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*Attorneys for Petitioners*

Dated: April 6, 2007

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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| BEAUFORT RAILROAD COMPANY,     )     | FINANCE DOCKET |
| INC. - MODIFIED RAIL CERTIFICATE   ) | NO. 34943      |

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**RESPONSE OF PETITIONERS TO REPLY OF  
BEAUFORT RAILROAD COMPANY, INC.**

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On December 1, 2006, the Beaufort Railroad Company, Inc., a subsidiary of the South Carolina Division of Public Railways (hereinafter "the Beaufort Parties"), filed a Notice for a Modified Certificate of Public Convenience and Necessity under 49 C.F.R. Section 1150.21, *et seq.* That notice was not served on parties that would have been interested in it, and it was not published in local newspapers where potentially interested parties could be made aware of it.

On December 28, 2006, the Board issued its notice responding to the Beaufort Parties' notice. The Board's notice was published in the *Federal Register* but was not published in any media outlet which potentially interested parties would have seen.

On January 17, 2007, a group of interested parties (hereinafter "the Coberly Group") filed a Petition To Reopen And/Or For Reconsideration in which it asked the Board to vacate its notice. On January 24, 2007, twenty-seven days after the Board published its notice in the *Federal Register*, additional parties sought leave to intervene in the proceeding. While the Beaufort Parties certainly did not welcome the prospective interveners or support the legal position they asserted, neither did they oppose their intervention or try to deprive those parties of an opportunity to be heard by the Board.

On March 22, 2007, certain entities which own land adjoining the erstwhile railroad right of way at issue in this proceeding filed a petition with the Board seeking leave to intervene and participate in this proceeding. Those petitioners (hereinafter "the Landowners") demonstrated how they may be adversely effected by the notice the Beaufort Parties filed and the notice the Board issued and contended that it would be unfair for the Board to proceed without including them as parties in interest. The Landowners associated themselves with certain of the legal positions asserted by the Coberly Group and its allies but distinguished themselves by the substantive issues they sought to raise and the procedural relief they requested.

Unlike their reaction to the filings of the Coberly Group and their allies, the Beaufort Parties replied in opposition to the Landowners and urged the Board to deprive the Landowners of their right to participate in the proceeding. The Landowners hereby respectfully file this Response to the Beaufort Parties' Reply and ask that it be rejected.

The Beaufort Parties assert that the Landowners' petition for leave to intervene is untimely. They assert that they were not required to serve the Landowners or any other potentially interested party, and they contend that even if the Landowners did not have notice of their filing with the Board, it is simply too late for the Board to let them intervene at this time.<sup>1/</sup> This contention is without merit. The Landowners do not suggest and never have suggested that

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<sup>1/</sup> It is noteworthy that the Beaufort Parties did not advance a similar argument in opposition to intervention by the interveners who filed subsequent to the filing of the Coberly Group petition even though, under the Beaufort Parties' standard for lateness, those requests for intervention would have been subject to the same complaint the Beaufort Parties advance against the Landowners. The fact that the Coberly Group was able to intervene within a time period the Beaufort Parties deem acceptable is easily explained by the fact that counsel for the Coberly Group seemed to have an ongoing business relationship of some sort with the Beaufort Parties that would have enabled him to be more informed about what the Beaufort Parties were planning.

the Board's rules required the Beaufort Parties to serve the Landowners or otherwise use their best efforts to see that potentially interested parties were made aware of their proposal. Clearly, the Board's rules do not contain such a requirement. But the Landowners do suggest that since the Beaufort Parties chose to proceed with the Board in secret and chose to eschew any effort to assure that their neighbors were informed about what they were proposing to do, they assumed the risk that they would not be permitted to complain when the Landowners and others seek leave to intervene some time after the Board's notice was published in the *Federal Register*.

The Landowners' position in this regard is particularly compelling when, as here, the effort to exclude them as parties in interest is not justified by anything substantive. The Beaufort Parties have failed to assert that they would be injured in any way if the Board were to permit more parties to intervene, and the Landowners fail to see how such an injury could be shown.<sup>2/</sup> To be sure, the Beaufort Parties do suggest that an "undue delay" will result if the Landowners are permitted to participate. But they fail to show how any delay would result or how that delay, if it were to occur, could be described as undue or could injure them in any way. Accordingly, to the extent the Beaufort Parties try to exclude their neighbors and constituents because the petition for leave to intervene is described by them as untimely, their attempt should be rejected.

