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July 28, 2008

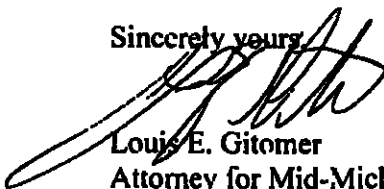
Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D. C. 20423

RE: Docket No AB-364 (Sub-No. 14X), *Mid-Michigan Railroad, Inc*
Abandonment Exemption—in Kent, Ionia, and Montcalm Counties,
MI

Dear Acting Secretary Quinlan.

Enclosed for efilng is a Response to the Petition filed on July 7, 2008. Thank
you for your assistance. If you have any questions please call or email me.

Sincerely yours,



Louis E. Gitomer
Attorney for Mid-Michigan Railroad, Inc.

Enclosure

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. AB-364 (Sub-No. 14X)

**MID-MICHIGAN RAILROAD, INC.--ABANDONMENT EXEMPTION--
IN KENT, IONIA, AND MONTCALM COUNTIES, MI**

**RESPONSE OF MID-MICHIGAN RAILROAD, INC. TO
PETITION TO REVOKE OR REOPEN JUNE 5, 2008 EXEMPTION DECISION AND
PETITION TO EXTEND DEADLINE FOR OFFERS OF FINANCIAL ASSISTANCE OF THE
CITY OF GREENVILLE**

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**Attorneys for: MID-MICHIGAN
RAILROAD, INC**

Dated: July 28, 2008

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. AB-364 (Sub-No 14X)

**MID-MICHIGAN RAILROAD, INC.– ABANDONMENT EXEMPTION–
IN KENT, IONIA, AND MONTCALM COUNTIES, MI**

**RESPONSE OF MID-MICHIGAN RAILROAD, INC. TO
PETITION TO REVOKE OR REOPEN JUNE 5, 2008 EXEMPTION DECISION AND
PETITION TO EXTEND DEADLINE FOR OFFERS OF FINANCIAL ASSISTANCE OF THE
CITY OF GREENVILLE**

Mid-Michigan Railroad, Inc (“MMRR”) responds in opposition to the Petition to Revoke or Reopen June 5, 2008 Exemption Decision and Petition to Extend Deadline for Offers of Financial Assistance (the “Petition”) filed with the Surface Transportation Board (the “Board”) on July 7, 2008 by The City Of Greenville (“Greenville”). The Petition does not meet the criteria for revoking an exemption or reopening an administratively final decision. Nor does the Petition justify the late filing of an offer of financial assistance. MMRR respectfully urges the Board to expeditiously deny the Petition.

BACKGROUND

MMRR commenced the instant proceeding on January 29, 2008, to abandon the 24.70-mile rail line between Lowell, milepost 103.20, and Greenville, milepost 78.50, at the end of the line in Kent, Ionia, and Montcalm Counties, MI (the “Line”) when it served the Combined Environmental and Historic Report as required by the Board’s rules.¹ Among the parties served were the Mayor of the City of Greenville and the Administrator of Montcalm County (where

¹ 49 C.F.R. §1105.7(c), .8(c), and .11.

Greenville is located). The parties were advised that MMRR would file a Petition for Exemption to abandon the Line on or about February 19, 2008. MMRR next published a notice in the Grand Rapids Press on February 19, 2008 that it would file the Petition for Exemption seeking an exemption to abandon the Line. That notice stated that the Petition for Exemption would be filed on or after February 20, 2008, and among other things that OFAs could be filed and that all pleadings were required to be served on counsel for MMRR. MMRR filed the Petition for Exemption on February 20, 2008. According to its rules², the Board published notice of the filing in the Federal Register.³ The Federal Register publication stated that the Petition for Exemption was filed on February 20, 2008, that comments were due on March 31, 2008, that an OFA would be required to be filed by June 19, 2008, and that all filings must be served on MMRR's counsel.

