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March 24, 2022

VIA ELECTRONIC FILING

304172

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, DC 20024

ENTERED
Office of Proceedings
March 24, 2022
Part of
Public Record

Re: **FD 36447**
Lake Providence Port Commission – Feeder Line Application – Line of
Delta Southern Railroad Located in East Carroll and Madison Parishes, LA

Dear Ms. Brown:

Enclosed for filing in the above-captioned proceedings is the **Response of Delta Southern Railroad, Inc. to Lake Providence Port Commission's Motion to File a Supplemental Application to Acquire the Entire Lake Providence Line Between MP 471.0 and MP 498.6**, dated March 24, 2022.

If you have any questions regarding this filing, please feel free to contact me.
Thank you for your assistance on this matter.

Respectfully submitted,

Thomas J. Healey

James D. Helenhouse
Thomas J. Healey
Attorneys for Delta Southern Railroad, Inc.

cc: Richard Streeter

TJH:th

Enclosure

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36447

**LAKE PROVIDENCE PORT COMMISSION
— FEEDER LINE APPLICATION—
LINE OF DELTA SOUTHERN RAILROAD LOCATED IN
EAST CARROLL AND MADISON PARISHES, LA.**

**RESPONSE OF DELTA SOUTHERN RAILROAD, INC.
TO LAKE PROVIDENCE PORT COMMISSION'S
MOTION TO FILE A SUPPLEMENTAL APPLICATION
TO ACQUIRE THE ENTIRE LAKE PROVIDENCE LINE
BETWEEN MP 471.0 AND MP 498.6**

Delta Southern Railroad, Inc. ("DSR") hereby responds to Lake Providence Port Commission's ("LPPC") "Motion to File a Supplemental Application to Acquire the Entire Lake Providence Line Between MP 471.0 and MP 498.6" (the "Motion") filed on March 4, 2022.

Consistent with its conduct throughout this proceeding, LPPC continues to grasp at air in an effort to find any cognizable basis to force the sale of all or any portion of the DSR's Lake Providence Branch (the "Branch"). Almost 16 months after initiating this proceeding to compel a sale of a selected portion of the Branch between mileposts 491.0 and 471.0 (the "North Segment"), LPPC has changed its mind. Now, LPPC wants to greatly expand the scope of its proposed taking, seeking to add to its Feeder Line Application (the "Application") the remaining portion of the Branch between mileposts 491.0 and 498.6 (the "South Segment"), and with it, the direct connection with The Kansas City Southern Railway Company ("KCSR") at Tallulah,

Louisiana. As LPPC knows, the South Segment actively supports local traffic for customers located on it, and none of those customers have alleged that DSR's ongoing provision of service is in any way inadequate.

Amazingly, the Motion includes no verified evidence, but is instead a rambling re-hash of LPPC's historical inaccuracies and false allegations intended to gloss over the simple fact that there is no inadequacy of DSR service anywhere, and to obscure LPPC's evasion of the proper legal standard for the forced transfer of a railroad line. The Motion conveniently ignores – again – that no one has requested service via the North Segment in years, and that the DSR interchange with North Louisiana & Arkansas Railroad (“NLA”), located at the north end of the North Segment, remains open and available for the purpose of handling through traffic. LPPC cannot plausibly claim any unmet service need on the North Segment, because LPPC's Port facilities are in no condition to allow DSR to access any customers located there. Finally, the INFRA Grant provides no basis for expanding the scope of LPPC's latest grab attempt.

LPPC's meritless Motion should be denied, and the Board should dismiss this docket pursuant to DSR's pending motion to dismiss.

I. LPPC BASELASSLY SEEKS PERMISSION TO FILE AN ENTIRELY NEW APPLICATION UNDER THE GUISE OF A “SUPPLEMENT”.

LPPC styles its Motion as one seeking leave to “supplement” its existing feeder line application (the “Application”) filed with the Board on November 12, 2020, while the caption for its Motion indicates that LPPC actually wants to file a new, heavily modified “supplemental application.” In either event, what LPPC proposes to file is much more than a supplement. Rather, LPPC wants the Board's permission to “hit the reset button” on the scope of its rail line acquisition aspirations, rightly calling into question LPPC's oft-stated urgency for expedited Board action.

