



STATE OF NEW YORK
DEPARTMENT OF TRANSPORTATION
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ASTRID C. GLYNN
COMMISSIONER

DAVID A. PATERSON
GOVERNOR

September 18, 2008

The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 L Street, SW
Washington, DC 20024

Dear Secretary Quinlan:

RE: Finance Docket 35141
US Rail Corporation - Construction and Operation
Exemption - Brookhaven Rail Terminal

The New York State Department of Transportation (NYSDOT) hereby submits comments concerning the above-listed Petition. I am filing this request on behalf of NYSDOT as an attorney who is licensed to practice law in the State of New York.

In the past nineteen months, Sills Road Realty LLC (Sills), Suffolk & Southern Rail Road LLC (Suffolk) and/or US Rail Corporation (US Rail) have proposed to construct the Brookhaven Rail Terminal (BRT) to handle construction aggregates. The BRT will be located within the Town of Brookhaven (Brookhaven) in Suffolk County, New York. Suffolk County is located on the eastern half of Long Island and there are no local sources of construction aggregates. Most of this material is currently delivered to the region from quarries in upstate New York and Connecticut by truck. In the above-listed Petition, US Rail states:

Sills desires to replace truck with rail transportation because increased fuel costs, higher tolls, lower gross vehicle weights over bridge crossings and increasing highway congestion on and off Long Island make motor carrier transportation non-economical and impractical. (Petition, p. 4-5)

As a result, the proposed BRT is consistent with a number of the goals and strategies set forth by

NYSDOT in its June 2008 Draft of the New York State Rail Plan which can be found at <https://www.nysdot.gov/portal/page.portal/divisions/policy-and-strategy/planning-bureau/state-rail-plan>. Specifically, these goals include the removal of trucks from the New York City Metropolitan area's congested highway network, increasing the rail market share in the Metropolitan area and providing additional freight yard capacity in the region. I would also note that State and local governments are among the largest consumers of construction aggregates for use in highway construction and maintenance operations in the region. The BRT may reduce shipping costs for this material which may result in direct benefits to the taxpayers of the State by lowering the costs of highway construction and maintenance activities. However, despite these benefits, the above-listed Petition does not have NYSDOT's unqualified support. Before discussing our concerns, we believe that it would be appropriate to briefly outline the history of the BRT.

On February 1, 2007, NYSDOT received an application for public funding from Suffolk for construction of the BRT. After reviewing the application, NYSDOT informed Suffolk that in order to qualify for public funding, Suffolk needed to be either an existing rail carrier or have a public sponsor, such as Brookhaven, Suffolk County or a local Industrial Development Agency.

On April 3, 2007, Suffolk filed a Notice of Exemption to become a rail carrier under Docket FD 35014, Suffolk & Southern Rail Road LLC – Sublease and Operation Exemption – Brookhaven Rail Terminal. In their application, Suffolk stated:

The parties to this transaction have decided to seek operating authority under the ICC Termination Act in order to obtain railroad rehabilitation funding from the New York State Department of Transportation. (Notice, p. 4).

On April 25, 2007, Suffolk requested that this proceeding be held in abeyance, citing inaccurate information contained in their April 3rd filing. The Board granted the request in a Notice published May 2, 2007 and there have been no further filings, notices or decisions in Docket FD 35014 to date.

On May 18, 2007, Suffolk filed a second Notice of Exemption to become a rail carrier under Docket FD 35036 Suffolk & Southern Rail Road LLC – Lease and Operation Exemption – Sills Road Realty LLC. The Board is well aware of the extensive pleadings under this Docket by NYSDOT, Sills, Suffolk, US Rail, Brookhaven and The New York & Atlantic Railway (NYAR). NYSDOT will not recount the details of this docket, but requests that the filings by all parties and all decisions and notices of the Board in FD 35036 be incorporated by reference in the above-listed proceeding.

On August 7, 2008, US Rail filed the above-listed Petition for the same facility which was the subject of the two prior proceedings which are still pending and requests expedited handling.

In the above-listed Petition, US Rail claims that their initial service will consist of approximately 40 to 50 cars of inbound crushed aggregate stone twice weekly and offers the unsubstantiated statement that this volume should have no adverse impact on either the Long Island Rail Road's (LIRR) or NYAR's service. Given the density of commuter operations on the LIRR and the limited operating windows for freight operations by NYAR, LIRR and NYAR should be requested to provide the Board with an assessment of the impact of this new traffic on their operations before taking action in the above-listed proceeding.

