue has been properly framed by the Notice and the Motion, and responses to the Motion are due to be filed on July 20, 2006. As described above, a decision that the Croton Track is an excepted track will mean that the Notice, the Petition and the Complaint are moot. It would be wasteful of the resources of the parties and the Board to conduct a proceeding on the Complaint parallel to the Notice and to engage in discovery with respect to the Complaint until there is a decision on the line-excepted track issue in connection with the Notice and the Motion or, at the very least, until the Board enters an order establishing an expeditious and efficient procedure for the resolution of the fundamental line-excepted track issue and subsidiary issues, such as the effectiveness of the Notice and, as requested by the Village, consolidation of the proceedings if the Notice is not rejected.

Neither the Village nor any other interested party would be prejudiced by the entry of an order holding this proceeding on the Complaint in abeyance. If the Board concludes that it will resolve the line-excepted track issue by some means other than a

decision on the Notice and the Motion, and that this Complaint proceeding should go forward, the parties can discuss discovery and procedural matters and submit a report to the Board as contemplated by 49 CFR 1111.10.

II. Discovery is Not Permissible in Connection with the Notice.

As an initial matter relating to discovery, it is not clear whether the Discovery Requests, which are attached hereto as Exhibit A, are advanced in connection with the Complaint in Finance Docket No. 34905 or the Notice in Finance Docket No. 34903. The inference that might be drawn from the parties named in the caption is that the Discovery Requests are being served in connection with the Complaint, but the finance docket number on the Discovery Requests--34903--is the number for the proceedings in connection with the Notice. Further confusing the issue, the opening paragraph of the Discovery Requests indicates that they are being submitted in part pursuant to 49 CFR 1121.2, which governs discovery in connection with petitions for exemption or petitions to revoke exemptions.

Subject to the terms and conditions of any protective order entered by the Board, discovery in connection with a formal complaint may proceed at any time in accordance with 49 CFR 1114. Discovery is also permitted under 49 CFR 1114 if a party files a petition--as distinguished from a notice--for exemption or in the event that an exemption becomes effective and a party petitions to revoke the exemption. Discovery is not authorized, however, under 49 CFR 1121.2 and 49 CFR 1114 in connection with notices of exemption. Consequently, the Village has no right to conduct discovery in connection with the Notice.

### III. All Discovery Should be Stayed Pending a Decision on Procedure.

Even assuming that the Discovery Requests are submitted in relation to Finance Docket No. 34905 and that the Board declines to hold this proceeding in abeyance generally, the Discovery Requests are, for the reasons described above, premature. The Board should enter an order deferring any discovery until the Board decides the procedural issues that are currently pending.

As the Board is well aware, it has broad discretion concerning the scope and timing of discovery. Pursuant to 49 CFR 1114.21(c), the Board can fashion conditions to protect against "undue burden or expense" and to "prevent the raising of issues untimely or inappropriate to the proceeding." An order staying discovery at this time would serve these purposes. As described above, if the Croton Track is an excepted track, all of the other issues will become moot. A stay would relieve BSOR of the burden and expense of potentially unnecessary discovery and would prevent the raising of issues in an untimely and inappropriate manner.

### IV. Any Discovery Eventually Permitted Should be Limited to Relevant Information.

If the Board determines that the line-excepted track issue should be resolved in this Complaint proceeding, rather than in connection with the Notice and Motion, and that discovery by the Village should be permitted, any such discovery should be limited to eliciting information relevant to the line-excepted track issue. In accordance with 49 CFR 1114.21(a) and (c), discovery must be relevant to the subject matter involved in the particular proceeding in which discovery is sought. "Relevance" is defined as "information" that "might be able to affect the outcome of a proceeding." Waterloo

Railway Company--Adverse Abandonment--Lines of Bangor and Aroostook Railroad Company and Van Buren Bridge Company in Aroostook County, Maine, STB Docket No. AB-124 (Sub-No. 2), decision served May 6, 2003.

