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BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
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April 10, 2018
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Public Record

FD 36164

ULSTER & DELAWARE RAILWAY REVITALIZATION CORP.
--PETITION FOR DECLARATORY ORDER--

ULSTER COUNTY, NEW YORK
VERIFIED REPLY TO MOTION TO STRIKE AND PETITION FOR LEAVE TO FILE
A REPLY
TO A REPLY

Submitted By:

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Dated: April 10, 2018

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SURFACE TRANSPORTATION BOARD

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The County of Ulster in the State of New York (the “County”) respectfully submits its Verified Reply to the Ulster & Delaware Railway Revitalization Corp. (“U&D”) Motion to Strike and Petition for Leave to File a Reply to a Reply. Attached to this Reply is the Verification of Christopher White who is the Deputy Director of the Ulster County Planning Department and Project Manager of the Ashokan Rail Trail and has been an integral part of the planning process of the rail line at issue in this proceeding. The Surface Transportation Board (“Board” or “STB”) should deny U&D’s Motion and Petition for the reasons below.

1. The Board Should Deny U&D’s Request to File a Reply to a Reply Because Good Cause Has Not Been Shown to Waive the Rule that Prohibits Such a Filing.

The Board’s Rules of Practice clearly state that “[a] reply to a reply is not permitted.” 49 C.F.R. § 1104.13(c). A reply to a reply to a petition for a declaratory order is no exception. *See, e.g., Cal. High-Speed Rail Auth., Petition for Declaratory Order*, FD 35861, slip op. at 5 (STB served Dec. 12, 2014) (denying motion for leave to file a reply to a reply to a petition for a

declaratory order). “[A]lthough the Board may waive Rule 1104.13(c) pursuant to Rules 1100.3 and 1100.9 for good cause shown,” U&D has not met this standard. *Ocean Logistics Management, Inc. v. NPR, Inc. and Holt Cargo Systems, Inc.*, WCC-102, slip op. at 3 (STB served Jan. 14, 2000) (denying motion for leave to file a reply to a reply where much of pleading consists of material not relevant or properly introduced).

U&D has not demonstrated “good cause” for why this reply to a reply should be permitted here. It simply argues that it could not have anticipated the arguments that the County made and therefore leave should be granted. U&D then goes on to ignore the valid legal arguments and incontrovertible evidence that the County submitted in its Reply to Petition for Declaratory Relief (“Reply”) and improperly raises various issues for the first time that it unquestionably could have raised in its original Petition. U&D’s Reply does more to obfuscate the facts and legal arguments than to clarify them.

In its Reply, the County clearly demonstrated that the Catskill Mountain Branch from Kingston (MP 2.9) to Bloomville, NY (MP 86.6) had been abandoned over 40 years ago by the Trustees of Penn Central pursuant to the Regional Rail Reorganization Act of 1973 (“3R Act”). 45 U.S.C. § 744(b). This abandonment included the portion of the Catskill Mountain Branch from MP 2.9 to MP 41.6 that the County bought from the Penn Central Trustees in 1979 and is at issue here (the “Line”). The County filed three exhibits with its Reply (Exhibits B, C, and D) that clearly establish that the Line was abandoned in accordance with the 3R Act. These exhibits include the portion of the Final System Plan Report that provided the Catskill Mountain Branch would not be designated for transfer to Conrail and consequently was authorized for abandonment. Exhibit 1 attached hereto. The other two exhibits, which demonstrate the abandonment was consummated pursuant to the 3R Act, are the March 1, 1977 Notice by the Trustees of Penn Central, which gave

notice of their intention to abandon this portion of the Catskill Mountain Branch, and the corresponding April 1, 1977 New York State Department of Transportation Abandonment Notification for the Catskill Mountain Branch to all interested State and local agencies, noting that the approval for abandonment had been made. Exhibits 2 and 3, respectively, attached hereto. Based on these three exhibits, it is beyond dispute that the abandonment of the Catskill Mountain Branch was long ago consummated in accordance with 45 U.S.C. § 744(b). *See also* Verified Statement of Christopher White attached to Reply at 2-4.¹ However, U&D basically fails to address these three documents and the consequent abandonment under the 3R Act. Moreover, U&D also fails for the most part to address the County's alternative argument that the Line had been abandoned based on "the line owner's intent." *Maryland Transit Administration – Abandonment – In Somerset County, MD*, AB 590 (Sub-No. 1X), slip op. at 4 (STB served May 14, 2015) ("Line owner's actions, viewed in their entirety, are consistent with abandonment.") In summary, U&D simply fails to address the crux of the County's Reply and instead raises several issues that it undoubtedly could have raised in its initial filing.

The only noteworthy item in U&D's Reply is its Exhibit J—and it is noteworthy only because it fortifies the County's position that the Line was abandoned. Exhibit 4 attached hereto. This exhibit is a 2012 email from the Director of the Freight and Passenger Rail Bureau of the New York State Department of Transportation ("NYS DOT") to the County Deputy Director of Planning. It states that the "documents [NYS DOT] transmitted establish that in the STB's eyes the corridor is legally abandoned" with respect to the Line at issue here. These documents are the

¹ U&D notes in its Motion to Strike and Petition for Leave to File a Reply to a Reply ("U&D's Reply") that this Verified Statement contains numerous references to "White V.S." These references were put in the document inadvertently. The County attaches to this Reply a corrected version of the Verified Statement without these references and with no other changes. The County respectfully asks the Board to replace the prior version with this corrected version.

three exhibits just discussed that demonstrate the abandonment took place under the 3R Act. This U&D exhibit only makes the County's unopposed position stronger regarding the abandonment under the 3R Act.

The abandonment of the Line is further evidenced by the remarks of Ernest Hunt, President of the Catskill Mountain Railroad Company ("CMRR"), as reported in a certified transcript of the Ulster County Legislature's Trail and Rail Advisory (TRAC) meeting on July 25, 2017, which is attached as Exhibit 5. Mr. Hunt addressed the TRAC regarding the Line's abandonment, noting, "We [the CMRR] have researched this issued [*sic*] heavily the last few years. On the issue of rail banking, Ms. Havranek [the County Attorney] is correct in that the railroad was essentially abandoned in the sense of being no longer under Federal jurisdiction in a...before the railroad was purchased by the county. Our lawyer estimated it was done around 1977..."

Instead of addressing the aforementioned, compelling evidence of the Line's abandonment, U&D suggests that the Line was somehow not abandoned because the County explored abandonment authority from the STB at one point in time,² and the CMRR used a small portion of the Line for a limited switching operation after the abandonment in 1977.³ However, neither of

² The County did explore the possibility of going to the STB at one point for abandonment authority because it had not discovered the abandonment documents required for consummation of the right to abandon under the 3R Act. Moreover, once they were discovered, it took the County some time to understand the legal significance of these documents under the 3R Act. Before the discovery of these documents, the County asked the STB for evidence of an abandonment proceeding regarding the Line, but nothing was found at the Board except for the portion of the Final System Plan Report with respect to the Line. Exhibit 1. This was because the Line was abandoned under the 3R Act which did not necessitate any action by the STB or Interstate Commerce Commission ("ICC"). As a result, there was a period of time that the County did not think the Line was abandoned, leading to an investigation of how to achieve that result. Once the County found and understood the significance of these documents, it logically ceased its investigation of how to abandon the Line because it was already abandoned. Consequently, this investigation prior to the discovery of the abandonment consummation documents under the 3R Act has no bearing at all on whether the Line was actually abandoned in 1977.

³ This limited, exempt rail operation by CMRR took place from approximately 1988-1992. The rail operation involved a switch that was put in place on the Line in Kingston, NY at MP 2.9, which connected a short piece of track to the nearby Conrail (now CSX) mainline at that time. This rail operation only required CMRR to run approximately 1000 feet on the Line and only involved the switching of one plant in Kingston. The switch was removed in 1995 or 1996 by Conrail once the rail operation ceased and no freight had been switched in several

these arguments can overcome the plain fact that the actual abandonment took place under the 3R Act in 1977. It is axiomatic that once the Line is abandoned, the Board has no jurisdiction over the Line. *Hayfield N. R.R. v. Chi. & N.W. Transp. Co.*, 467 U.S. 622, 633 (1984). Indeed, U&D seemingly concedes that the abandonment took place under the 3R Act by referencing the fact that “Penn Central filed its abandonment notice.” U&D’s Reply at 10. Therefore, U&D’s Reply adds nothing to U&D’s position and actually appears to run counter to it in certain instances.

Lastly, the County sees no reason to further delay this proceeding by permitting this reply to a reply. It is in the process of constructing a rail trail on a portion of the Line near the Ashokan Reservoir and would like to see this matter resolved before it moves ahead with Phase 2 of the project.

As a result, the County asks the Board to deny U&D’s request to delay this proceeding by filing a reply to a reply and to issue an order in an expedited manner, finding that the Line has been abandoned in accordance with the 3R Act.⁴

2. The Board Should Also Deny U&D’s Motion to Strike Various Exhibits Because They Are Each Clearly Relevant to the Case at Hand.