The Petition for Exemption described the burden justifying MMRR's proposed abandonment as follows: (1) traffic on the Line declined from about 3,500 carloads in 1988 to no traffic on the Line in 2007 and 2008 (at 6); (2) capital expenditures of \$125,000 are required for rehabilitation (at 6); (3) annual maintenance costs would be \$123,500 (at 7); (4) opportunity costs are \$656,811 (at 9); and (5) the net liquidation value of the Line was \$3,753,210 (at 9).⁴

Despite the direct notice of the filing provided to Greenville, the newspaper publication, and the Federal Register publication, no protests to the Petition for Exemption were filed. Although Greenville and Delta Properties, GRL sent letters to the Board, the Board properly

² 49 C.F.R. §1152.60(a).

³ 73 *Fed. Reg.* 13069-13070 (March 11, 2008).

⁴ MMRR notes that because of the sky rocketing value of scrap steel, the cost of rehabilitation and maintenance are substantially higher today. In addition, the net salvage value of the track and material in the Line has also increased about two fold since the time the Petition for

considered them as environmental comments because all three were addressed to the Section of Environmental Analysis and were not served on MMRR's counsel. It is important to note that in the May 22, 2008 letter filed by Greenville, that Greenville indicated that it had had discussions with a possible client and that the May 22 letter was filed well in advance of the June 19, 2008 date for filing an OFA. After filing the May 22 letter, Greenville did nothing to protect its opportunity to file a timely OFA. Indeed, Greenville even failed to ask MMRR for information on the valuation of the Line. These facts are crucial because they are contrary to the arguments made by Greenville in the Petition that the emergence of MMBO is a changed circumstance and that Greenville is entitled to reopening in order to late-file an OFA.

Based on the record before and the correspondence from the two parties, none of which questioned the burden on MMRR, the Board granted the exemption subject to standard labor protective conditions, an interim trail use/rail banking condition, and a section 106 process condition.⁵ MMRR has complied with all three of the conditions.⁶

In granting the exemption, the Board concluded:

Detailed scrutiny under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy in this case. By minimizing the administrative expense of the application process, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. An exemption will also foster sound economic conditions and encourage efficient management [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be adversely affected.

Exemption was filed. The burden on MMRR is greater today than it was in February of 2008 when the Petition for Exemption was filed.

⁵ *Mid-Michigan Railroad, Inc.—Abandonment Exemption—in Kent, Ionia, and Montcalm Counties, MI*, STB Docket No. AB-364 (Sub-No. 14X) (STB served June 9, 2008) (the “Exemption Decision”).

⁶ See letters to Acting Secretary Quinlan filed on May 15, 2008 agreeing to negotiate trail use and June 23, 2008 notifying the Board of compliance with the section 106 process and requesting that the condition be removed.

Regulation of the proposed transaction under 49 U.S.C. 10903 is not necessary to protect shippers from an abuse of market power.⁷

The Board set June 19, 2008 as the date for filing an OFA. No OFA was filed. An OFA has not been filed to date. Nor has a request for information been filed.

On July 7, 2008, Greenville filed the Petition.

ARGUMENT

Greenville seeks to have the grant of the abandonment exemption revoked or to have the proceeding reopened. In addition, Greenville seeks an extension of time to file an OFA. The basis for the relief sought by Greenville is speculation over the opening of facility to manufacture "Bio Oils and Bio-Diesel fuel" in Greenville. Petition at 18.

However, there are no concrete proposals that have been put forward by Mid Michigan Bio-Oil ("MMBO"). MMBO is "negotiating" to purchase or lease a portion of an existing warehouse MMBO "anticipates heavy rail use." MMBO wants to locate where rail service is available, but will not consider Greenville for a location if there is no rail service *Id.* Indeed, there is no guarantee that a single carload will ever be proffered by MMBO

MMRR has attempted to explore the likelihood of MMBO actually opening a major rail facility in Greenville. MMBO has provided MMRR no concrete information. MMBO has not indicated that it will acquire the property in Greenville, only that it is negotiating. MMBO has not demonstrated the financial wherewithal to proceed with its proposed project. MMBO has not indicated how long it would take to convert a warehouse into a manufacturing facility and whether it has even applied for any permits, the likelihood of obtaining the permits and how long it would take to obtain the permits MMBO has not indicated to MMRR that it will ship enough