The Discovery Requests are overly expansive and broad ranging and have very little, if anything, to do with the line of railroad-excepted track issue. Rather, the Discovery Requests are directed, for example, at the question whether BSOR or the other defendants knowingly violated or knowingly assisted in the violation of section 10902. Interrogatories 1-3, 29; Document Requests 2-4. The Discovery Requests also seek information concerning actions taken by BSOR to hold itself out as a common carrier at the Croton Track. Interrogatories 4-5, 19-20; Document Request 9. In addition to being irrelevant to the line-excepted track issue, the activities of BSOR as a common carrier on the Croton Track are not in dispute. BSOR has acknowledged, and the United States District Court for the Southern District of New York has held, that BSOR is acting as a common carrier with respect to operations on the Croton Track. In addition, the Discovery Requests seek detailed information concerning the operations of BSOR, including information with respect to its equipment, employees, customers, revenues and costs. Interrogatories 8-26; Document Requests 8-19. Such information might be relevant in a proceeding in which BSOR is seeking a certificate of public convenience and necessity, but it is not probative when the question is whether the Croton Track is a line or an excepted track.

As demonstrated above, the majority of the information sought by the Village is irrelevant to the fundamental issue--whether the Croton Track is a line or an excepted

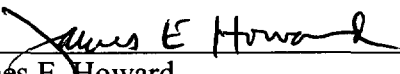
track. Consequently, any discovery that may eventually be permitted should initially be limited to information relevant to the line-excepted track issue.

### CONCLUSION

In summary, the Board should enter an order holding the proceedings in Finance Docket No. 34905 in abeyance generally. In the event that the Board determines that there are issues that remain to be resolved by means of adjudication in this Complaint proceeding and that discovery would be appropriate with respect to such issues, the Board should permit such discovery only in accordance with the principles and protective conditions suggested above and such other conditions as BSOR may request in the future, such as a protective order concerning confidential information.

Respectfully submitted,

BUFFALO SOUTHERN RAILROAD, INC.

  
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Suite 201  
Charlestown, MA 02129  
Telephone 617-886-9322

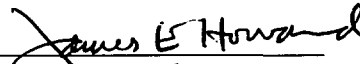
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Crane, Parente, Cherubin & Murray  
90 State Street  
Albany, NY 12207  
Telephone 518-432-8000

Attorneys for Buffalo Southern Railroad, Inc.

Dated: July 19, 2006

Certificate of Service

I hereby certify that I have served the foregoing pleading by sending a copy via Federal Express on July 19, 2006 to Michael B. Gerrard, Arnold & Porter LLP, 399 Park Ave., New York, NY 10022-4690.

  
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James E. Howard

## EXHIBIT A

BEFORE THE SURFACE TRANSPORTATION BOARD

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Finance Docket No. 34903

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VILLAGE OF CROTON-ON-HUDSON, NEW YORK

v.

BUFFALO SOUTHERN RAILROAD, INC.; GREENTREE REALTY, LLC; RS  
ACQUISITION CO., LLC; and NORTHEAST INTERCHANGE RAILWAY, LLC

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VILLAGE OF CROTON-ON-HUDSON, NEW YORK'S FIRST AMENDED DISCOVERY  
REQUESTS TO BUFFALO SOUTHERN RAILROAD INC.

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Michael B. Gerrard, Esq.  
ARNOLD & PORTER LLP  
399 Park Avenue  
New York, NY 10022  
(212) 715-1000

Attorney for:  
VILLAGE OF CROTON-ON-  
HUDSON, NEW YORK

Dated: July 10, 2006

BEFORE THE SURFACE TRANSPORTATION BOARD

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VILLAGE OF CROTON-ON-HUDSON, NEW YORK

v.

BUFFALO SOUTHERN RAILROAD, INC.; GREENTREE REALTY, LLC; RS  
ACQUISITION CO., LLC; and NORTHEAST INTERCHANGE RAILWAY, LLC

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Finance Docket No. 34903

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VILLAGE OF CROTON-ON-HUDSON, NEW YORK'S FIRST AMENDED DISCOVERY  
REQUESTS TO BUFFALO SOUTHERN RAILROAD, INC.

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Pursuant to 49 C.F.R. §§ 1121.2 and 1114.21, .26, .27, and .30, Village of Croton-on-Hudson, New York (the "Village") submits its First Amended Discovery Requests to Buffalo Southern Railroad, Inc. ("BSOR") in connection with the petition filed on June 30, 2006 by the Village in this proceeding. Counsel for BSOR should contact the undersigned promptly to discuss any objections or questions regarding these requests with a view to resolving any disputes or issues of interpretation informally and expeditiously.

The Village requests that BSOR respond to the following Interrogatories and Document Requests in compliance with 49 C.F.R. Part 1114 and in accordance with the following Definitions and Instructions. The responses to these discovery requests should be served on the Village through its undersigned attorney at the address below, by August 1, 2006.