In its Motion to Strike, U&D asks the Board to strike seventeen exhibits in the County’s Reply pursuant to 49 C.F.R. § 1104.8 claiming they are irrelevant or redundant. However, each of these documents is clearly relevant to the County’s 3R Act abandonment argument or its alternative “owner’s intent” to abandon argument. *See Maryland Transit*, slip op. at 3.

years. Because the operation involved excepted switching track under 49 U.S.C. § 10906, the County or CMRR did not need authority to run over the Line for this rail operation. As a result, this exempt rail traffic also has no bearing on whether the Line was actually abandoned in 1977. No freight has run on the line since the removal of the switch in the mid-1990’s.

⁴ In the event the Board permits this reply to a reply, the County respectfully asks the Board for the right to respond. U&D states that it has no objection to such a filing. U&D’s Reply at 2.

The list of these Exhibits, reasons for striking as claimed by U&D, and reasons for not striking by the County are as follows:

Exhibit E, Annual Report (1977) – U&D asserts Exhibit E is 41 years old and of no relevance. The County’s response is that Exhibit E specifically mentions the Line was abandoned close to the time the Line was in fact abandoned under the 3R Act, which is relevant to the abandonment argument under the 3R Act.

Exhibit F, Environmental Assessment (1991) - U&D asserts Exhibit F is 27 years old and of no relevance. The County’s response is that Exhibit F mentions various government agencies as involved and interested parties but not the ICC, demonstrating no federal involvement in the rail matter, which shows the Line was not subject to the ICC’s jurisdiction at the time of the Assessment. This is relevant to the abandonment argument under the 3R Act because an abandoned line would not require any action by the ICC.

Exhibit H, CE Maquire Report (1978) – U&D asserts Exhibit H is 40 years old and of no relevance. The County’s response is that Exhibit H specifically mentions the notice of intention to abandon the Line by Penn Central Trustees close to the time the Line was abandoned under the 3R Act, which is relevant to the abandonment argument under the 3R Act.

Exhibit K, Notice of Default (2013) – U&D asserts Exhibit K is irrelevant as it pertains to litigation between CMRR and the County, a matter outside the STB’s jurisdiction.⁵ The

⁵ U&D makes this relevance argument while simultaneously submitting its own exhibit regarding litigation between the County and CMRR. (U&D’s Reply Exhibit C). This inconsistency in its positions clearly shows how unfounded its Motion to Strike is on this point.

County's response is that Exhibit K demonstrates the poor physical condition of Line, which is relevant to the "owner's intent" to abandon standard.

Exhibits L through N, HDR Report – U&D asserts Exhibits L through N, which are photos of the deterioration of the Line, are unnecessarily redundant, and they are not necessarily indicative of abandonment in a legal sense but could support an adverse abandonment application. The County's response is that Exhibits L through N are photos, inspections, and reports demonstrating the deteriorated condition of Line relevant to "owner's intent" to abandon standard.

Exhibit O, Photos of the Line - U&D asserts Exhibit O is redundant and irrelevant and not necessarily indicative of abandonment in a legal sense but could support an adverse abandonment application. The County's response is that Exhibit O is photographic evidence demonstrating the deteriorated condition of Line relevant to "owner's intent" to abandon standard.

Exhibit P, Photos of Butternut Creek Culvert along Line – U&D asserts Exhibit P is irrelevant on the issue of abandonment and, if abandoned, irrelevant on the issue of whether the National Trails System Act applies. The County's response is that Exhibit P is photographic evidence demonstrating the deteriorated condition of Line relevant to "owner's intent" to abandon standard.

Exhibit Q, Line Washout Photos and Spreadsheet – U&D asserts Exhibit Q is redundant and irrelevant. The County's response is that Exhibit Q is photographic evidence of the deteriorated condition of Line relevant to "owner's intent" to abandon standard.

Exhibit R, New York State Attorney General Eminent Domain Letter (2016) - U&D asserts Exhibit R is irrelevant and is only an indication that New York is providing funding for property acquisition, which has no bearing on abandonment or National Trails System Act eligibility. The County's response is that Exhibit R shows a property taking of a part of the Line by New York State, indicating the State does not believe this is an active rail Line, and demonstrates the Line has been permanently severed at this point, which is relevant to "owner's intent" to abandon standard.

Exhibit S, Photos of State Property Taking – U&D asserts Exhibit S is redundant and irrelevant and not necessarily indicative of abandonment in a legal sense but could support an adverse abandonment application. The County's response is that Exhibit S demonstrates that Line has been severed to the extent that no rail traffic could operate under the new State bridge, which is relevant to "owner's intent" to abandon standard.

Exhibit T, Alta Trail Study (2006) - U&D asserts Exhibit T is irrelevant. The County's response is that Exhibit T mentions that Line was abandoned, which is relevant to the abandonment argument under the 3R Act.

Exhibit U, Camoin Report (2013) – U&D asserts Exhibit U is irrelevant. The County's response is that Exhibit U documents that the County examined rail trail possibilities over the Line, which is relevant to "owner's intent" to abandon standard.

Exhibit W, Numerous County Resolutions – U&D asserts Exhibit W is irrelevant. The County's response is that Exhibit W demonstrates the legislative policies that designated part of Line as trail only and part as intrastate tourist rail, which is relevant to "owner's intent" to abandon standard.

Exhibit Z, New York State SHPO Correspondence – U&D asserts Exhibit Z is irrelevant. The County's response is that Exhibit Z shows the State Historic Preservation Office approved the use of the Ashokan Rail Trail segment of the Line for trail use, which is relevant to "owner's intent" to abandon standard.

In summary, each document that U&D seeks to strike from the record is either uncontroverted evidence of the abandonment argument under the 3R Act or the "owner's intent" to abandon standard that the Board applies to determine in certain instances whether an abandonment authorized prior to 1996 had been consummated. *See Maryland Transit*, slip op. at 3. Some of these exhibits (Exhibits E & H) document that the 1977 abandonment took place under the 3R Act by referencing it around that time. Other exhibits (Exhibits K-U, W, and Z) show the extremely poor condition of the Line and the County's later plans to use it as a rail trail, which are strong evidence of the "owner's intent" to abandon as outlined in *Maryland Transit*. *Id.* ("In determining intent, the Board look[s] to the line owner's actions considered in their entirety, assessing both the owner's stated intentions and the various physical acts taken that might carry out that intent, such as cessation of operations, cancellation of tariffs, the length of time there had been no rail service, efforts taken to maintain the line, salvage of the track and track materials, and relinquishment of control over the right of way.")

Moreover, the age of some of these documents, which U&D raises as a reason to strike them, makes them more relevant rather than less relevant. These documents that were produced in the 1970s for the most part provide the best evidence of record about what occurred to the Line at that time. None of the documents possibly could have been made in anticipation of this litigation. Since the Line was abandoned in 1977, the best

evidence would be a document reflecting the abandonment that was drafted shortly after this event, which is the case here.

Finally, none of these documents are redundant because they are for the most part provided by different parties at different times. This variety of documents about the Line demonstrates that it was general knowledge that the Line had been abandoned since this occurrence in 1977.⁶

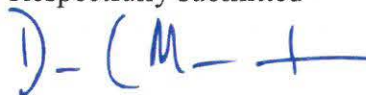
As a result, U&D's Motion to Strike should be denied because each of the documents is relevant and not redundant. Each of these documents demonstrates that the Line had been abandoned either under the 3R Act or the "owner's intent" to abandon standard.

CONCLUSION

Based on the foregoing discussion, the STB should deny both U&D's Motion to Strike and its Petition to File a Reply to a Reply. Undoubtedly, the Line was abandoned under the 3R Act, and the evidence supplied by the County supports that finding. Therefore, the County respectfully asks the Board to find in an expedited manner that the Line was abandoned, so the County can finish the Ashokan Rail Trail Project during the short outdoor construction season in New York.

⁶ Moreover, in the event of an appeal, the County needs to create a strong record to show that the Line was abandoned.

Respectfully submitted



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1850 M Street N.W., Suite 600
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(202) 887-5711

Counsel for Ulster County, New York

Dated: April 10, 2018

CERTIFICATE OF SERVICE

I, Donn C. Meindertsma, hereby certify that a copy of the foregoing Verified Reply to Motion to Strike and Petition for Leave to File a Reply to a Reply dated April 10, 2018, was sent by Federal Express overnight mail to the following in this proceeding.

John D. Heffner
Strasburger & Price, LLP
1025 Connecticut Avenue, N.W., Suite 717
Washington, D.C. 20036

Charles Spitulnik
Kaplan Kirsch & Rockwell
1001 Connecticut Avenue, NW, Suite 800
Washington, D.C. 20036

Ralph C. Mitchell (by email through consent)
Ralphm1050@aol.com



Donn C. Meindertsma

Exhibit 1

WALLKILL VALLEY BRANCH

USRA Line No. 136

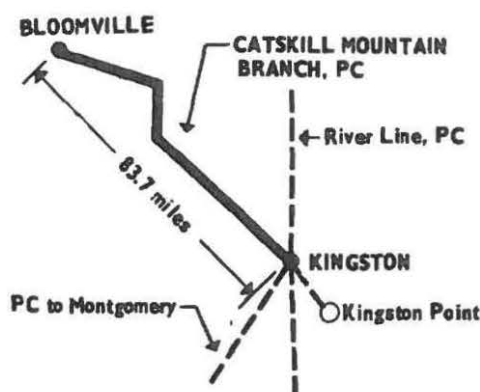
Penn Central

The Wallkill Valley Branch, extending from *Kingston* (Milepost 0.0) to *Montgomery, N.Y.* (Milepost 33.0), a distance of 33.0 miles, in Ulster and Orange Counties, N.Y., a line which was recommended for inclusion on page 626 of the Preliminary System Plan, shall be transferred to the Consolidated Rail Corp.