LPPC offers no newly-discovered evidence, intervening facts, or changes in the law to explain its abrupt decision to target the South Segment in addition to the North Segment. Despite vaguely asserting that the forced sale of the South Segment would be in the public interest (*Motion*, 8, 12), LPPC makes no reference to, nor effort to satisfy, any of the five mandated statutory elements for determining whether the public convenience and necessity require or permit the compelled sale of the South Segment (*See* 49 U.S.C. § 10907(c)), and there is not the slightest hint of a service inadequacy on the South Segment. In fact, LPPC’s previously-supplied evidence shows that DSR’s South Segment service is “generally regarded as adequate.” *Application*, Exhibit 7, Verified Statement of Terry Patrick Murphy, par. 4.

Lacking any truly justifiable basis for a 16-month delay in seeking to take DSR’s South Segment, LPPC explains that its new efforts stem from a “realization” (*Motion*, 2) that apparently came to it on “further review” (*Id.*, 4). But surely no amount of review should have been needed to realize that even if LPPC were to somehow prevail on its acquisition of the North Segment (which it should not), the South Segment would remain with DSR.

LPPC points to *Keokuk Junction Railway Company—Feeder Line Acquisition—Line of Toledo Peoria and Western Railway Corporation Between La Harpe and Hollis, IL.*, FD 34335, slip op. at 4 (STB served Sep. 26, 2003) (“*Keokuk*”) to justify filing a “supplemental application.” But *Keokuk* does not support LPPC’s Motion – it is entirely distinguishable on its facts. *Keokuk* establishes that a feeder line applicant may supplement a previously-filed application that is substantively incomplete, under circumstances where the Board specifically afforded the applicant 30 days to shore up deficiencies in its original feeder line application. The cited language from *Keokuk* has nothing to do with the issue of whether a feeder line applicant is ever entitled to amend its application to expand the scope of the lines it wishes to acquire, and it

certainly does not support such a step well over a year after the initial feeder line application was filed. Given the radical change in scope and the abusive nature of LPPC's latest effort, one would expect LPPC to provide solid precedent to support its Motion, rather than referencing one case with thoroughly distinguishable facts, but that is what LPPC has chosen to do.

Moreover, LPPC's desire to acquire the South Segment has to do with asserted operational *convenience*, not *necessity*. Today, tenants in LPPC's Port have access to direct, single-line service to KCSR by shipping on DSR (which, as discussed below, no shipper in the Port has requested in several years, and for probable reasons also discussed below), without a need for interchange. LPPC's efforts to force the sale of the North Segment would interrupt that direct service and create the very interchange that concerns it.

In sum, the Motion seeks permission for LPPC to file a new feeder line application, not to supplement an existing one. Due process, along with common sense, dictate that if the Motion is granted (and it should not be), the Board must also re-start the feeder line process under 49 C.F.R. § 1151, *et seq.*

II. LPPC STILL REFUSES TO ACCEPT THE FACT THAT AN OPEN INTERCHANGE HAS EXISTED FOR YEARS AT LAKE PROVIDENCE.

As the Board is aware, LPPC alleges that DSR has refused – and continues to refuse – to interchange traffic with NLA at Lake Providence. Application, 18. Such claims are patently false. They are insufficient to satisfy the exacting criteria for relief under the feeder line statute, as has been discussed extensively in DSR's pending Motion to Dismiss. Yet LPPC strenuously ignores the ramifications of DSR's reaffirmation, made over a year ago, that “*DSR is currently willing and able to accommodate DSR-NLA interchange if so requested.*” See DSR's Motion to Strike (filed March 8, 2021), 5 (emphasis in original). DSR's statement does not denote a change in the status of the interchange, which AAR records confirm has been open

continuously since spring of 2016, after DSR restored the North Segment to operable condition.¹ Rather, DSR sought to reassure the Board and potential shippers (many of whom are apparently misled to believe that the DSR-NLA interchange is closed) that *DSR can and will provide through service with NLA through the Lake Providence interchange if ever such a service request were to materialize*. DSR would welcome such a service request to demonstrate to shippers, the Board and all other observers of this case that LPPC is simply being purposefully dishonest about DSR's capacity to handle local or through service on the North Segment.

Similarly, no one has requested DSR service to or from LPPC's Port (located on the North Segment) in a number of years.² But there are reasons why this is the case, illustrated below. Suffice to say here that, as with many of LPPC's other claims, the contention that DSR cannot and will not handle cars to and from Lake Providence (including in interchange with NLA) is nothing more than shameless fabrication.³

III. NLA AND LPPC FACILITIES AT OR NEAR LAKE PROVIDENCE ARE IN NO CONDITION TO SUPPORT RAILROAD TRAFFIC.

Among a long list of falsehoods, LPPC continues to insist that DSR's ongoing car storage on the North Segment is definitive proof that DSR cannot and will not handle local or through traffic over that line, even when it knows that its conclusory statement is unproven, incorrect, and at odds with DSR's repeated statements of an ability and willingness to serve such

¹ See Verified Statement of Jon Ryan ("V. S. Ryan"), attached as Exhibit A, par. 2.