## **DEFINITIONS AND INSTRUCTIONS**

1. “The Village” shall mean the Village of Croton-on-Hudson, New York.
2. “BSOR” shall mean Buffalo Southern Railroad, Inc. and any departments, subsidiaries, affiliates, or related companies, its present and former employees, agents, officers, directors, advisors, consultants, divisions, and all other persons or entities acting on its behalf.
3. “Greentree” shall mean Greentree Realty, LLC and any departments, subsidiaries, affiliates, or related companies, its present and former employees, agents, officers, directors, advisors, consultants, divisions, and all other persons or entities acting on its behalf.
4. “RSA” shall mean RS Acquisition Co., LLC and any departments, subsidiaries, affiliates, or related companies, its present and former employees, agents, officers, directors, advisors, consultants, divisions, and all other persons or entities acting on its behalf.
5. “NIR” shall mean Northeast Interchange Railway, LLC and any departments, subsidiaries, affiliates, or related companies, its present and former employees, agents, officers, directors, advisors, consultants, divisions, and all other persons or entities acting on its behalf.
6. “Regus” shall mean Regus Industries LLC and any departments, subsidiaries, affiliates, or related companies, its present and former employees, agents, officers, directors, advisors, consultants, divisions, and all other persons or entities acting on its behalf.
7. “CSXT” shall mean CSX Transportation, Inc. and any departments, subsidiaries, affiliates, or related companies, its present and former employees, agents, officers, directors, advisors, consultants, divisions, and all other persons or entities acting on its behalf.

8. The “Property” shall mean the property located at 1A Croton Point Avenue in the Village.

9. The “Line” shall mean the approximately 1600-foot track located on the Property.

10. The “Board” shall mean the Surface Transportation Board.

11. “Communicate” and “Communication” shall mean every manner or means of disclosure or transfer or exchange of information whether orally, by document, or otherwise, and whether face to face, in a meeting, by telephone, or other electronic media, mail, e-mail, personal delivery, or otherwise.

12. “Person” shall mean and include natural persons, partnerships, corporations, and all other forms of organization or association.

13. “Document” or any variation thereof is used in its broadest sense and shall mean any writing, drawing, graph, chart, photograph, tape, phono-record, e-mail, magnetic disc, compact disc, or other data compilation from which information can be obtained, translated, if necessary through devices into reasonably usable form, and includes, but is not limited to, correspondence, telegrams, cables, telex messages, minutes, reports, studies, specifications, order forms, bills of sale, leases, recordings of telephone or other conversations, or of interviews, conferences or other meetings, affidavits, statements, journals, statistical records, financial statements, accounting records, desk calendars, appointment books, diaries, lists, tabulations, summaries, computer printouts, photographs, maps, or any other items of a similar nature, including all originals, drafts, and non-identical copies.

14. The terms “relate” or “relating to” are to be used in their broadest sense and shall mean to refer to, discuss, involve, reflect, deal with, consist of, represent, constitute, emanate from, be directed at, or in any way to pertain to, in whole or in part, the subject.

15. The term “solid waste” shall mean solid waste as defined in the regulations of the New York State Department of Environmental Conservation.

16. The singular shall include the plural and vice versa, and the conjunctive shall include the disjunctive and vice versa in order to give these interrogatories the broadest scope.

17. To “identify” or to “describe” a document means to state the following:
- a. The full name of the person who prepared it and his last known address;
  - b. The full name of the person who signed it or over whose name it was issued and his last known address;
  - c. The full name of each person to whom it was addressed or distributed and his last known address;
  - d. The nature and substance of the document with sufficient particularity to enable it to be identified;
  - e. Title and number of pages;
  - f. Its date or, if it bears no date, the date or approximate date when it was prepared;
  - g. Whether any other documents were attached to or included with such documents; and
  - h. Its physical location and the name and address of its custodian.

18. To “identify” a person when used with respect to a natural person means to state the person's full name, home and business addresses and telephone numbers, employer and job position at the present time and at the time to which the interrogatory relates, and whether the person is ill, disabled, incompetent, or deceased. To identify a person where the person to be identified is anything other than a natural person means to state its full name, the kind of legal entity which it is, its present or last known address, and its chief executive officer.

19. “Identify,” “describe,” or any variation thereof, when used with respect to a conversation, meeting, or oral discussion, shall mean stating and describing the date and location of such conversation, meeting, or oral discussion, the name of each person who was present at or who participated in such conversation, meeting, or oral discussion, and the manner in which the conversation, meeting, or oral discussion was conducted (e.g., face-to-face conversation, telephone, etc.).