CATSKILL MOUNTAIN BRANCH

USRA Line No. 137

Penn Central



The Catskill Mountain Branch, formerly part of the New York Central RR, extends from *Kingston* (Milepost 2.9) to *Bloomville, N.Y.* (Milepost 86.6), a distance of 83.7 miles, in Ulster, Delaware and Schoharie Counties, N.Y. At Kingston, this branch connects with the River Line and the Wallkill Valley Branch of the PC (see Line No. 136).

Traffic and Operating Information

Stations (with their 1973 carloads) served by this line:

West Hurley	0
Phoenicia	3
Grand Hotel Station	0
Fleischmann's	42
Arkville	7
Halcottville	1
Roxbury	846
Grand Gorge	23
Stamford	834
Hobart	3
South Kortright	87
Bloomville	6

Total carloads generated by the line..... 852

Average carloads per week	16.4
Average carloads per mile	10.2
Average carloads per train	9.5
1973 operating information:	
Number of round trips per year	90
Estimated time per round trip (hours)	28.0
Locomotive horsepower	1,800
Train crew size	4

Public Comments on Preliminary System Plan

The Catskill Mountain Transportation Corp. (CMTC), said this line could show a profit of \$90,701 on the assumption that the line would produce \$100,429 in additional revenues with assurance of improved and expanded service. Included was a surcharge of \$2 per ton which shippers on the line would be willing to pay on all freight shipped or received on the line. Lutz Feed and Briggs Lumber Co. stated that they offered PC such a surcharge 3 years ago but have never received a reply.

CMTC reported it had three qualified men thoroughly check "every inch" of roadbed on the Catskill branch and submitted a 200-page, mile-for-mile report describing the condition of the roadbed. The report concluded that total rehabilitation costs for the branch would be \$467,000 or \$47,000 per year.

CMTC also pointed out the following errors in USRA's analysis of the line:

- USRA stated there were 180 round trips, but there were not more than 90.
- The average number of cars per train was 10, not 4.7.
- The line has only one turnout every 5 miles instead of one every 2 miles as estimated by USRA's average.
- The line has only one crossing every 3 miles instead of one per mile as estimated by USRA's average.

Lutz Feed and Briggs Lumber account for 50 percent of the traffic on the line. These companies stated that the line now meets FRA Class I standards and could be brought to Class II standards with a minimum of work. Lutz predicts that its traffic would grow 25 percent if the line remains in service.

Lutz Feed receives 20,000 tons of feed per year. Lutz, Briggs and Wadler Lumber stated that loss of service would have a serious effect upon their competitive positions.

Williamson Veneer has reopened a plant at Fleischmann's which will generate at least 35 carloads per year.

Husky Industries of Grand Gorge and Stamford would build a new plant with a rail siding if assured of continued service. The plant would produce 90 carloads per year.

The New York DOT noted the following station errors: Roxbury generated 445 carloads and Stamford generated 449 carloads. New York DOT recommended

that the line be evaluated as the Kingston to Stamford branch since service is not warranted beyond Stamford.

Information for Line-Transfer Decision

Revenue received by PC-----	\$404,858
Average revenue per carload-----	\$475
Variable (avoidable) cost of continued service:	
Cost incurred on the branch line-----	659,730
Cost of upgrading branch line to FRA	
Class I: (1/10 of total upgrading cost)-----	97,579
Cost incurred beyond the branch line-----	328,175
Total variable (avoidable) cost-----	1,085,493
Net contribution (loss): total-----	(681,135)
Average per carload-----	(799)

This line would require upgrading to meet the requirements of the Federal Railroad Administration's minimum safety standards (Class I track, which has a maximum safe operating speed of 10 m.p.h.). Based on available information, this upgrading would include the replacement of a total of 18,000 crossties (an average of 215 crossties per mile).

This line was reanalyzed using 90 round trips per year and 23 hours per round trip.

Service to this line generated a loss of \$681,135 in 1973. Recovery of this loss would require approximately a ninefold increase in traffic or a 168-percent rate increase. The inclusion of an additional 214 carloads on this line, as reported by New York DOT, would reduce this loss to \$662,000. In addition, with the reduced rehabilitation reported in the testimony presented to the RSPO, the loss would still be \$612,000. The surcharge of \$2 per ton offered by the shippers would further reduce the loss to \$534,102.

Disposition

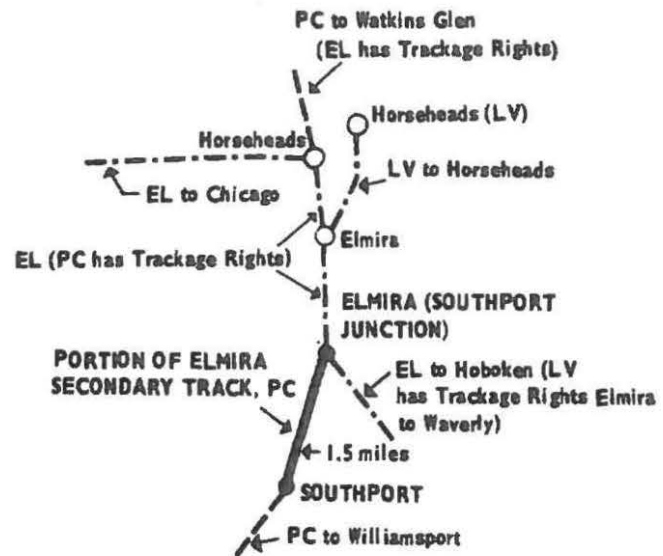
The Catskill Mountain Branch is *not* designated for transfer to Consolidated Rail Corp. and is available for subsidy pursuant to section 304 of the Act. Public officials have recommended that certain rail rights-of-way be used for other public purposes if rail service is discontinued. For line-specific recommendations, see section C of this appendix.

PORTION OF THE ELMIRA SECONDARY TRACK

USRA Line No. 230a

Penn Central

This portion of the Elmira Secondary Track, formerly part of the Pennsylvania RR, extends from *South-*



port (Milepost 74.0) to Elmira (Southport Junction), N.Y. (Milepost 75.5), a distance of 1.5 miles in Chemung County, N.Y. At Elmira, this line connects with the Jersey City-to-Chicago line of the EL over which PC has trackage rights to Horseheads (see Line No. 231a). From Southport, this line continues to Williamsport (See Line No. 230). LV also serves Elmira and Horseheads via trackage rights over the EL from Waverly to Elmira.

Traffic and Operating Information

Stations (with their 1973 carloads) served by this line:

Elmira (Southport) ¹ -----	114
Total carloads generated by the line-----	114
Average carloads per week-----	2.2
Average carloads per mile-----	76.0
Average carloads per train-----	2.2
1973 operating information:	
Number of round trips per year-----	52
Estimated time per round trip (hours)-----	1.0
Locomotive horsepower-----	2,000
Train crew size-----	4

¹ Includes only traffic on segment.

Public Comments on Preliminary System Plan

Thatcher Glass Manufacturing Co. has a \$30 million plant at Elmira which uses this line and Line No. 231a. The plant consumes 120,000 tons of sand and 43,000 tons of soda ash per year.

Linn S. Chapel Co., Inc. of Elmira reported that it shipped 114 carloads over this line in 1973 and 142 carloads in 1974 and contended that the line would meet USRA's criteria for inclusion in ConRail. USRA attributed only 48 carloads to the entire line.

The data available indicates that the USRA analysis included two locomotives per trip. The traffic involved does not appear to warrant a second unit.

Exhibit 2

N O T I C E

The Trustees of Penn Central Transportation Company hereby give notice, pursuant to Section 304(b) of the Regional Rail Reorganization Act of 1973, as amended, of their intention, effective March 1, 1977 to abandon the
Catskill Mountain Branch

between Kingslon (Milepost 2.9),
and Stamford (Milepost 74.9),
in the State of New York.

In the Final System Plan adopted under the terms of the 1973 statute, as amended, the line to which this notice relates is not designated for continued operation by Consolidated Rail Corporation or any other carrier, and no offer of subsidy pursuant to Section 304(c) of the above statute has been received.

ROBERT W. BLANCHETTE, RICHARD C.
BOND AND JOHN H. McARTHUR, TRUSTEES
OF THE PROPERTY OF PENN CENTRAL
TRANSPORTATION COMPANY, DEBTOR

PC 137 1436 7/1/77

Exhibit 3

NEW YORK STATE
DEPARTMENT OF TRANSPORTATION
Raymond T. Schuler, Commissioner



1220 Washington Avenue, State Campus, Albany, New York 12232

April 1, 1977

Re: Railroad Abandonment Notification
Penn Central Transportation Co.
Catskill Mountain Branch, Kingston
to Stamford, Ulster, Delaware &
Schoharie Counties

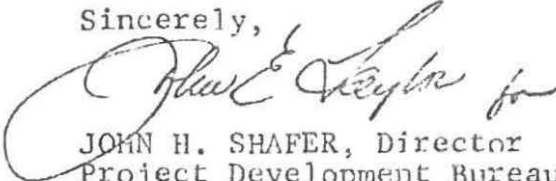
Dear

Under the provisions of Chapter 998 of the Laws of 1973, the Department of Transportation is designated as the official State agency to receive all notifications from the Federal Interstate Commerce Commission, United States Railroad Association (USRA), or any other Federal or State agency in regard to discontinuance of service or railroad property abandonment proceedings, including notification of applications from railroad companies for such purposes.