² *Id.*, par. 3.

³ LPPC's argument that DSR's car storage activities on the North Segment preclude through service is at odds with DSR's declaration that it is willing and able to reach the northern end of the North Segment for interchange with NLA, and to access LPPC's Port. Car storage is clearly not an impermissible use of the North Segment, so long as it doesn't interfere with DSR's response to (long-nonexistent) requests for through or local service. LPPC's assertion that car storage is "incompatible" with DSR satisfying its common carrier obligations (Motion, 4, 7, 12, 14) is mere self-serving nonsense.

local and through traffic if any shipper so requested. LPPC also recklessly speculates that the North Segment is in no condition to safely accommodate the movement of freight cars.

Application, 23. In fact, DSR regularly accesses (and moves) the cars stored on the North Segment, usually at least weekly.⁴ There is no violation of STB or FRA standards in maintaining track to FRA excepted track status. In any event, DSR continues to invest in both the North Segment and the South Segment.⁵

On the other hand, neither LPPC nor NLA appear to have invested much, if anything, to support potential traffic movements to/from the Port or via the NLA-DSR interchange at Lake Providence. Attached as Exhibit B are pictures of the rail facilities located in LPPC's Port, taken by Jon Ryan in December 2020 (shortly after the Application was filed). Visible in the photos are stored boxcars with vines growing through them, a derelict rail regulator, and a pipe (perhaps a water or sewer pipe) that has been in place for some time, all directly blocking the lead track into the Port. Lest the Board be confused by the inference that LPPC (which is served by DSR directly and by NLA through trackage rights) and NLA have a thriving business moving railcars north of the Port and simply cannot wait to be able to bring that same thriving service south of Lake Providence, it does not appear that anything has moved by rail into or out of the Port for some time.

Nor does it appear that NLA was requested to use its main line track for the movement of railcars in quite a while. Attached as Exhibit C are photographs of NLA's track, taken by Mr. Ryan in February 2021.⁶ The photos plainly illustrate that the track had not seen

⁴ V. S. Ryan, par. 4

⁵ *Id.*

⁶ DSR does not know why the milepost designations shown in the photos on the blue Emergency Notification Signs do not match the numbering sequence of the mileposts referenced by NLA

any rail service, or maintenance, in quite a while. These photos establish that one of the key reasons that there has been no DSR-NLA through traffic flows in years is because NLA-operating track leading to the interchange has not been operable.

IV. THE INFRA GRANT REMAINS A RED HERRING.

Throughout this proceeding, LPPC has relied upon the Infrastructure for Rebuilding America Program Grant (the “INFRA Grant” or “Grant”) as the primary justification for granting its Application. Application, 8-13. But, as is its tendency, LPPC is very selective about the information it has supplied about the INFRA Grant which, with the exception of one item addressed immediately below, DSR will address in a formal response to the merits of the Application (unless the Application is dismissed, as it should be).

Specifically, LPPC falsely maintains in the Motion that unless *all* of DSR’s Lake Providence Branch (that is, the North Segment and South Segment) is rehabilitated with INFRA Grant funds, the Grant’s objectives will be thwarted. Motion, 4. LPPC’s own actions, however, thoroughly refute that claim. LPPC is not that interested in undertaking extensive capital improvement to DSR’s lines, because it does not have enough Grant money to fund such track work. LPPC acknowledged that it has significantly underestimated the cost to restore LPPC and NLA-owned track in Arkansas (between mileposts 408.9 and 433.0), all operated by LPPC’s ally, NLA. Motion, 15. But LPPC (no doubt purposely) failed to mention that LPPC and its allies reallocated over \$1.2 million dollars earmarked for work on DSR’s lines to cover the referenced shortfall in Arkansas. Attached as Exhibit D are the official minutes of LPPC’s November 17, 2021 board meeting, reading in part as follows:

and LPPC in this docket. The at-grade crossings shown are located on the main line operated by NLA between Halley and Eudora, AR.

Bids for the Arkansas portion of the railroad rehabilitation were opened 29 July with Queen City Railroad Construction having the lowest bid at \$6,270,029.00. A Preconstruction Meeting was held 26 August in Lake Village where the contracts were signed. As a result of the bid going over the estimated cost by \$1,223,286, a portion of funding in Segment D [DSR's North Segment] was moved to cover those higher costs.