20. “Identify” means to describe or explain when used in any other context.

21. The answers to these interrogatories and document requests shall include such information and documents as are within BSOR’s custody, possession, or control, or are within the custody, possession, or control of any of BSOR’s consultants, accountants, attorneys, or other agents, or which are otherwise available to BSOR. In responding to these interrogatories, BSOR is specifically instructed to review the personal files, records, notes, correspondence, daily calendars, and telephone logs or records of all persons who have knowledge of the information inquired about in each request.

22. If the answers or portions of answers to these interrogatories are supplied upon information and belief rather than upon actual knowledge, BSOR should so state and specifically describe or identify the source or sources of such information and belief.

23. Each interrogatory should be answered separately and fully in writing. The answers to these interrogatories should include, but not be limited to, an identification of each person having knowledge of the information provided in the answer, and of all documents (including calculations) and communications relating to that information.

24. If BSOR objects to any interrogatory or document request, BSOR must state in writing the reason for the objection.

25. These discovery requests are continuing in nature and should be amended and supplemented immediately if at any time any of the following occurs:

a. BSOR determines that the original answers to these discovery requests as of the time they were filed, for whatever reason, were incorrect;

b. new developments occur (such as the retaining of an expert, etc.) which, if BSOR's answers were being filed as of the time of these new developments, would have to be disclosed in those answers; or

c. new information is developed (such as the identification of additional witnesses or additional documents) which, if known at the time of the filing of the original answers, would have been required to have been disclosed in such answers.

26. Unless otherwise specified, the time period covered by these discovery requests is January 1, 2005, to the date of BSOR's responses.

27. Each interrogatory and document request herein stands independent of each and every other interrogatory and document request. No interrogatory or document request modifies, limits, or relates to any other interrogatory or document request unless specifically stated in the interrogatory or document request.

28. If any discovery request herein cannot be complied with in full, it shall be complied with to the extent possible with an explanation as to why full compliance is not possible.

29. Communications that BSOR has posted on the Board's web site, filed with the U.S. District Court for the Southern District of New York in BSOR's action against the Village, or served upon the undersigned counsel to the Village, should be identified but need not be produced.

### **INTERROGATORIES**

1. Identify all communications between or among BSOR, Greentree, NIR, RSA, Regus, and CSXT, or any of them, regarding the Property or the Line.

2. Identify all agreements between or among BSOR, Greentree, NIR, RSA, Regus, and CSXT, or any of them, regarding the Property or the Line.

3. Identify all facts, events, circumstances and documents that were evaluated, considered, relied upon, or used by BSOR in reaching a determination to operate over the Line.

4. Identify all acts, documents or communications used to inform the Board or the Village of BSOR's plans or intent to operate over the Line.

5. Identify all communications with any public official or governmental entity concerning current or potential rail service provided or to be provided by BSOR over the Line.
6. Describe the ways and manners in which BSOR alleges that the Village has interfered or sought to interfere with BSOR's operations, and identify any associated communications.
7. Identify all reasons that BSOR decided not to seek authority from the STB before commencing operations on the Property and the Line.
8. Identify and describe the Line and all facilities that BSOR is operating on the Property.
9. Identify and describe all of BSOR's current operations on the Line.
10. Identify and describe all operations on the line that BSOR is planning or has planned.
11. Describe in detail how BSOR is providing common carrier services over the Line.
12. Identify all acts, documents and communications in which BSOR has held itself out as providing common carrier service on the Line.
13. Identify all employees on the Line. For each, describe the employee's specific function on the Line and the employee's type of employment
14. Identify all locomotives and cars being used on the Line.
15. Describe all traffic that has moved to, from, and over the Line by carload, commodity, origin, destination, and (if applicable) method for final delivery (i.e., rail or truck).
16. Identify all tariffs for traffic moving to, from, and over the Line.
17. Identify all contracts for traffic moving to, from, and over the Line.

18. Describe BSOR's projections for future traffic to, from, and over the Line by carload, commodity, origin, destination, and (if applicable) method for final delivery (i.e., rail or truck).

19. Identify any business opportunities BSOR received, solicited, accepted or rejected with regard to service along the Line.

20. Identify all communications with former, current and potential future shippers regarding requests or solicitations for service along the Line. Include all marketing, sales or commercial communications in your response.