Furthermore, the Department of Transportation is required to inform all interested State agencies, transportation authorities and local municipalities in which such railroad property is located of these notifications.

In accordance with the provisions of this statute, you are hereby notified that the approval for the abandonment has been made for the subject railroad property identified in the enclosed description and map. You are being advised of this abandonment for informational purposes only.

Sincerely,


JOHN H. SHAFER, Director
Project Development Bureau

Enclosures

JHS/JPB/dc

bcc: J. K. Mladinov, 502-5
J. E. Collison, 204-5
K. W. Shiatte, 115-4
H. B. Clarkson, 115-4
J. K. Lussi, 212-4
B. S. Zodikoff, 316A-5
H. L. Peyrebrune, 206-4
M. D. Graham, 404-5
A. E. Dickson, Region #8
J. Lawrence, Region #8
J. K. Connors, Region #9
J. P. Carrington, Region #9

SANFORD L. SHULL
Regional Manager
PENN CENTRAL TRANSPORTATION COMPANY
466 Lexington Ave. Rm. 1646
New York, N. Y. 10017
(Ulster)

PENN CENTRAL TRANSPORTATION COMPANY

- 1) Catskill Mountain Branch,
Kingston (M.P. 2.9) To Stamford
(M.P. 74.9), Ulster, Schoharie
and Delaware Counties, New York.

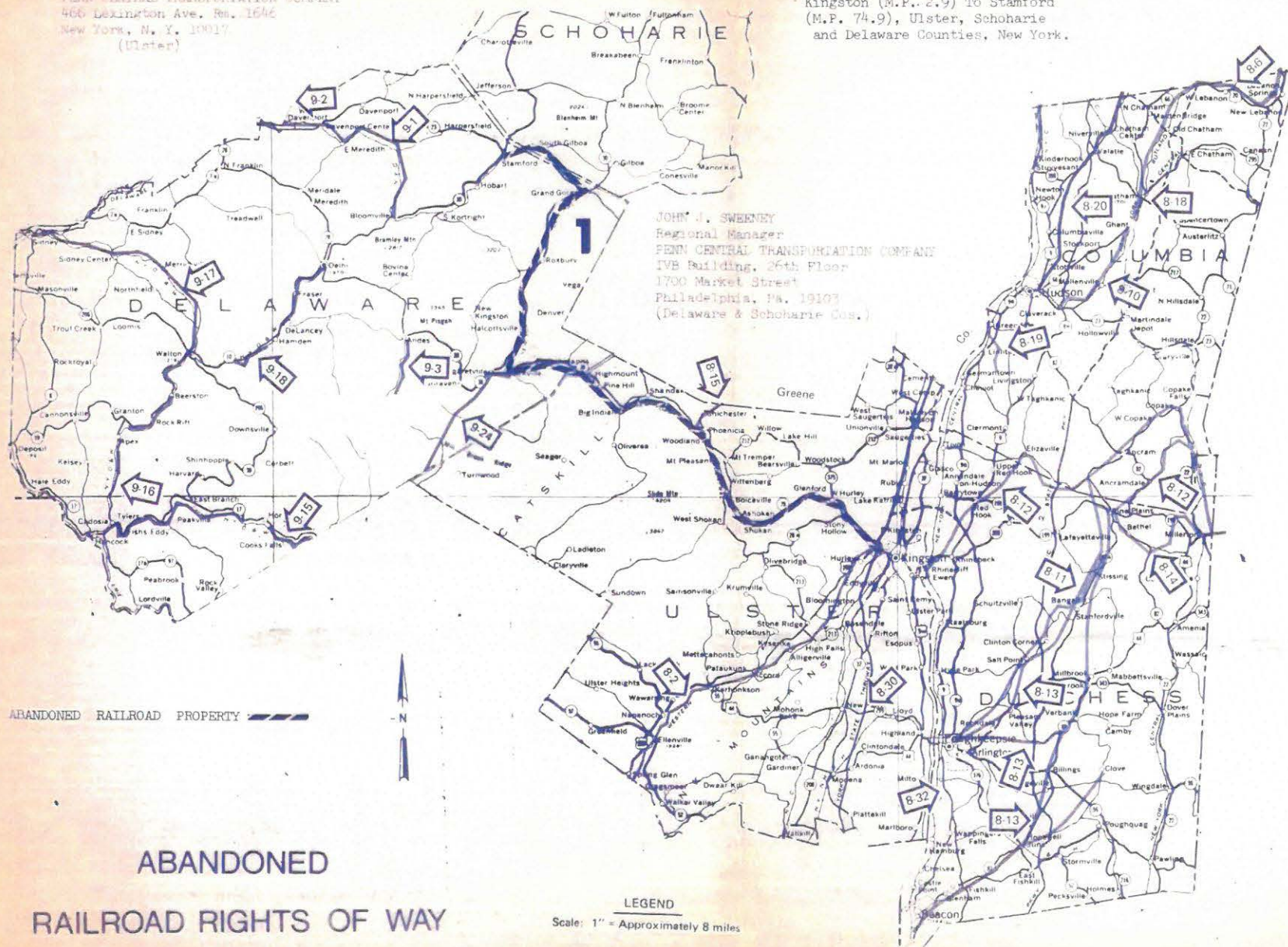


Exhibit 4

"Hessinger, Raymond (DOT)" ---12/12/2012 08:59:30 AM---"Hessinger, Raymond (DOT)"
<Raymond.Hessinger@dot.ny.gov>

"Hessinger, Raymond (DOT)"
<Raymond.Hessinger@dot.ny.gov>

12/12/2012 09:00 AM

To "Younsi, Mike (DOT)"
<Mike.Younsi@dot.ny.gov>,
"cwhi@co.ulster.ny.us"
<cwhi@co.ulster.ny.us>

cc
Subject RE:

There can be a difference between ICC / STB abandonment (in which common carrier rail service is abandoned) and abandonment as defined in the deeds (which could be removal of the tracks). You would need to review each of the deeds that make up the right if way.

The documents Mike transmitted establish that in the STB's eyes the corridor is legally abandoned, and as such, railbanking under the rails to trails act would likely not be available to preserve the corridor from reversionary clauses should the tracks be removed.

Raymond F. Hessinger, P.E.
Director, Freight & Passenger Rail Bureau
NYS Department of Transportation
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Sent via DroidX2 on Verizon Wireless™

-----Original message-----

From: "Younsi, Mike (DOT)" <Mike.Younsi@dot.ny.gov>
To: "cwhi@co.ulster.ny.us" <cwhi@co.ulster.ny.us>
Cc: "Hessinger, Raymond (DOT)" <Raymond.Hessinger@dot.ny.gov>
Sent: Wed, Dec 12, 2012 12:50:04 GMT+00:00
Subject: RE:

Good morning Chris;

I don't think we seem to have any ICC's abandonment certificate granted to Penn's Trustees in our files, and I am also not sure based on what the state recognized said abandonment, and sent the notice out to all interested entities! Anyway, I will continue searching our documents. In the overall, it is certain that there was no request for the release of the state's preferential right of acquisition, and I believe, because the Line was going to be used for tourism and scenic operations, and therefore it was not subject to the process of preferential right of acquisition.

Thanks

M. Younsi

From: cwhi@co.ulster.ny.us [mailto:cwhi@co.ulster.ny.us]
Sent: Tuesday, December 11, 2012 4:47 PM
To: Younsi, Mike (DOT)
Subject: Re:

Exhibit 5

(35:38) **ERNEST HUNT, President of Catskill Mountain Railroad Company, Inc.**

We have researched this issue heavily the last few years. On the issue of rail banking, Ms. Havranek is correct in that the railroad was essentially abandoned in the sense of being no longer under Federal jurisdiction in a... before the railroad was purchased by the county. Our lawyer estimated it was done around 1977 as part of the trail...of the railroad, um, um, to New York State. 1977. 1978. Actually we, I think we gave those papers to you all.

So, it has not been under Federal jurisdiction since 1977, let's say. In order... as I understand it... from what our attorneys told me...In order to...for rail banking to occur on this corridor the Federal government has to become involved again, and the only way to bring it in was for us or another carrier to file as a... as a carrier, um, of a, obviously we are already a passenger carrier, it is not necessary to do that, to do passenger service, but also file as a freight carrier which means you have to interconnect with the national system. And we have never filed as a (inaudible) member. We could do that but because we never carried freight we never have filed or become part of the...never become under the jurisdiction of the STB. We are under the jurisdiction of the FRA (Federal Rail Road Administration) , we are under New York State DOT but not under the STB which is the Surface Transportation Board.

The Surface Transportation Board is the entity that grants rail banking and in order for them, we in, in order for the County to do that, we or another carrier would have to file as a freight carrier and be recognized as that under the STB, look for freight for a reasonable amount of time... we wouldn't actually have to actually do it, but actually be accept it to run freight, and next then come to the conclusion that you could not do that you can file for abandonment.

When you file for abandonment, we really abandon it, there is a 30 day period where in the interim trail use can be brought before the STB and requested and that is essentially rail banking. Rail banking essentially freezes the abandonment process and thereby keep all the easements in place and the rail road is not completely abandoned. So, it would be a very complicated process to do that.