⁷ *Exemption Decision*, at 2.

cars or pay a rate high enough to cover the operating costs of the Line, much less the opportunity costs. An article in the Daily World dated June 10, 2008 (See Exhibit A) indicates that several government officials in Montcalm County are skeptical of the MMBO proposal. Greenville's Petition is based on mere speculation that a factory might open at some unknown future time and might ship goods by rail. The uncertainty of the MMBO proposal does not outweigh the demonstrated burden on MMRR.

MMRR urges the Board to deny all of the relief sought by Greenville.

1. Greenville has not justified revocation of the abandonment exemption.

Greenville contends that the exemption should be revoked because regulation is required: "(1) to ensure the continuation of a sound transportation system to meet the needs of the public (See 49 U.S.C. § 10101(4)); and (2) to foster sound economic conditions in transportation (See 49 U.S.C. § 10101(5))." Petition at 2-3. Greenville equates these two provisions with the need for rail service, but totally ignores the impact on the railroad of being required to retain a burdensome line.

The Board has stated that:

Under 49 U.S.C. 10502(d), we may revoke an exemption, in whole or in part, if regulation is necessary to carry out the rail transportation policy set forth in 49 U.S.C. 10101. We may exercise that revocation authority to protect the integrity of our processes. *Minnesota Comm. Ry., Inc.—Trackage Exemp.—BN RR. Co.*, 8 I.C.C.2d 31, 37 (1991). The party seeking revocation has the burden of proof, and petitions to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted and that regulation of the proposal is necessary. *J&M Rail Link LLC—Acquisitions and Operation Exemption—Certain Lines of Soo Line Railroad Company d/b/a Canadian Pacific Railway*, STB Finance Docket No. 33326 *et al* (STB served Apr. 2, 1997), *aff'd sub nom. City of Ottumwa v. STB*, 153 F.3d 879 (8th Cir. 1998). Here, UTU seeks revocation on the grounds that the notices allegedly contain false and misleading information, but, as discussed below, UTU has failed

to substantiate its claims. Accordingly, UTU has not shown that revocation is warranted ⁸

Greenville did not raise an issue concerning the integrity of the process that MMRR has followed. Greenville's insinuation that it did not receive sufficient notice to participate in the abandonment is belied by the actual and constructive notice that Greenville received, as demonstrated above. Moreover, Greenville was provided with constructive notice by the Federal Register notice that it could protest the abandonment by March 31, 2008. Greenville failed to comply.

Greenville has not raised reasonable, specific concerns or demonstrated that regulation is required. Certainly, Greenville has not even challenged the financial burden that the Line imposes on MMRR. Greenville merely contends that the railroad must provide service, regardless of the financial harm to the railroad and the speculative nature of MMBO. Revoking the exemption and denying the abandonment will not promote the two rail transportation factors cited by Greenville. Instead, MMRR will continue to incur a large burden due to financial losses and assets being tied up in non-productive use. Moreover, if the proposals of MMBO turn out to be nothing more than speculation, MMRR will have incurred substantial costs that will harm the sound transportation system and harm economic conditions in transportation. Indeed, MMBO may decide that there is a better location than Greenville with rail service that will not rely on MMBO as the single shipper and locate there. Greenville has not made a clear and convincing showing of the present need for rail service since there is no shipper, and the need for future rail service is mere speculation, with no concrete plans or proposals.

⁸ *Progressive Rail Inc -Continuance in Control Exemption-Montgomery Short Line LLC*, STB Finance Docket No 35092 and *Montgomery Short Line LLC-Lease and Operation Exemption-Union Pacific Railroad Company*, STB Finance Docket No 35093 (STB served February 13, 2008) at 2.

Greenville also alleges that there may be other projects that might generate railroad traffic. Petition at 5. However, Greenville does not identify a single project, much less the time frame for it to open.