21. Identify all acts, documents and communications relating to the alleged shipment or attempted shipment of three carloads of materials by Coastal Distribution for delivery to BSOR on the Line, as described in the Motion of BSOR to Dismiss Verified Notice of Exempt Transaction.

22. Identify all past or scheduled inspections of the Line. For each inspection, describe the frequency with which the inspection is scheduled to occur, the person or entity who performed (or will perform) the inspection, the qualifications of any such inspector, and what reports have been or will be prepared in relation to the inspection.

23. Identify all cost studies, cost projections, and cost assessments undertaken by BSOR in connection with operation of the Line.

24. Describe all revenue projections, both gross and net, for the Line.

25. Describe BSOR's actual revenues during 2003, 2004, 2005 and 2006.

26. Describe any background checks that BSOR has conducted with respect to any contracted or potential shippers that would use the Line.

27. State whether BSOR has discussed with Greentree, NIR, RSA, or any potential or contracted shipper the possibility of hauling any type of solid waste, including but not limited to construction and demolition debris, on the line, and if so, describe and identify all such discussions and communications.

28. State whether has hauled any solid waste on its trackage in Western New York, and if so, identify the shipper(s) and consignee(s), and describe the solid waste.

29. Describe any business dealings that BSOR has had with RSA, NIR, and/or Regus other than in relation to the Line or the Property.

#### **DOCUMENT REQUESTS**

1. Produce all documents that are referenced in, or have been used to respond to, these discovery requests.

2. Produce all documents relating to or reflecting agreements or communications between or among BSOR, Greentree, NIR, RSA, Regus, or CSXT, or any of them, regarding the Property or the Line.

3. Produce all documents relating to or reflecting agreements and communications with the owner of the Line, its assignee, or any related entities regarding the Line.

4. Produce all documents relating to BSOR's decision to operate over the Line.

5. Produce all documents relating to or reflecting communications with the STB or the Village regarding BSOR's plans or intent to operate over the Line.

6. Produce all documents relating to or reflecting communications with any public official or land owner concerning current or potential rail service provided or to be provided by BSOR over the Line.

7. Produce all documents relating to BSOR's decision not to seek authority from the STB before commencing operations on the Property and the Line.

8. Produce all documents describing or evaluating the Property or the Line, including, but not limited to, appraisals, track charts, inspection reports, val maps, historic construction plans, FRA reports, maintenance plans, and rehabilitation plans.

9. Produce all documents relating to BSOR's operations on the Line, including, but not limited to, agreements and communications with CSXT, shippers (whether on the Line or not), any provider of service to BSOR on the Line, car and locomotive leases and other financing agreements.

10. Produce all documents relating to traffic that has moved to, from, and over the Line, including, but not limited to, documents relating to tariffs and contracts for traffic that has moved to, from, and over the Line.

11. Produce all documents relating to BSOR's projections for future traffic projected to move to, from, and over the Line.

12. Produce all Bills of Lading for traffic that has moved over the Line.

13. Produce all documents relating to any business opportunities BSOR received, accepted or rejected with regard to requests for service along the Line.

14. Produce all documents relating to or reflecting requests or solicitations for service on the Line.

15. Produce all documents relating to requests by or solicitations for service to former, current and potential future shippers on the Line. Include all documents relating to marketing, sales or commercial communications in your response.

16. Produce all documents relating to the alleged shipment or attempted shipment of three carloads of materials by Coastal Distribution for delivery to BSOR on the Line, as described in the Motion of BSOR to Dismiss Verified Notice of Exempt Transaction.

17. Produce all documents relating to cost studies, cost projections, and cost assessments undertaken by or for BSOR in connection with operation of the Line.

18. Produce all documents relating to revenue projections for the Line.

19. Produce all balance sheets and income statements relating to the Line.

Respectfully submitted,



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Michael B. Gerrard, Esq.  
ARNOLD & PORTER LLP  
399 Park Avenue  
New York, NY 10022  
(212) 715-1000

Attorney for:  
VILLAGE OF CROTON-ON-HUDSON,  
NEW YORK

**CERTIFICATE OF SERVICE**

I hereby certify that on July 10, 2006, I caused the foregoing document to be served by  
overnight courier on the following address:

James E. Howard LLC  
One Thompson Square  
Suite 201  
Charlestown, MA 02129



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Michael B. Gerrard  
Date: July 10, 2006