Under the circumstances, it is quite possible that LPPC's bid to file a "Supplemental Application" to acquire the South Segment along with the North Segment is an attempt to acquire profit-generating DSR assets at less than fair market value to leverage its capital improvement funding shortfall. Regardless, LPPC and its allies have misleadingly contended that they must acquire all the North Segment and the South Segment to undertake track rehabilitation for which they no longer have sufficient committed and available funds.

V. THE BOARD SHOULD GRANT DSR'S PENDING MOTION TO DISMISS, AND, IN ANY EVENT, MUST ACT ON THAT MOTION BEFORE ADDRESSING LPPC'S LATEST REQUEST TO REFORMULATE ITS APPLICATION.

Finally, LPPC's Motion should await – and may become moot, depending upon the results of – Board action on DSR's pending Motion to Dismiss. The Board may (and should) agree with DSR that LPPC's current Application should be dismissed because there can be no service inadequacy warranting the extreme action of a forced taking where there is no service demand that is going unmet in the first place. If that is the case, then entertaining a "supplemental application" covering other lines where there is a demand for rail service *and* where such demands are being met would be pointless. Given the amount of (likely unnecessary) work that would be required to prepare a Supplemental Application⁷ and the

⁷ On Monday, March 21, 2022, LPPC served ten interrogatories and 51 multi-part requests for the production of documents on DSR. Paradoxically, these new discovery requests are both premature (as they relate to the South Segment, which LPPC has not been permitted to fold into this proceeding) and untimely (as the time set for a potential feeder line applicant to serve discovery on a target railroad has long passed). See 49 C.F.R. § 1151.2(d).

response thereto, DSR urges the Board to act on its Motion to Dismiss before ruling on LPPC's Motion. Favorable action on the former would render action on the latter moot. That said, should the Board deny DSR's motion to dismiss and allow LPPC's "supplemental application," the Board should treat the new filing as a renewed commencement of the other feeder line case, and it should restart the regulatory processes set out at 49 C.F.R. § 1151.2.⁸

For all of the foregoing reasons, the Board should grant DSR's pending Motion to Dismiss, and should only devote its attention and resources to the instant Motion if the Application is not dismissed.

Respectfully submitted,

/s/Thomas J. Healey

James D. Helenhouse

Thomas J. Healey

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**ATTORNEYS FOR DELTA SOUTHERN
RAILROAD, INC.**

Dated: March 24, 2022

⁸ On page 13 of the Motion, [

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CERTIFICATE OF SERVICE

I hereby certify that, on this 24th day of March, 2022, I served copies of the foregoing “Response of Delta Southern Railroad, Inc. to Lake Providence Port Commission’s Motion to File a Supplemental Application to Acquire the Entire Lake Providence Line Between MP 471.0 and MP 498” electronically (via email) upon each the following party of record:

Richard H. Streeter
5255 Partridge Lane, NW
Washington, DC 20016
rhstreeter@gmail.com

/s/ Thomas J. Healey
Thomas J. Healey

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36447

**LAKE PROVIDENCE PORT COMMISSION
— FEEDER LINE APPLICATION—
LINE OF DELTA SOUTHERN RAILROAD LOCATED IN
EAST CARROLL AND MADISON PARISHES, LA.**

EXHIBIT A

**VERIFIED STATEMENT
OF JON RYAN**

VERIFIED STATEMENT OF JON RYAN

1. My name is Jon Ryan. From May of 2017 until January of 2021, I acted as the Vice President of Finance in a consulting role for the Delta Southern Railroad, Inc. (DSR). In January of 2021 I was appointed as the Chief Executive Officer of the DSR, and I remain in that position today. I have personal knowledge of all the facts stated herein and am duly authorized to present this Verified Statement on behalf of DSR.

2. Through my staff, I have determined that the records of the Association of American Railroads show that the interchange between DSR and North Louisiana & Arkansas Railroad ("NLA") at Lake Providence, Louisiana has been open for customers to request interchange service since May 1, 2016, after DSR completed track work to restore its connection to NLA.