Greenville also seems to rely on the "Overview: Abandonments & Alternatives to Abandonments" dated April 1997 (the "*Overview*") Greenville erroneously claims that the *Overview* is "guidance published by the Board." Petition at 5. However, the *Overview* states that "This paper is not an agency statement approved by the STB, but OPS believes it provides a good overview of these subjects." The *Overview* is not Board guidance and cannot be relied upon as a statement by the agency. Indeed, Greenville's apparent familiarity with the *Overview* must lead to the conclusion that Greenville knew when a protest was due to be filed (*Overview* at 16). Even if *Overview* had any binding effect, Greenville has failed to provide any computations that are required by the *Overview*. Greenville, as does MMBO, relies on indefinite generalities with no time frame or guarantee of rail traffic.

Greenville has not raised a single issue concerning the burden of rail operations on MMRR. It is uncontroverted that: (1) traffic on the Line declined from about 3,500 carloads in 1988 to no traffic on the Line in 2007 and 2008; (2) capital expenditures of \$125,000 are required for rehabilitation; (3) annual maintenance costs would be \$123,500; (4) opportunity costs are at least \$656,811; and (5) the net liquidation value of the Line is at least \$3,753,210. Regulation of the proposed abandonment is not required to foster the rail transportation policy.

2. Greenville has not demonstrated changed circumstances to justify reopening.

Greenville claims that the potential MMBO facility is a changed circumstance that requires the Board to reopen this proceeding. Greenville is wrong.

The Board has stated that

A petition to reopen an abandonment proceeding must state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances. 49 CFR 1152.25(e)(4). In its petition to reopen, OR-DOT alleges materially and substantially changed circumstances, in that the economy of the region has assertedly stabilized sufficiently to support rail operations. IN&P points out in reply, however, that there is not a single guaranteed carload of freight--only allegations that some shippers have expressed a desire to ship by rail--and notes that no traffic has moved on the line, nor has any one requested rail service on the line, in over 5 years.

Speculation that additional traffic might materialize in the future does not justify forcing a railroad to continue to incur losses in operating a rail line, nor does it justify tying up assets that could be used more productively elsewhere. *See, e.g., Burlington Northern Railroad Company--Abandonment Exemption--Between Mesa and Basin City, Franklin County, WA*, STB Docket No. AB-6 (Sub-No. 370X) (STB served Jan. 27, 1997); *Consolidated Rail Corporation--Abandonment Exemption--In Wicomico County, MD*, STB Docket No. AB-167 (Sub-No. 1176X) (STB served Feb. 19, 1997). OR-DOT has not presented sufficient evidence to show that future traffic levels would support the resumption of rail service on this line. Accordingly, it would be inappropriate to reopen this exemption proceeding on this account.⁹

The Board has been presented with an analogous situation in this proceeding by Greenville, except that MMBO is not even an existing shipper and it is unknown when, if ever MMBO will be ready to ship a single car.

As shown in Exhibit A, MMBO's plans have been known since at least late May or early June, if not before. MMBO's plans are not changed circumstances. Greenville and MMBO have "not presented sufficient evidence to show that future traffic levels would support the resumption of rail service on this line." *Id.* MMRR contends that there is no evidence of changed circumstances and urges the Board to reach the same conclusion.

3. An extension of time to file an OFA is not justified.

⁹ *Idaho Northern & Pacific Railroad Company--Abandonment Exemption--in Wallowa and Union Counties, OR*, STB Docket No. AB-433X (STB served December 13, 2001) at 3.

Greenville seeks an extension of one to two months to file an OFA because of the potential impact of the abandonment, the minimal impact of the extension on MMRR, and the general policy favoring continued rail service. However, Greenville does not commit to the filing of the OFA, but merely that the extension is needed "to allow interested parties an opportunity to submit an OFA." Petition at 8. MMRR contends that all of Greenville's arguments are wrong in this proceeding and the speculative nature of the unknown potential offeror does not support an extension.