We actually did offer a letter offering to assist if the county wanted to use us to do that. They could do it with another carrier, too. You can tell it is not an easy process and it could be stopped at any point by somebody saying "Well, this is a fake, you are not really, you're not really serious about creating a freight carrier." (Inaudible) Someone could write a letter to the STB and just say this is a fake application. The STB would just reject it. So in that view it would take a real serious effort to function as a railroad interconnected to the system in order to be essentially Federal jurisdiction to come back in.... so, it could be done. It is a multi-step, you know, process and again it doesn't take... all it takes is one party to essentially hold that process up.

So, and we did research the issue. Just like any easement, the rail road has many easements you find when the railroad was built many, many years ago. The Ashokan Reservoir easement is just one of many and it is just a really big one. And, a, but the other way to preserve your rights is essentially to renegotiate an easement in a bilateral manner which is what the county has done.

Any negotiation between two parties can be litigated in the future and, you know, obviously it would take litigation to undo this easement. And, and, we reviewed this and felt that... our lawyers reviewed the agreement and felt and it was quite well done. I want to congratulate Bea on it. I can't even imagine what you guys have been through to get this done. I imagine it was a really tough negotiation.

Obviously, any bilateral agreement can be litigated but there would have to be a reason to do it. For Ashokan Reservoir for the DEP to break this agreement there would need to be some justification to litigate the breaking and it is hard at this point to see what that could be. But, you know, any court can break a contract for sufficient reason. But normally, as far as we can see this is really quite well done and it does preserve the rights of the county for this particular trail or easement. I mean, you can do each one just like this or you can do rail banking or you won't. The county has to make a decision on the other easements at this stage.

So we, um, we always were worried that, that, you know, you couldn't do rail banking and the county was in a bad position where you would have to rely on the MOU which obviously put the county...

(inaudible)

So anyway, we did put a lot of research into it. I mean, obviously Federal rail banking does give you the Federal government back in, that's the positive part of it, but it is a long process. And, I guess, it still could be done in addition to what you have done. If you really wanted to go through it there is no reason you couldn't still do it in addition. Hopefully that answers your question.

FT

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)

Galvin A. Santilli

4th day of April, 2018.


Notary Public

JENNIFER MAHLER
Notary Public, State of New York
No. 01MA6121648
Qualified in Ulster County
Commission Expires Jan. 24, 2021

Corrected Verified Statement of Christopher White

VERIFIED STATEMENT OF CHRISTOPHER WHITE

My name is Christopher White, and my business address is 244 Fair Street, PO Box 1800, Kingston, NY 12402. I am the Deputy Director of the Ulster County Planning Department. I have over 5 years of experience in the Planning Department, including trail and tourist rail development. I am also Project Manager for the Ashokan Rail Trail and as such, am familiar with Ulster County's plans to develop the 38.7-mile portion of the Catskill Mountain Branch that runs through Ulster and its history since the 1970s.

I am making this statement in support of Ulster County's Reply to the Petition for Declaratory Relief in Finance Docket No. 36164. More specifically, this statement describes and documents the development planning and history of this rail line based on a thorough search of the relevant County files and my personal knowledge. See Exhibits A-Z attached hereto. This statement concludes that this rail line was abandoned by law.

The following history and overview are helpful in establishing and documenting that the Catskill Mountain Branch was abandoned more than forty years ago and is no longer under the jurisdiction of the Board. In addition, if one sets aside the issue of abandonment and the lack of connection to the national rail transportation system, the highly deteriorated condition of the Catskill Mountain Branch, resulting from decades of deferred maintenance and severe storm events, makes common carrier rail operations infeasible and unrealistic absent investment of tens of millions of dollars to restore missing bridges, damaged culverts, washed-away embankment, and to conduct massive tie replacement, which are discussed in greater detail below.

The County of Ulster (the "County") purchased the former Catskill Mountain Branch (also known as the Ulster and Delaware Railroad) right-of-way within Ulster County from The Penn Central Corporation and The Owasco River Railway, Inc. on July 24, 1979 for \$1,500,000.

The right-of-way purchased by the County extends approximately 38.7 miles from the main track of the West Shore Branch in the City of Kingston, NY (at approximately Milepost 2.9) to the hamlet of Highmount, NY at the border of Ulster and Delaware Counties (at approximately Milepost 41.6), as described in the Deed filed with the Ulster County Clerk on August 10, 1979, a copy of which is attached hereto as Exhibit A.

The County purchased the aforementioned segment of the Catskill Mountain Branch right-of-way (the "Line") with the intent of using the abandoned line to establish tourism railroad operations for economic development purposes. The Line formerly had been a part of a successful passenger and freight line connecting Kingston, NY to Oneonta, NY (where it connected with the Delaware & Hudson Railroad), winding through the Catskill Mountains and along the Esopus Creek. However, the last regular interstate passenger service on the Catskill Mountain Branch ended in 1954. The last freight carrier ended its remaining operations on September 28, 1976, following the termination of a New York State subsidy. This subsidy had been provided through the State's Branchline Assistance Program to Conrail to operate on the Branch for six months.

In the years prior to the County's purchase of the Line, the Catskill Mountain Branch from Kingston (MP 2.9) to Bloomville (MP 86.6) was analyzed by the United States Railway Association ("USRA") for possible inclusion in the Final System Plan for Restructuring Railroads in the Northeast and Midwest Regions ("Final System Plan") pursuant to the Regional Rail Reorganization Act of 1973 ("3R Act"). The segment between Bloomville and Oneonta had been abandoned previously. In its July 26, 1975 Final System Plan report, the USRA noted the Catskill Mountain Branch was not designated for transfer to the Consolidated Rail Corporation ("Conrail") and was available for subsidy pursuant to section 304 of the 3R Act. A copy of the

relevant pages (pp. 270-271) of the Final System Plan is attached hereto as Exhibit B. Since the Catskill Mountain Branch was not included in the Final System Plan, it was authorized for abandonment under the 3R Act.

The County Planning Department confirmed the exclusion of the Line from the Final System Plan in a call to Brian O'Boyle of the STB on October 23, 2012, following which Mr. O'Boyle emailed the relevant sections of the Final System Plan to the County. Mr. O'Boyle advised the County that he could not find the documents consummating the abandonment, which at the time, the County had not located in its archives. Most of the documents confirming the abandonment were later located during exhaustive searches of the County record archives relating to the Line.

Following the termination of freight services in 1976, the Trustees of the Penn Central Corporation ("Penn Central"), which was in bankruptcy proceedings, gave notice on March 1, 1977, pursuant to Section 304(b) of the 3R Act, of their intention to abandon the Catskill Mountain Branch from MP 2.9 in Kingston, NY to MP 74.9 in Stamford, NY ("Notice of Abandonment"). The railroad right-of-way subject to this Notice included all 38.7 miles of the Line that was later purchased by the County. A copy of the Notice of Abandonment is attached hereto as Exhibit C. On April 1, 1977, the New York State Department of Transportation ("NYS-DOT") issued a Railroad Abandonment Notification for the Catskill Mountain Branch—including the Line—to all interested State and local agencies, including the County of Ulster, noting that the approval for abandonment had been made for the subject railroad property identified in the accompanying map. A copy of said notification and accompanying map are attached hereto as Exhibit D.

Based on these documents, it is clear the abandonment of the line was fully consummated as authorized by the USRA's prior exclusion of the Catskill Mountain Branch from the Final System Plan, effectively terminating federal jurisdiction over the Line. The abandoned status of the Line is specifically mentioned in the Ulster County Planning Board's Annual Report for 1977 ("1977 Board Report"), a copy of which is attached hereto as Exhibit E and is alluded to in other reports that will be discussed below.

Prior to the consummation of abandonment in 1977, it appears that Penn Central had attempted to abandon the Line in 1972-73, by petition at the former Interstate Commerce Commission ("ICC"). According to the Railroad History cited in the "Catskill Mountain Railroad Environmental Assessment" issued in February 1991, a copy of which is attached hereto as Exhibit F, this "abandonment [attempt] was invalidated due to procedural deviations." Exhibit F at 7. Other documents similarly note the remaining shippers and local municipalities along the Line objected to this earlier attempt(s) to abandon the Catskill Mountain Branch. However, once the Branch was excluded from the Final System Plan, the Trustees of Penn Central were able to complete the abandonment as discussed earlier. The attached Environmental Assessment from 1991 also lists the agencies involved in the Line, and there are no federal agencies, such as the ICC, cited. Exhibit F at 30-31.

As noted previously, the County purchased the Line from approximately MP 2.9 to approximately MP 41.6. The remaining right-of-way of the Catskill Mountain Branch in adjacent Delaware County was purchased by the seven town governments in Delaware County through which the track ran (from approximately MP 41.6 to MP 86.6) using grant funding from the A. Lindsay and Olive B. O'Connor Foundation. Following the purchases of the Delaware County sections of the Catskill Mountain Branch ("Delaware Section"), the seven towns created

a non-profit organization called the Catskill Revitalization Corporation (“CRC”). The CRC’s charge was to manage, insure, maintain, and improve the Delaware Section. In the years since the purchase of the Delaware Section, the CRC developed the Delaware and Ulster Railroad (“DURR”), an intrastate seasonal tourism railroad excursion operation between Arkville, NY (approximately MP 47.0) and Roxbury, NY (MP 59.5), which continues to operate.