The Beaufort Parties also argue that the Landowners should not be allowed to intervene because their central legal position may be the same as or similar to the one tentatively asserted by other parties. The Landowners are not aware of any situation where the Board, its predecessor or any other administrative agency subject to the provisions of the Administrative Procedures Act

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<sup>2/</sup> It might well be contended that, as an instrumentality of the State of South Carolina, the effort of the Beaufort Parties to bar citizens of the State from participating in a proceeding instituted by the State is particularly inappropriate and offensive.

has barred participation by a prospective intervenor just because the central legal position it seeks to advance might be shared by another party. Cases before the Board and its predecessor are legion where, for example, an applicant is opposed by large numbers of intervenors, all of which share the identical goal -- to oppose and defeat the proposal of the applicant. Accordingly, the contention that the Landowners should be barred from participation because one of their central legal positions is similar to one advanced by another intervenor should be rejected.

In addition, it is by no means certain that the goals of the Landowners and those of the Coberly Group and its allies are and will remain the same. It is obvious that the Beaufort Parties have not shown and are not able to show that the interests of those parties may not diverge at some point in the future notwithstanding the fact that, at this time, they share a common basic premise -- that the Board does not have jurisdiction to sanction the notice filed by the Beaufort Parties.

It should also be recalled that the expressed goals of the Landowners with respect to this proceeding are not the same as those declared by the Coberly Group and its allies. Because of the ambiguities and inconsistencies of the notice filed by the Beaufort Parties, the Landowners have sought the institution of an ancillary investigation to explore more completely the bona fides of the notice and to determine more precisely just what the Beaufort Parties seek to achieve through the filing of their notice.<sup>3/</sup> The Coberly Group did not request such an investigation and

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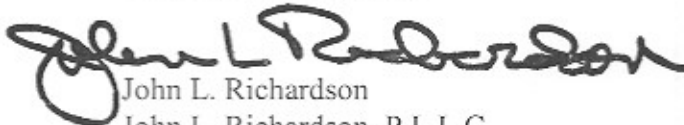
<sup>3/</sup> For example, while the Beaufort Parties seem to be on all sides of the question of whether they intend to engage in interstate commerce, the Board's notice states that the Beaufort Parties do "not expect to make any interchange or interline connections with any connecting railroads." If this is so -- and the Beaufort Parties have not corrected the Board -- it is hard to understand how the Beaufort Parties intend to engage in interstate commerce. More importantly, for present purposes, there exists a clear inconsistency that can only be resolved through the type of investigation the Landowners request.

seemed to be willing to accept that the notice did reflect a good faith effort on the part of the Beaufort Parties to organize and operate a railroad operating in interstate commerce. The Landowners are not sanguine about this conclusion and believe that if the Board is willing to entertain the Beaufort Parties' notice at all, the Board's deliberations will benefit from a factual investigation to test the true goals and ambitions of the Beaufort Parties.<sup>4/</sup>

Thus, the interests of the Landowners and the Coberly Group are demonstrably not the same. It would be completely unjustified for the Board to accept the contention that the Landowners are seeking leave to intervene so they can advance "needless, cumulative reiterations of arguments presented by others." Reply, page 1.

Accordingly, for all these reasons, the Landowners respectfully request that they be permitted to intervene in this proceeding and that their other requests be granted.

Respectfully submitted,



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April 6, 2007

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<sup>4/</sup> The Landowners do not contend that the investigation is needed solely because the Beaufort Parties failed to provide information required by Section 1150.23, although it is clear that their notice does not include all the evidence required by the rule (see, Sections 1150.23 (b)(1)(iii), 1150.23 (b)(3), 1150.23 (b)(4)(ii) and (iii), 1150.23 (b)(6), and 1150.23 (c)), and it is also clear, contrary to the declaration of the Beaufort Parties (Reply, page 3), that the Board never "determined" that the information the Beaufort Parties offered in support of their notice "was complete." The investigation the Landowners believe is necessary will also have to address the ambiguities and inconsistencies in the notice and what those deficiencies may indicate as to the true intentions of the Beaufort Parties; whether they are using the notice they filed in an effort to reestablish interstate rail service or to achieve some other goal they have not yet disclosed to the Board.

CERTIFICATE OF SERVICE

I hereby certify that, on April 6, 2007, I caused a copy of the foregoing document to be served upon the following persons by first-class mail, postage prepaid:

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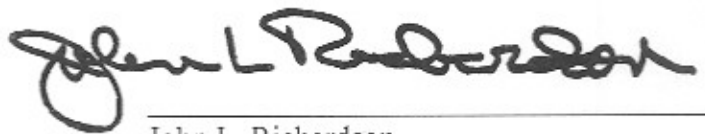
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