The Board has stated:

that the OFA process includes Congressionally imposed deadlines designed to protect the owning railroad from bearing the costs associated with unreasonable delay in disposing of rail lines approved for abandonment. Although we have extended the deadlines when the owning railroad does not object to the extension because that Congressional intent is not compromised, here the owning railroad objects to further delay in this proceeding.¹⁰

MMRR objects to extending the deadline to for Greenville or any other party to file an OFA.

MMRR does not believe that MMBO will be able to open the facility it is discussing in the near future, if at all, and that the proposed traffic will not materialize.

An extension will not have a minimal impact on MMRR. First, MMRR has entered a contract to sell the real estate underlying the Line by December 31, 2008. Second, the value of the track and materials in the Line are at an all time high and MMRR stands to lose substantial value if the sale of the track and materials is delayed as sought by Greenville.

An extension of the OFA process does not represent the Board's policy when the abandoning railroad opposes the extension and the railroad would suffer harm. The unknown

¹⁰ *CSX Transportation, Inc.—Abandonment Exemption—in Franklin County, PA*, STB Docket No. AB-55 (Sub-No. 568X) (STB served July 27, 2005) at 5.

identity of the offeror weighs against an extension. Greenville and any potential offeror have ignored the Board's process until this time. The Petition was filed nearly three weeks after the OFA was due, and now Greenville seeks a one to two month extension for the filing of an OFA, without any assurance that the offeror will be financially responsible or that the unknown offeror and MMRR will be able to reach agreement. Indeed, it is MMRR's experience that this type of proceeding would result in a 30-day negotiation period, followed by another 30-day period for the Board to set terms and conditions, including a 90-day window for closing. Adding the five months to the one to two months sought by Greenville would require MMRR to retain the Line well into the first quarter of 2009 and forego the sale of the Line for trail use by the end of 2008 and the immediate sale of the track and materials at historically high levels.

In light of the harm to MMRR that would occur if the Board granted the extension, MMRR respectfully requests the Board to deny the extension request.

Greenville contends that it will lose rail service and have limited highway access.

CONCLUSION

The Board has found that the application of the regulatory requirements and procedures of 49 U.S.C. § 10903 to the abandonment of the Line is not required to carry out the rail transportation policy set forth in 49 U.S.C. § 10101, and that regulation is not required to protect shippers from the abuse of market power.

MMRR has demonstrated that: (1) traffic on the Line declined from about 3,500 carloads in 1988 to no traffic on the Line in 2007 and 2008; (2) capital expenditures of \$125,000 are required for rehabilitation; (3) annual maintenance costs would be \$123,500; (4) opportunity

costs are at least \$656,811; and (5) the net liquidation value of the Line is at least \$3,753,210.

Greenville has not questioned this showing.

MMRR respectfully requests the Board to deny Greenville's Petition seeking: (1) revocation of the abandonment exemption granted in this proceeding; (2) reopening of an administratively final decision because Greenville has not demonstrated changed circumstances; and (3) an extension of time to file and OFA.

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Respectfully Submitted,



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Attorneys for: MID-MICHIGAN
RAILROAD, INC.

Dated: July 28, 2008

EXHIBIT A-THE DAILY WORLD ARTICLE

From: Dine, Bob (MMRR)
 Sent: Monday, June 23, 2008 4:47 PM
 To: Bobby, Jack (HESR), Bobic, Mike (HESR)
 Cc: Franger, Sandy K. (Boca)
 Subject: Emailing: Main.htm



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New energy project has eye on Greenville

Ryan Jeltner
 Assistant News Editor

"I don't know how to take it. It was very vague all the way around. There's a lot of talk but nothing to show for it. He never came up with a solid plan. If he's got something, fine, let's see it." - Ronald Retzlaff, Montcalm County commissioner

STANTON - A businessman Monday unveiled what appear to be conceptual plans for a proposed alternative energy facility at the former Electrolux property in Greenville that would cost up to \$150 million and potentially support thousands of jobs.

Charles Rhines, president of Mid-Michigan Bio-Oil Inc., told the Montcalm County Board of Commissioners that the operation would start with about 40 employees and eventually expand to about 400 jobs. Another 3,000 to 4,000 people would be required "to sustain and enhance those jobs" but they would not be direct employees.