In addition to running the seasonal DURR scenic and dinner trains on the 12.5-mile operating track section, the CRC also converted a segment to trail. CRC removed the track infrastructure from and converted a 26-mile section of the Delaware Segment (with a small section in Schoharie County) to a public recreational trail for hiking, bicycling, and snowmobile operations (the “Catskill Scenic Trail”) from Roxbury (at approximately MP 60) to South Kortright (at approximately MP 86.) This “rails-to-trails” project was implemented locally without use of the National Trails System Act or federal railbanking as the CRC did not require federal approval for removal of the track from the abandoned Catskill Mountain Branch in Delaware County. The “segmented” use of the Delaware Segment for both rail and trail uses, an overview of which from the CRC is attached hereto as Exhibit G, is quite similar to the County’s segmented rail and trail policy under which the Ashokan Rail Trail is currently being constructed. This policy designated certain segments of the primarily single-tracked Line for tourism rail operations and other segments for conversion to recreational trail only, including the segment designated for construction of the Ashokan Rail Trail in the Towns of Hurley and Olive, NY between MP 10.0 and MP 21.6 (“Ashokan Segment”).

While the Delaware Segment was redeveloped for both rail and trail use following CRC’s purchase of the right-of-way, Ulster County initially planned tourism railroad uses only for the entire 38.7 miles following its purchase of the Line in 1979, although the County planners also

noted a possible use for public trails at some point in the future. Following the 1977 Notice of Abandonment, the County commissioned the “Reuse Feasibility Study for the Catskill Mountain Railroad,” which evaluated the feasibility of establishing a tourism railroad on the Line and was completed by CE Maguire, Inc. in January 1978, a copy of which is attached hereto as Exhibit H (“Maguire Report”). The Maguire Report notes the following:

On September 28, 1976, the last run was made over the Catskill Mountain Branch and on March 1, 1977 the trustees of the Penn Central Transportation Company gave notice of their intention to abandon the line.

Exhibit H at 1.

Shortly before the Notice of Abandonment, former Director of the Ulster County Planning Board, Herbert Heckler, organized a meeting of local, County, and State officials to promote the County’s re-use of the Line for tourism railroad operations. As evidenced in the previously mentioned 1977 Board Report, many County officials viewed the available rail line as a potential tool for boosting tourism and economic development. The Maguire Report considered potential ridership and economic development opportunities from re-using the Line for tourism steam train operations and cited the relatively close proximity to New York City as a positive factor for the success of future tourism operations. The Maguire Report further noted that the condition of the track was fair to good, citing however, that at that time, heavy tie replacement would be necessary along with repairs to several structures and washouts. Throughout the Maguire Report, the Line is repeatedly referred to as “abandoned,” so it is clear that the County was aware of the Line’s abandoned status as it prepared to purchase the Line in 1979.

Following the purchase of the Line, the County commissioned a second report, which was conducted by Transportation and Distribution Associates, Inc. and titled, “Inspection and

Rehabilitation of the Former Ulster and Delaware Railroad,” a copy of which is attached hereto as (“TDA Report”). This December 1979 report covered both the Line in Ulster County and the Delaware Segment and documented a major washout along the Line in Phoenicia (Town of Shandaken), poor tie condition with 85-90 % of ties being defective, and the elimination of an overhead bridge carrying the railroad over State Route 30 in the Delaware Segment.

By the time of the inspection in 1979, the Line already had experienced years of deferred maintenance and neglect as Penn Central reduced capital investment in the tracks and supporting structures following its first attempt to abandon the Line in the early 1970s. The TDA report was commissioned as the County was working to attract a major railroad tourism operator and was in discussions with Steamtown, USA, which was looking to relocate from Vermont. Steamtown ultimately decided not to locate its operations in New York State, leaving Ulster County no immediate prospects for re-using the Line for tourism purposes. While the TDA Report made clear that the Line required millions of dollars in capital investment for tie replacement and other maintenance, without the prospect of a major tourism operation such as Steamtown, the County Legislature decided at that time to make no investments in the Line it had purchased.

Beginning in 1982 or 1983, the County began a series of short-term leases with a local tourism railroad company, the Catskill Mountain Railroad Company, Inc. (“CMRR”). CMRR initially operated a seasonal tourism train on approximately 3 miles of track in the Town of Shandaken following the Esopus Creek, where the train (known as the “Tubers Special” or “Esopus Creek Shuttle”) primarily carried visitors who rafted in inflatable tubes down the adjacent Esopus Creek from Phoenicia. In the following years, the CMRR incrementally expanded its operations although its maintenance of the Line was, and remains today, a primarily volunteer effort with limited resources. However, at this time, most of the Line did not meet

minimum FRA Class 1 standards so any expansions of CMRR service required rehabilitation of the track.

In 1991, the County Legislature leased the Line to the Ulster County Industrial Development Agency (“IDA”), through which the Line was subleased to CMRR for a period of 25 years starting May 29, 1991 and ending May 31, 2016 (the “Lease”). This extended Lease was well beyond the County’s typical five-year property lease, requiring conveyance of the Line to the County IDA to allow for a longer term. The longer term was intended to encourage much-needed capital investment in the Line, which by 1991 had faced nearly two decades of neglect and deterioration. CMRR and others had argued that without a long-term Lease, the required capital investments could not be made.

During the term of the Lease, a copy of which is attached hereto as Exhibit J, CMRR was required to spend at least \$25,000 per Lease year and rehabilitate at least one mile of track per Lease year to FRA Class 1 standards. It was also responsible for maintaining the rehabilitated track to Class 1 standards or better for the duration of the Lease. This rehabilitation and maintenance provision pertained only to the 25-mile eastern segment of the Line between Kingston (MP 2.9) and Phoenicia (27.9). The Lease provision recognized the reality that most of the track between Kingston and Phoenicia, with the exception of the small section of track used for the Tuber’s Special, did not meet Class 1 standards due to a prolonged lack of maintenance since the Line’s abandonment. As noted previously, Penn Central had been trying to abandon the Branch since the early 1970s and presumably invested as little as possible in capital projects and maintenance in the years preceding the final abandonment.

The remainder of the Line west of Phoenicia was apparently severed from the Kingston to Phoenicia segment by a washout along the Esopus Creek. This western segment was also more

deteriorated than the eastern section due to its close proximity to the Esopus Creek in some areas. Therefore, in the Lease, the CMRR was only required to keep the segment from MP 27.9 to MP 41.6 free of brush, but this segment still was largely neglected. By the time of the execution of the Lease in 1991, the washout in the Town of Shandaken had worsened and a major bridge structure at Herdman Road in Woodland Valley had been severely damaged (and was subsequently removed).

Over the 25-year term of the Lease, the Catskill Mountain Railroad was only able to rehabilitate and maintain a small portion of the 38.7-mile Line to Class 1 standards, and as a whole, the Line continued to deteriorate from lack of maintenance and storm events. As it became increasingly evident that CMRR was not conducting the required maintenance of the Line, the County issued CMRR a Notice of Default-Demand to Cure in June 2013 (“Demand to Cure”), a copy of which is attached hereto as Exhibit K. While numerous defaults are cited in the Demand to Cure, the lack of rehabilitation and maintenance was the primary issue.

By the time of the Demand to Cure in 2013, CMRR had rehabilitated—and operated trains on—only two short segments of the Line, including the segment it historically operated to serve tourists tubing in the Esopus Creek as well as a short segment in the City of Kingston. In 2014 and 2015 as the Lease was nearing its expiration and the County was involved in litigation commenced by the CMRR following the Demand to Cure, the County commissioned track inspection reports of the Line between Kingston and Phoenicia where the CMRR was required to upgrade 25 miles of track to Class 1 standards by May 2016. The reports documented that CMRR had rehabilitated and maintained only six or seven miles of Class 1 track, a small fraction of the required 22-23 miles required by the Lease provision to upgrade one mile of track per Lease year. Copies of the 2014 and 2015 track inspection reports, which were performed by

Henningson, Durham and Richardson Architecture and Engineering, P.C. (“HDR”), are attached hereto respectively as Exhibits L and M.

In July 2017, the County contracted with HDR to produce a Statement of Opinion Letter (“HDR Letter”) based on its inspections and reports recommending to the County whether removing all rail, ties and other track materials from the Ashokan Segment or instead burying these materials was preferable in terms of the County potentially reactivating the Ashokan Segment at some point in the future for tourism or other railroad operations, a copy of which is attached hereto as Exhibit N. The HDR Letter recommended the removal of all rail, ties and other track materials, highlighting that if the County wanted to restore railroad uses to the Ashokan Segment at some point in the future, it would be best served by removing the deteriorated railroad infrastructure, stabilizing the existing embankment, and installing all new rail materials. In summarizing the current condition of the Ashokan Segment, the HDR Letter noted the following:

HDR’s Rail Engineer found and documented that the Corridor was in an advanced state of disrepair from this lack of maintenance, and the railroad infrastructure-including as culverts, bridges, drainage ditches, embankment and right-of-way have numerous locations of complete failure with the majority of the infrastructure evidencing marginal function as to its intended design purpose.

Exhibit N at 2.

