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VIA E-FILING

Cynthia T. Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: Norfolk Southern Railway Company – Abandonment Exemption – In Roanoke,
Virginia, AB-290 (Sub-No. 389X)

Dear Ms. Brown:

Please find enclosed Norfolk Southern Railway Company's Reply in Opposition to Thoroughbred Energy & Environmental Corporation's May 22, 2017 Request To Toll The Time Period To File An Offer Of Financial Assistance. If there are any questions about this pleading, please contact me directly either by telephone or by e-mail, or if I am unavailable you may contact my associate, Crystal Zorbaugh, who can be reached at (202) 663-7831 or by e-mail at czorbaugh@bakerandmiller.com.

Sincerely,



William A. Mullins
Attorney for Norfolk Southern Railway Company

cc: Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

AB-290 (Sub-No. 389X)

**NORFOLK SOUTHERN RAILWAY COMPANY
– ABANDONMENT EXEMPTION –
IN ROANOKE, VIRGINIA**

**REPLY IN OPPOSITION TO REQUEST TO TOLL THE TIME PERIOD TO FILE AN
OFFER OF FINANCIAL ASSISTANCE**

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**Attorneys for Norfolk Southern
Railway Company**

May 23, 2017

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

AB-290 (Sub-No. 389X)

**NORFOLK SOUTHERN RAILWAY COMPANY
– ABANDONMENT EXEMPTION –
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**REPLY IN OPPOSITION TO REQUEST TO TOLL THE TIME PERIOD TO FILE AN
OFFER OF FINANCIAL ASSISTANCE**

Norfolk Southern Railway Company ("NSR") hereby replies to Thoroughbred Energy & Environmental Corporation's May 22, 2017 Request To Toll The Time Period To File An Offer Of Financial Assistance ("Request").¹ The Board should deny the Request. Offeror offers two rationales for the proposed extension, but as explained herein neither such rationale provides sufficient grounds for granting Offeror an extension of the time to file an OFA, and continuing to unnecessarily delay this proceeding to NSR's and the City of Roanoke's detriment.

As an initial matter, it is important to note that neither of the rationales provided by TEEC rely upon the failure of NSR to promptly respond and produce the information required by the Board's May 5th Decision, which accepted TEEC's late-filed Notice Of Intent To File An Offer Of Assistance ("NOI") for the 0.5 miles. Indeed, on May 11, less than week after the

¹ TEEC, a non-carrier, is a Virginia corporation owned by David L. Foster. TEEC is referred to herein as ("TEEC" or "Offeror"). It is unclear why the Board is accepting filings on behalf of TEEC being submitted into the record by Mr. Foster. Under the Board's rules located at 49 C.F.R. § 1103.2 and 49 C.F.R. § 1103.3, only a lawyer or STB practitioner may represent TEEC. See Norfolk Southern Ry.--Petition for Exemption--in Baltimore City & Baltimore County, Md., AB 290 (Sub-No. 311X), slip op. at 3 (STB served Mar. 22, 2010). See also Strohmeyer v. Surface Transportation Board, Nos. 16-4362 & 16-4435 (3rd Cir. May 18, 2007). To NSR's knowledge, Mr. Foster is neither a licensed attorney nor practitioner approved to practice before the Board. Mr. Foster may represent himself, but not TEEC.

Board's decision, NSR, pursuant to 49 C.F.R. § 1152.27(a) and 49 C.F.R. § 1152.27(d), provided Offeror with all of the information necessary for Offeror to prepare and file an OFA, including deeds, valuation maps, a listing of the rail and other track materials, an estimate of the salvage value of the track and OTM, and the price that the City of Roanoke was willing to pay for the real property. NSR supplemented this information on May 16 and 17 promptly in response to Offeror's requests for further clarification. Indeed, NSR even prepared and produced two additional maps, at its expense and solely for the benefit of TEEC, in order to be as cooperative as possible and provide TEEC with full disclosure and information. Given that OFA deadlines are to be strictly enforced and that there are no allegations that NSR failed to provide the required information in a timely manner, there is no basis to extend the OFA deadline further.²

TEEC does not contest or argue that NSR failed to provide it with timely information or that NSR's production was insufficient. Instead, Offeror claims that it needs additional time to digest the materials provided and that he finds "it impossible to craft a cogent OFA by the May 24 deadline set forth by STB." See Request at 2. The first basis for this "impossibility" claim is that Offeror claims to be confused by the location of the line; however, this confusion is one of Offeror's own making and is not a justification for tolling the very strict OFA deadlines.

Offeror continues to rely upon an inaccurate map issued by the Board in its Environmental Assessment ("EA") on March 28, 2017. The EA included an erroneous map prepared by the Board's Office of Environmental Analysis ("OEA") and which itself contains a

² Cf., SWKR Operation Co. -- Abandonment Exemption -- In Cochise County, AZ, AB-441 (Sub-No. 2X), 1997 STB Lexis 2890 (STB served March 12, 1997) (failure of abandoning carrier to provide timely information justified tolling the OFA deadline).

disclaimer that it is to be used “for reference purposes only.” NSR did not prepare this map and has informed Offeror repeatedly that this map is inaccurate.