Board Chairman and District 7 Commissioner Patrick Q. Carr said after the meeting that Rhines called most or all the nine commissioners over the past several weeks to brief them on the project and the need for rail service. Rhines indicated he hoped they would support the city of Greenville's efforts to maintain rail service.

Carr and District 3 Commissioner Ronald Retzlaff both said they were somewhat skeptical about Rhines' plans because few details were available.

"I don't know how to take it. It was very vague all the way around," Retzlaff said. "There's a lot of talk but nothing to show for it. He never came up with a solid plan. If he's got something, fine, let's see it."

Retzlaff believes the project may involve biofuels and food production from corn and soybeans grown by local farmers. Rhines said the company already is operating out of state and would move its headquarters to Greenville but he declined to say where the other operations are located and exactly what work would be done locally.

"We're talking hundreds of thousands of people that would receive benefits processing this here rather than shipping this out of state or the country," Rhines said.

He said he previously considered locating the project in Greenville but backed off when the area appeared unsuitable. After considering other locales, Greenville got back in the running.

"Everything that your governor has been striving for to increase in Michigan is happening through us



It seemed like your governor was speaking directly to us so we started pursuing this harder," he said "There is no other location in Michigan worthy of us pursuing."

Rhines would not discuss a project timeline

"All we need is transportation rights. Everything else is in place," he said "It is our intent to keep the rail and expand the system but that requires your assistance and participation."

At Greenville's request the commissioners have delayed action since April on a request from the West Michigan Trails and Greenways Coalition to support turning a 34.5-mile stretch of the Mid-Michigan Railroad corridor from Greenville to Lowell into a pedestrian trail.

The commissioners appear unwilling to back Rhines' efforts further until more details are revealed.

Retzliff said Rhines easily should be able to pay a \$1,300 filing fee with the Surface Transportation Board in Washington, D.C., before a June 19 deadline to declare his intent to help subsidize the \$250,000 annual operating shortfall Mid-Michigan Railroad says it is incurring on the Greenville to Lowell line.

"I would back away from him until there's something there," Retzliff said. "If he's really got something that big, they'll pay \$1,300 to file papers and that would delay for a while I'm sure."

Reader Comments

Posted: Wednesday, June 11, 2008

Article comment by: **MMBO**

From the President's office MMBO.

It is our pleasure to announce our desire and interest to locate MMBO in Greenville Michigan.

We will be very community orientated. This means we desire to only bring good things to the area. We are also interested in the public's opinions and concerns and value your comments. While we can not disclose all our business activities and interests at this time, we invite your dialog. We set up an email account for you the people of Greenville to send comments and to receive our response.

MMBO Michigan@gmail.com

As to rail, while we wish to set up operations in your town and provide the jobs and products produced, this would not be welcomed at the expense of your access to the roads if trucking were our only means of transport. Rail is required.

We give our best. MMBO

Posted: Tuesday, June 10, 2008

Article comment by: **Mike Mulholland**

Okay.. so if this job is bringing IN employees, and a large number of them, but they need to have the railroad... simple solution for both. build the pedestrian trail NEXT to the railroad. Both parties are happy that way. build a fence in between them for safety.

Article Comment Submission Form

Please feel free to submit your comments

Article comments are not posted immediately to the Web site. Each submission must be approved by the Web site editor, who may edit content for appropriateness. There may be a delay of 24-48 hours for any submission while the web site editor reviews and approves it.

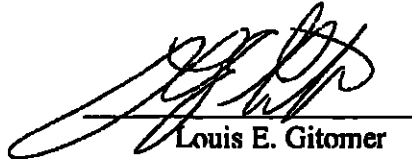
Note: All information on this form is required. Your telephone number is for our use only, and will not be attached to your comment.

Name:

Telephone:

CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the foregoing document was served by first class mail postage pre-paid on the parties of record in this proceeding.



Louis E. Gitomer
July 28, 2008