The prolonged lack of maintenance and resulting damage to the Ashokan Segment was further evidenced during the preliminary and final engineering design of the Ashokan Rail Trail project along this section of track. As the County’s consultants collected data and survey information and subsequently worked to obtain necessary environmental permits and approvals from the New York State Department of Environmental Conservation (“DEC”) and the New York City Department of Environmental Protection (“DEP”), several areas of track were now

designated as State and/or federal wetlands. The evolution of these track areas into protected wetlands resulted from a failure of CMRR to clean and maintain culverts and ditches over a period of decades, which was required for this eastern segment. In some areas, CMRR had cut fallen trees and dumped the branches and wood debris in adjacent drainage ditches. In at least two spans of the Ashokan Segment, the Ashokan Rail Trail must detour from the railroad alignment or span the rail bed with an engineered surface in order to avoid impacts to wetlands created by years of neglect to the underlying drainage systems. The lack of maintenance to culverts and drainage ditches was unfortunately not unique to the Ashokan Segment.

While the Line became heavily deteriorated from lack of maintenance, it was also severely damaged in areas from storm disaster events since the County's purchase of the Line. Esopus Creek flooding in 1987 took a heavy toll on the Line west of Phoenicia, including damaging the aforementioned Woodland Valley Bridge. Subsequent flooding events damaged track within the CMRR's operating area along the Esopus Creek, some of which was repaired. However, in 2011, Hurricane Irene and Tropical Storm Lee delivered severe blows to the Line, leaving the Boiceville Trestle at MP 21.3 substantially destroyed, creating a 600-foot washout along the Esopus Creek at MP 23.3, and damaging track at various other points. The Big Indian Trestle Bridge at MP 36.7 was knocked off its center pier and was near collapsing into the Esopus Creek (and was removed by the County in September 23, 2013 to protect public safety and downstream resources). Photos taken in 2012 and 2013 of the Line's deterioration, tree and brush overgrowth, and storm damages, including the Boiceville Trestle, Big Indian Trestle and washout at MP 23.3, are attached hereto as Exhibit O. In some of these photos, it is difficult to identify the rail or rail bed which are obscured by heavy overgrowth of trees, brush and debris or strewn in the Esopus Creek in areas where the embankment and ballast were completely washed

away. Along the Ashokan Section, there is also a failed major culvert at the Butternut Creek, photos of which are attached hereto as Exhibit P. This major culvert will be removed as part of the Ashokan Rail Trail project, and the creek will be “daylighted” or restored to its original flow for the first time in a century. Finally, the Line’s overpass at MP 36.9 was also removed some years ago by the Town of Shandaken to increase the clearance for vehicles on the road beneath.

While some of the brush and trees in the attached photos were subsequently removed, these photos provide a good sense of why the Line is no longer viable for railroad use in many areas and is delineated for conversion to trail uses in multiple segments. While opponents of rail removal claim that railroad services could feasibly be restored along the entire Line, a quick perusal of these photos demonstrate that such contentions are without any basis. In addition to the photos, the County’s Department of Environment conducted a detailed survey of the Line in 2012-2013 and documented that 7,225 linear feet (1.37 miles) was completely or substantially washed out, a report and map of which are attached hereto as Exhibit Q. Ignoring the extreme costs of rebuilding these areas for a moment, there is zero probability that the environmental regulatory agencies with jurisdiction of this critical area of the New York City Watershed would ever allow new embankment fill to be placed in a creek that feeds a critical drinking water supply reservoir for nine million people.

Following the extreme storm events in 2011, the CMRR applied to the Federal Emergency Management Agency (“FEMA”) for disaster recovery assistance for four major projects, including the Boiceville Trestle and washout at MP 23.3, which are included in the attached photos. However, to date, none of these FEMA projects have been implemented because the costs of work estimated by CMRR, on which the FEMA assistance awards are based, were vastly underestimated and based on incomplete scopes of work. For example, the

washout at MP 23.3 was estimated to cost approximately \$184,000 to repair by CMRR volunteers. However, the County must implement the repairs and therefore conducted survey and engineering design of the repairs followed by a competitive bid process. The lowest responsible bid on this one washout exceeded \$757,000. The County has requested rescoping of the project by FEMA, but repair work is on hold until FEMA approves the rescoping request. These facts demonstrate that large portions of this Line are in an advanced state of disrepair and highlight the difficulties and steep expense of restoring even one washout or missing structure.

In addition to the many washouts, missing bridge structures, advanced tie deterioration, failure of culverts, and other physical deterioration, the Line is also now permanently severed by a NYSDOT highway bridge structure installed along State Route 28 where the Line previously crossed the State highway. In June 2016, the NYSDOT acquired by Eminent Domain a small stretch of the Line from the County in order to reconstruct and significantly raise a bridge along Route 28 prone to flooding from the Esopus Creek. A copy of the taking letter from NYSDOT is attached hereto as Exhibit R. The new bridge structure installed at approximately MP 33.5 was increased in height from the prior bridge to raise it out of the flood zone. As shown in the photos attached hereto as Exhibit S, the new bridge does not provide the vertical clearance necessary for a train and has effectively cut the Line in that location. The NYSDOT was aware that the Line was abandoned, and the track segment acquired was already delineated by the County Legislature for conversion to trail only. As such, the County was able to have the NYSDOT construct a concrete pedestrian and bike passage under the new bridge to accommodate the future trail, which is evident in the attached photos.

While the history and supporting documents provided demonstrate the Line was properly abandoned and details the Line's deterioration and irreversible gaps in physical continuity in

multiple sections, the County believes it is also important to highlight the public interest considerations and public policy development behind the County's rail removal for construction of the Ashokan Rail Trail. Opponents of track removal for the project now argue the County somehow acted rashly or thoughtlessly in pulling up tracks to construct the Ashokan Rail Trail, but the fact is that this Project has been the result of more than a decade of planning, studies, public debate, policy development and design, and negotiation with the City of New York ("City") and its DEP.

In 2005, County officials began seriously examining the possibility of opening some of the Line to recreational trail uses due in part to the fact that the CMRR was only using about 15% of the available 38.7 miles of track. The County commissioned Alta Planning & Design to complete a "U & D Rail + Trail" Feasibility Study for the Ulster and Delaware Railroad Corridor ("Alta Study"), a copy of which is attached hereto as Exhibit T. Since the CMRR had more than 10 years remaining on its Lease at the time of the Alta Study, the Study was not allowed to consider the alternative of removing rail and converting segments to trail only as the train operations were considered an existing condition. The Alta Report again confirms that the Line was abandoned. Exhibit T at 7. Other than in small segments of the Line, the Alta Report noted serious constraints to co-locating a multi-use recreational trail along the railroad, including rock cuts, topography, and DEP regulations along the Ashokan Reservoir limiting public access at the time.

While the Alta Study created some momentum for development of trail in sections of the Line, no trail projects were implemented in the remainder of the CMRR Lease, in part due to opposition from CMRR for utilizing unused railroad segments for trail. For instance, local residents in the Town of Shandaken had proposed to CMRR to allow trail use of a segment of the

existing tracks that were not used by CMRR during the entire 25-year Lease. After months of meetings and negotiations, the CMRR Board of Directors rejected any proposal for trail development during the Lease.

In late 2012, the County Executive announced a proposal to remove some of the track in the unused western segments of the Line where the County owns the Line in fee and which were heavily overgrown with brush and trees. The proposal also included opening up most of the Line for public trail uses, which sparked a prolonged and sometimes fierce debate on the County's "rail versus trail" issue. The trail proposal was consistent with many County policies, including its Non-Motorized Transportation Plan and Open Space Plan. The County then partnered with several local non-profits to commission studies to examine the benefits and feasibility of using some or all of the Line for a recreational trail to support tourism, improve public health, and enhance the quality of life for area residents. The studies included the "Catskill Mountain Rail Trail: Economic & Fiscal Impact Analysis" commissioned by the New York-New Jersey Trail Conference and conducted by Camoin Associates ("Camoin Report"), a copy of which is attached hereto as Exhibit U. The report's finding forecast that the conversion of the Line to a public recreational trail would attract more than 140,000 annual visitors, result in \$3.1 million in new local sales, and create 44 jobs.

At the time of the Camoin Report's release, the most recent annual report from CMRR from 2012 noted the total visitors on CMRR's trains as 9,302 customers for the entire year. The Lease payment to the County, which was a percentage of CMRR's gross revenues, was only \$4,464 for 2012 for CMRR's exclusive use of the 38.7-mile Line. In fact, prior to Ulster County's proposal for trail development, CMRR ran no licensed theme trains, which only began in 2015. CMRR's revenues from 1991-2014 were so modest that the total Lease payments to the

County over those 23 years totaled only \$38,561. Based on such data, it is hard to argue that prior to 2015, when CMRR started to offer theme train events like Polar Express and Day Out With Thomas, the limited, seasonal operations on a small fraction of the available Line justified the growing opportunity costs of the CMRR controlling the entire Line to the exclusion of other public uses.

In 2013, the County began working with the Open Space Institute on a Feasibility Study for the Ashokan Rail Trail. The more than \$150,000 comprehensive study, which included a detailed site assessment and survey, was funded by private sources and was completed by July 2015. As these studies were being done, the County Legislature passed its first policy on the future use of the Line which called for the Line to be converted to trail except between MP 21.3 (location of collapsed Boiceville Trestle) to MP 27.9 (north of which are the most extreme washouts). CMRR and its supporters strongly opposed the removal of track between Kingston and the Boiceville Trestle.