NSR has explained to Mr. Foster several times that the map originally included in NSR’s Environmental and Historic Report (“E&HR”) had the end points reversed but was nonetheless accurate with respect to the starting and ending mileposts, the correct length of the line, and the approximate location of the line.³ At no point has NSR provided a map to either the Board or to TEEC showing the to be abandoned line as extending into the line serving Associated Asphalt, as the map in the EA produced by Board staff appears to do and upon which TEEC apparently continues to rely. All maps produced by NSR in both the E&HR submitted to the Board and in the Notice of Exemption (“NOE”) filing contained the accurate endpoints, the accurate length of the to be abandoned line, and the approximate location of the line. Likewise, the valuation maps and produced deeds also indicated the length and location of the line, as did the additional maps produced in response to Mr. Foster’s questions.⁴ It is simply not credible that it is “impossible to craft a cogent OFA” because of the one inaccurate map provided by Board staff in the EA when all other maps have been accurate.

As the Board is well aware, the Offeror previously used a mistake by the Board’s Rail Customer and Public Assistance Program to justify late-filing his NOI. Now, Offeror wants to punish NSR for the Offeror’s reliance upon one faulty map that NSR did not prepare even

³ Noticing the error of reversing the endpoints, NSR filed an errata on March 15, 2017 to provide a corrected map.

⁴ Offeror says that an “accurate determination of the end points” (Request at 3) is the most important issue. NSR agrees. There has never been a dispute about endpoints. The endpoints in all of NSR’s maps have remained the same throughout this proceeding. The additional maps provided to Mr. Foster showing close-up viewpoints of the end points also contained the same endpoints. These endpoints have always been consistent and have not changed. There is simply no reason to toll the deadline for submitting an OFA because the Offeror made faulty assumptions and waited to the last moment to verify information that he had over 40 days to confirm.

though all other maps have been accurate. Offeror has had at least 40 days to review and discuss the map issue and has been informed numerous times that the map he was relying upon was not the right map. NSR's NOE and E&HR have both been certified as meeting all requirements for an abandonment exemption proceeding, and no shipper has suggested otherwise. The Offeror is simply using an incorrect map in the E&HR as a tactical maneuver to give the Offeror more time to prepare an OFA. The Board should reject this excuse.

Offeror also claims that tolling the deadline is justified because there are conflicting ownership claims concerning the right of way and differing valuations based upon whether the real property is held in fee simple or via easement. As the Board knows, this issue frequently arises during OFAs. In such OFA proceedings, each side submits evidence as to what they believe the value should be based on their view of how title is held. Parties often times put in expert opinion as the quality of title. The Board makes the ultimate determination of real estate value and quality of title based upon this evidence.⁵

As acknowledged by Offeror, "NSR has provided Offeror with copies of numerous deeds to support the railroad's claim that it owns this real estate in fee simple." Request at 3. NSR did so in a timely manner. There is no need to toll the time period for filing an OFA simply because the parties disagree as to the quality of title and its value. In submitting its OFA, either Offeror accepts NSR's claims of ownership and value, or Offeror can offer its own value for the real

⁵ NSR has already provided Offeror evidence that it owns the land in fee simple. It is important to recognize that should the parties not agree on value of the land, Offeror has the right to ask the Board to set the terms and conditions. If the Board ultimately sets the terms and conditions, the railroad will be required to support its valuation. Once a railroad provides evidence of value of the nature of real estate ownership, the burden of proof shifts to the offeror to demonstrate that the railroad lacks marketable title to the property, only then is the Board precluded from assigning any value to the real property for purposes of NLV. See e.g., Burlington Northern Railroad Company – Abandonment Exemption – In Snohomish County, WA; In The Matter Of A Request To Set Terms And Conditions, AB-6 (Sub-No. 375X) (STB served Mar. 8, 1996).

estate based on its own beliefs as to the quality of title. If there is a difference, Offeror can request the Board to set the terms and conditions. The Board will be the ultimate decider based upon the evidentiary record. The fact that the parties may disagree over the value and quality of title is not a justification for tolling the deadline for submitting an OFA.

Neither of the Offeror's rationales is a valid reason for further delaying this proceeding. As stated herein, the endpoints have always been accurate, the information in the NOE was accurate, no shipper has complained, and NSR has given the Offeror all of the required information. NSR has supplemented that information in a timely and responsive manner. There is no dispute that NSR has been fully cooperative and responsive. NSR has done its part. The Offeror is free to accept NSR's values or not. The Offeror has all relevant information to make its own determination as to value. There is no need to further delay the deadline. If Offeror does not agree with NSR, it can submit its own values. If different, Offeror can then request the Board to set the terms and conditions. That is the normal process. That process should continue here without further delay.

Respectfully submitted,

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