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April 26, 2017

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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

ENTERED  
Office of Proceedings  
April 26, 2017  
Part of  
Public Record

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

Dear Ms. Brown:

Norfolk Southern Railway Company ("NSR") hereby replies to the April 24<sup>th</sup> letter submitted by Mr. David L. Foster and Thoroughbred Energy & Environmental Corp (collectively, "Offeror"). Offeror's April 24<sup>th</sup> letter replied to NSR's April 19<sup>th</sup> request that Offeror's notice of intent to file an offer of financial assistance ("NOI") be rejected. Offeror makes several points that require clarification and correction, but none that justify in any way further delay of the effectiveness of this abandonment.

Offeror has provided one explanation as to why the NOI was ten days late. Apparently, notwithstanding that the notice of exemption published by the Board itself on March 23<sup>rd</sup> ("Notice") specifically stated that notices of intent to file an offer of financial assistance ("OFA") were due April 3, Offeror relied upon equivocal and ultimately incorrect information from the Office of Public Assistance, Government Affairs, and Compliance ("OPAGAC"). Given the specific April 3 date in the Notice and OPAGAC's informal, non-binding role, Offeror should not have relied upon this informal and indefinite information.

Even if this excuses the late filed NOI, which it should not given the importance of deadlines in the OFA process,<sup>1</sup> Offeror's NOI should still be rejected because Offeror has not

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<sup>1</sup> Board precedent has made clear that the statute requires that OFA's and abandonments be processed expeditiously including adherence to established procedural timeframes. See General

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shown that there is the potential for future common carrier service over the line.<sup>2</sup> As noted previously in NSR's April 19<sup>th</sup> letter, at best, Offeror seeks to retain the line for excursion train purposes, which is not a common carrier purpose. There are also no existing or future shippers requesting service. These two facts alone justify rejection of the NOI. In addition, the two parties who Offeror claims as wanting to preserve the line and who Offeror proffers as justification for his potential OFA – Roanoke Southern, LLC and Virginia Museum of Transportation – have both submitted statements supporting the abandonment of the line and in opposition to the NOI, which further supports rejection of the NOI.

Offeror also claims that there is an active shipper on the line, Associated Asphalt (“AA”) and that either NSR's map is wrong or the statement that there are no active shippers is wrong. Offeror is wrong, not NSR. AA is an active shipper, but NSR accesses AA from west of the Line<sup>3</sup> to be abandoned. The switch to access AA is located at approximately milepost 3.6. NSR has no plans to abandon that portion of its line and will continue to provide service to AA as it does today. Current usage includes AA's utilization of the sidetrack, as well as at times the mainline, to load asphalt up to the switch at the western edge of the Line to be abandoned at approximately milepost 4.0.<sup>4</sup> Furthermore, AA has not filed in support of the NOI nor has it opposed the abandonment. There simply are no current or future shippers that could be served on, over, or via the Line.

Offeror also raises potential environmental issues. Those issues do not warrant further delay of the effective date of this abandonment. As an initial matter, these issues should have been raised as comments in response to the Board's Environmental Assessment (“EA”) issued in this proceeding on March 28, 2017. They were not and are thus late-filed and should be rejected.

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Railway Corporation d/b/a Iowa Northwestern Railroad-Abandonment Exemption - In Osceola and Dickinson Counties, IA, AB-1067 (Sub-No. 2X), slip op. at 2 (STB served October 24, 2008) See also R.R. Ventures, Inc. v. Surface Transp. Bd., 299 F.3d 523, 531 (6th Cir. 2002); see also Mid-Michigan Railroad, Inc. - Abandonment Exemption - In Kent, Ionia, and Montcalm Counties, MI, AB-364 (Sub-No. 14X), slip op. at 5 (STB served Sept. 26, 2008).

<sup>2</sup> A potential offeror must establish that there is the potential for future common carrier rail service. See Los Angeles County Metropolitan Transportation Authority—Abandonment Exemption—in Los Angeles County, California, AB 409 (Sub-No. 5X), slip op. at 3 (STB served June 16, 2008); see also Offers of Financial Assistance, EP 729, slip op. at 1 (STB served Sept. 30, 2016) (“NPRM”). Offeror has failed this test.

<sup>3</sup> NSR seeks to abandon rail service over approximately 0.5 miles of rail line extending from milepost R 4.0 on the western terminus to milepost R 4.5 on the eastern terminus (the “Line”).

<sup>4</sup> To the extent that any portion of the Line may be useful in switching traffic or spotting cars for AA, such trackage can be utilized as excepted industrial track pursuant to 49 U.S.C. § 10906 after abandonment.

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Nonetheless, the Board's proposed salvage conditions already address the concerns raised by Offeror. NSR intends to fully comply with those proposed salvage conditions. But the existence of these concerns and of the salvage conditions cannot and should not prevent consummation of the abandonment.<sup>5</sup> As such, the existence of these concerns is not a basis to continue the Board's housekeeping stay.

In yet another attempt to forestall consummation of the abandonment, Offeror claims that NSR is required to comply with the National Trails Systems Act, 16 U.S.C. §1241, et seq. ("Trails Act") in order to implement an agreement with the City of Roanoke regarding the establishment of a trail on the right-of-way. Offeror is incorrect. The Trails Act is purely voluntary.<sup>6</sup> There is no statutory requirement prohibiting the establishment of a trail outside of the Trails Act. The fact that the City desires to establish a trail on the right-of-way and NSR seeks to facilitate that decision outside of the Trails Act is not justification for a further stay of the consummation deadline.

Offeror's supplemental filing simply does not provide a justification for continuing the housekeeping stay. The NOI was late-filed. Offeror has not shown that any potential OFA is for continued rail service. For these reasons alone, the NOI should, consistent with precedent, be rejected. In addition, the positions advocated by Offeror are not supported by any shipper or government agency, and it is specifically opposed by the very interests that Offeror claims to be protecting. As such, because the Board is tasked with expeditiously handling abandonment proceedings, it should reject the NOI, lift the housekeeping stay, and allow the abandonment to become effective.

Sincerely,



William A. Mullins  
Norfolk Southern Railway Company

cc: Parties of Record  
Greg Summy  
Laura Hoag

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<sup>5</sup> Environmental salvage conditions are not barriers to consummation, merely barriers to salvage. Consummation Of Rail Line Abands. That Are Subject to Historic Pres. & Other Envtl. Conditions, EP 678, slip op. at 4 and n.2 (STB served Apr. 23, 2008).

<sup>6</sup> Rail Abandonments – Use Of Rights-Of-Way As Trails, EP 274 (Sub-No. 13), 1986 ICC LEXIS 193 (STB served Aug. 13, 1986).