The County Executive proposed a compromise plan to leave a second tourism railroad section in the City of Kingston, which led to the Legislature forming the U&D Railroad Advisory Committee, a bipartisan committee composed of nine County Legislators. The Committee commissioned a detailed report from a railroad consultant, Stone Consulting & Design, P.C., a copy of which is attached hereto as Exhibit V. The report, titled the "Highest and Best Use Recommendations-U&D Railroad Corridor" ("Stone Report"), was conducted over an approximately eight-month period, during which the Committee and consultants reviewed all available data and studies, interviewed a wide range of stakeholders, and visited the majority of the Line to personally observe conditions.

The Stone Report recommendations became the basis for a revised rail and trail policy. The Stone Report's findings recognized that rail and trail use could not exist side-by-side in most sections of the Line, which was constructed as a single-track corridor and had many constraints to co-locating rail and trail, including narrow underpasses, constricted bridge and culvert structures, adjacent wetlands and/or private property encroachments, tight high-fill embankment areas, and regulatory constraints. For instance, in the Ashokan Segment, which the Stone Report strongly recommended for conversion to trail only, the County's Line was an easement for railroad purposes only. Along the majority of the Line, the County owns the right-of-way in fee; however, in the 11.5-mile segment along the City of New York's Ashokan Reservoir, the underlying land ownership was the City and the DEP. The DEP agreed to allow the County to convert the Ashokan Segment into a public recreational trail (and provide \$2.5 million in funding to support the project) with the stipulation that rail and trail uses could not take place over the Ashokan Segment concurrently.

Recognizing the poor condition of many areas of the Line and the growing opportunity costs of not allowing alternative public uses, the County Legislature developed and passed a compromise segmented rail and trail policy in December 2015 that delineated two sections of the Line for future tourism rail operations and the rest of the Line for conversion to trail only. This policy resolution (Resolution No. 488 of 2015) passed unanimously (23-0) and was supported by CMRR. A copy of this resolution, its predecessor resolution, and the subsequent thirteen resolutions underlying progressing the Ashokan Rail Trail project are attached hereto as Exhibit W. The adoption of this compromise policy and its subsequent implementation was the culmination of years of public debate, research by a specially-appointed bipartisan Legislative committee, and planning and study which started as early as 2005. The tourism railroad

components of this policy have already been implemented. The County has issued a multi-year permit to CMRR to operate between MP 3.8 and MP 8.3 although CMRR currently only runs its theme and other trains to MP 6.5 because it has not yet restored the remaining available track to minimum FRA Class 1 standards. Additionally, the County has signed a multi-year lease for a rail bike company, Rail Explorers Corporation, to operate starting in May 2018 in the segment between MP 23.3 to MP 27.9. The combined operations of these two operations is projected to attract more than fifty thousand visitors in 2018, which demonstrates that the segmented rail and trail policy is already spurring economic benefits for the County.

While the County was studying the rail and trail issue and formulating policies for the Line's redevelopment following the expiration of CMRR's Lease, the County also worked to secure a critical agreement with the City and DEP to allow trail uses along the Ashokan Reservoir upon property owned by the City over which the County's Railroad Easement exists. In late 2012, the DEP and the County announced an historic agreement in principle to convert the Ashokan Segment to trail only, which would open the northern shores of the Ashokan Reservoir to the public without special permits for the first time since the construction of the Reservoir in 1911-1912.

During the construction of the Ashokan Reservoir, the Line had been relocated from its original alignment along the Esopus Creek Valley that became part of the Reservoir, and the City granted a permanent railroad easement to the Ulster and Delaware Railroad Company upon property owned by the City of New York, along which the permanent easement was granted. Using City funding, the railroad was reconstructed on its current alignment on the border of the Reservoir on City lands, including over two major dikes. The City of New York and DEP were aware that no freight or passenger trains had run on the Ashokan Segment since 1976. In

considering the protection of the City's Ashokan Reservoir, a terminal reservoir in the nation's largest unfiltered drinking water system, the City was consistent and clear over a period of more than ten years that a trail could not be built alongside the railroad, which would require significant disturbance of and impact to the lands and waters along the Ashokan Reservoir.

The County and the City negotiated terms for a Memorandum of Agreement ("MOA"), which was approved by the Legislature and executed on June 16, 2015. This MOA, a copy of which is attached hereto as Exhibit X, established the framework and partial funding for the conversion of the Ashokan Segment from railroad to recreational trail. In the MOA, the City would grant the County a Land-Use Permit to design and build the Ashokan Rail Trail and the County's easement for railroad purposes ("Railroad Easement") would be modified at some future date. Since a Land-Use Permit is revocable and not a permanent property interest, the County and DEP discussed a potential avenue for protecting the Railroad Easement from possible reversion by using the National Trails System Act. The MOA allowed the County, with DEP input, to seek from the STB reactivation of the Line for freight operations. After a brief period of time in which no shipper(s) in all likelihood would request service that would justify the significant capital investments necessary to ship freight and reconnect to the national rail transportation system, the County would then seek to use federal railbanking to protect the Railroad Easement while allowing for Interim Trail Use under the National Trails System Act.

The MOA gave the County the option to reactivate the Line and then request railbanking, but it did not require it. As the County and the City further negotiated the follow-up agreement(s) to create the Ashokan Rail Trail, the parties agreed after months of discussion and research that it would be advantageous to both parties not to reactivate the Line. Instead, the County and City negotiated a new trail easement, which would overlay and protect the County's

underlying Railroad Easement. The new Ashokan Trail Easement (“Trail Easement”), a copy of which is attached hereto as Exhibit Y, obviated the need for, and risks of, a revocable Land-Use Permit and provided the County the right to terminate the Trail Easement in the future in order to re-establish rail uses under its perpetual Railroad Easement. Absent reactivation of the Line and federal railbanking, the Trail Easement enabled the County to protect its underlying Railroad Easement and not be subject to possible reversionary interests upon the removal of rail on the Ashokan Segment. The Trail Easement was executed and filed with the County Clerk’s office on August 28, 2017, conveying a permanent trail easement to the County and laying the groundwork for the beginning of trail construction. That construction began in early January 2018 following the bidding and award for track removal and securing of necessary permits and approvals. As of the date of this filing, a majority of the steel rail has been removed and salvaged.

It is important to note that in addition to receiving financial support from the DEP for the Ashokan Rail Trail, the Project was also awarded more than \$3.6 million in grants through the New York Department of Environmental Conservation and another \$500,000 through the New York State Office of Parks, Recreation, and Historic Preservation (“OPRPH”). In addition to providing funding support, OPRHP also reviewed the project and issued a determination to the County that the proposed track removal and trail construction would have No Adverse Impact on the historical resources along the Line, a copy of which is attached hereto as Exhibit Z.

The Ulster & Delaware Railway Revitalization Corp. (“U&D”), which filed the Petition for Declaratory Relief (FD 36164) on January 16, 2017, appeared not to be aware that the documentation of abandonment exists. Also, U&D appears to be confused about the Line’s connection to the national rail transportation system. U&D claims the Line is connected, but that

simply is not the case because the Line has clearly been severed at various points. Further, U&D seems unaware that the Ashokan Trail Easement is in addition to the County's Railroad Easement and obviates the need to use the National Trails System Act. The County has not proposed and has no intention to use the National Trails System Act for the Ashokan Rail Trail. The contention that the Ashokan Segment will revert to DEP is simply incorrect, which is clearly addressed in the Ashokan Trail Easement. The U&D has also made public statements questioning why the County had announced it was going to use federal railbanking in early 2013. The fact is that the County had not yet then located in its archives the Notification of Abandonment and other documents showing conclusively that the Catskill Mountain Branch, including the Line, was abandoned in 1977 under the 3R Act. The confirmation of this abandonment is reflected in the 2015 MOA between the County and City in which the County left itself the option of reactivating the Line for freight operations so it could then use railbanking to allow Interim Trail Use to protect its Railroad Easement. In the end, the negotiation of an additional Trail Easement obviated the need for any reactivation or railbanking.

The County met with three Board members of the U&D during the summer of 2016 at the request of the newly-formed organization. Most of the members of this small organization had not been involved in the meetings and public debate of the past five years on this matter and many of them live in other counties. As such, the County representatives conveyed much of the information in this Statement of Facts to the U&D representatives, including information on the physical deterioration and major gaps in the system. The U&D left the meeting and then began to wage a campaign against the County's trail plans. It is important to note that the County worked through to a compromise on the rail versus trail issue that received bipartisan and unanimous support in the Legislature, was supported by the CMRR in public statements at the time of its

passage and was lauded by local newspapers for taking a balanced and thoughtful approach to an emotional and complex issue. In addition, the County has entered into a legally valid agreement with the City that enables the County to remove track for the Ashokan Rail Trail without the right-of-way reverting to the City or compromising the Railroad Easement. The County looks forward to implementing diligently the rail and trail components of this compromise policy and appreciates the Board's patience and consideration in allowing the County to clarify and correct the record on this important local issue.

VERIFICATION

I, Christopher White, Deputy Director of Planning Department and Project Manager of Ashokan Rail Trail, of Ulster County, New York, verify under penalty of perjury that the foregoing Verified Reply to Ulster & Delaware Revitalization Corp. Petition to File a Reply to a Reply and Motion to Strike is true and correct to the best of my knowledge, information, and belief. Further, I certify that I am qualified and authorized to file the foregoing document.

Executed on April 9, 2018



Christopher White
Deputy Director of Planning Department
Ulster County, New York