US Rail further claims that the project will be environmentally beneficial, but provides no information to support this claim. Such a determination can only be made after the completion of an environmental assessment by the Board. This assessment must consider both the beneficial environmental impacts of moving freight by rail and the potential negative environmental impact caused by the construction of the BRT on what had been 28 acres of undeveloped land prior to the unauthorized clearing and earthmoving operations conducted by Sills and US Rail until ordered to cease construction by order of the Board on October 12, 2007 under Docket FD 35036. Under Section 10901(c), the Board may issue a certificate authorizing construction unless it finds that such construction would be inconsistent with the public convenience and necessity. However, the Board has the discretion to deny US Rail's Petition on environmental grounds (See Decision No. 13 at 9 (Commissioner Buttrey concurring, by separate expression) Cf. Alaska Railroad Corp. – Const. and Oper Exempt – Rail Line between Eielson AFB and Fort Greeley, AK, STB Finance Docket No. 34658 (STB served October 4, 2007) at 2).

Opponents of this project could argue that Sills, Suffolk and US Rail have misused the Board's procedures in an attempt to avoid environmental and/or local government review of their project through two prior filings (FD 35014 and FD 35036) with the Board regarding the same facility. US Rail now comes before the Board in this third filing (FD 35141) relating to the same facility and requests expedited handling. Such a request for expedited handling is inappropriate and should be denied. If Sills, Suffolk, or US Rail had filed the above-listed Petition at the time of their initial filing in FD 35014 sixteen months ago, it is likely that the Board would have issued a decision on the merits of their Petition by now. As noted already, this is the third Petition that has been filed with the Board relating to the construction and/or operation of the BRT. Opponents of this project may very well feel that they have been playing an administrative game of "Whack-a-Mole," in that whenever objections to or concerns have been raised with the construction of the BRT, a new Docket "pops up" to frame the issues in a slightly different manner.

As a part of the above-listed Petition and a request for expedited handling, a verified statement of Gerard Drum, the Chief Financial Officer and General Counsel of Sills, noted that the BRT is essential for Sills to meet its contractual commitments to customers for the supply of construction aggregates. However, the reliance of Sills on the availability of a terminal which does not exist in making contractual commitments should not be a basis for the Board to expedite this proceeding, especially in light of the prior filings of Sills, Suffolk and US Rail with respect to the BRT. NYSDOT is unmoved by Sills Group's claims regarding contractual commitments to customers. Sills was well aware of, or should have been aware of, the Board's actions in issuing a cease and desist order in Docket FD 35036 and that there was the potential that the BRT would not be opened on the schedule proposed by Sills, Suffolk and/or US Rail.

In addition to the arguments raised above opposing the request for expedited handling, the schedule proposed by US Rail for development, publication and comment upon a NEPA EA/DEIS is simply unrealistic. As proposed by the applicant, the schedule provides a mere 37 calendar days from the initial determination for the need for public scoping meeting and only 20 calendar days from the classification of the action by the Board's Section of Environmental Analysis for the publication of a Draft EA/EIS. The public is provided only twenty calendar days (including the Thanksgiving holiday weekend) to review and comment on the document and the SEA is offered only eight calendar days (including Christmas Eve) to review the comments received, resolve those comments, and publish a Final EA/EIS. If all of the above were to be accomplished, the Board is then asked to make a decision based on the merits of the Petition seven calendar days (including Christmas Day and New Year's Eve) later. Such a schedule does not serve the public interest.

NYSDOT believes that the proposed BRT has the potential for considerable transportation, economic and environmental benefits. The facility will remove trucks from the bridges and highways in the New York City Metropolitan area, will lower transportation costs and improve the availability of construction aggregates (of which all levels of New York State government are large consumers) and reduce fuel consumption and diesel emissions in an Air Quality non-attainment zone. As such, NYSDOT supports the construction of the BRT. However, this support is qualified by the need to perform the appropriate environmental reviews prior to authorizing construction of the BRT. Such review should consider the characteristics of the site prior to any construction activities undertaken by Sills, Suffolk, US Rail, or any contractors or affiliates.

In issuing its decision, NYSDOT respectfully requests that the Board institute a proceeding under 49 U.S.C. 10502(b) and impose the following conditions:

1. That Suffolk should be required to request the Board to terminate the proceedings currently pending under FD 35014 and FD 35036, provided that the filings and petitions of any party and the notices and decisions of the Board issued in FD 35036 are incorporated by reference and made a part of the above-listed Petition, including the cease and desist order.
2. That the request for expedited handling be denied.
3. That a reasonable schedule for completion of the required environmental reviews, publication of NEPA documents, public review and comment, and issuance of a Final EA/EIS should be established.
4. That the LIRR and NYAR should be requested to provide the Board with an assessment of the impact of this new traffic on their operations

I am, by copy of this letter, serving this letter on all parties of record.

Sincerely yours,



ROBERT A. RYBAK
Division of Legal Affairs

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