3. In my position as CEO with DSR and given the sensitivity to DSR of the pending feeder line application, I am certain that I would be made aware of any requests from a shipper to either interchange cars with NLA at Lake Providence, or to service a tenant at the Lake Providence Port (the "Port"), operated by the feeder line applicant, the Lake Providence Port Commission ("LPPC"). To the best of my knowledge, and after consultation with our car service and operating personnel, I do not believe that any such requests have been made in approximately four years. I was made aware by a customer of one instance in the last few years where a customer noted that waybills were incorrectly coded to send cars to the DSR via the NLA, but the customer noticed the routing and made a change to route the cars to DSR via its interchange with The Kansas City Southern Railway Company at Tallulah, LA. All of this occurred before the DSR became aware of the situation. I do not know why the customer re-routed the cars. This change was made by the customer prior to discussing the matter with the DSR. Had the cars been routed to the DSR via interchange with NLA at Lake Providence, we would have moved the cars to the customer, per the directed routing.

4. Over the last few years, DSR has used various portions of the northern end of its Lake Providence Branch (generally between milepost 491.0 and milepost 471.0 (the "North Segment")) to store railcars. In addition to allowing DSR to realize some return on the investment it has in that 20-mile stretch of track, the revenues derived from storing railcars provides DSR with additional funding to maintain both the North Segment and the segment of track located between mileposts 491.0 and 498.6 (the "South Segment"). DSR is routinely called upon to place additional cars into storage on the North Segment, and to retrieve particular cars from storage on the North Segment, as requested by our storage customers. We accomplish these movements on a frequent basis (perhaps three to five times per month). That track, while in FRA "excepted" condition, allows for us to safely place and retrieve stored cars.

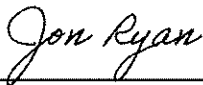
6. I took the photographs that are attached to this filing as Exhibits B and C. Exhibit B includes photographs of what I witnessed at the Port's rail facilities in December 2020. The stored box cars, maintenance of way equipment, and pipe all are located on the lead track to the Port, and indicate to me that no Port customer has received rail service for some time. I

confirmed on a visit this spring that the conditions on the Port's tracks remain as they are shown in my photographs. Exhibit C reflects photographs that I took in February 2021 of the main line operated by NLA between Halley and Eudora, Arkansas. This segment of track is located between the DSR-NLA interchange at Lake Providence and NLA's interchange with Union Pacific Railroad Company at McGehee, Arkansas. Again, it does not appear to me that this track has been operated, or maintained, for several years.

Verification

I, Jon Ryan, verify under penalty of perjury that I am Chief Executive Officer for Delta Southern Railroad, Inc., that I have read my foregoing verified statement and know its contents, and that the same is true and correct to the best of my knowledge and belief.

Executed March 24, 2022



Jon Ryan
Chief Executive Officer
Delta Southern Railroad, Inc.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36447

**LAKE PROVIDENCE PORT COMMISSION
— FEEDER LINE APPLICATION—
LINE OF DELTA SOUTHERN RAILROAD LOCATED IN
EAST CARROLL AND MADISON PARISHES, LA.**

EXHIBIT B

**PHOTOGRAPHS OF LAKE PROVIDENCE
PORT COMMISSION'S RAIL INFRASTRUCTURE**









**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36447

**LAKE PROVIDENCE PORT COMMISSION
— FEEDER LINE APPLICATION—
LINE OF DELTA SOUTHERN RAILROAD LOCATED IN
EAST CARROLL AND MADISON PARISHES, LA.**

EXHIBIT C

**PHOTOGRAPHS OF NLA'S
MAIN LINE TRACK**



















**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36447

**LAKE PROVIDENCE PORT COMMISSION
— FEEDER LINE APPLICATION—
LINE OF DELTA SOUTHERN RAILROAD LOCATED IN
EAST CARROLL AND MADISON PARISHES, LA.**

EXHIBIT D

**MINUTES OF
LAKE PROVIDENCE PORT COMMISSION'S
NOVEMBER 17, 2021 MEETING**

REGULAR MEETING OF THE LAKE PROVIDENCE PORT COMMISSION

HELD ON NOVEMBER 17, 2021

The Lake Providence Port Commission met in regular session on Wednesday, 17 November 2021 at 8:00 a.m. in the Port Commission office at the Lake Providence Port.

Officers Jim Thom, President, Jerry King, Vice President, and Francis Lensing, Secretary-Treasurer were present. Commissioners Mark Buntyn, and Roger Clement were present. Commissioners Derrius Morris, and Karvan Powell were absent. Bryant Killen, Deputy Director and Wyly Gilfoil, Port Director were also present.

The minutes from the meeting held in October 2021 were accepted on a motion by Mr. Lensing and second by Mr. King.

On a motion by Mr. Clement and second by Mr. Buntyn, the Commission approved the financial reports for the period ending October 2021.

The bills for November 2021 were approved as presented on a motion by Mr. Clement and seconded by Mr. King.

Mr. Gilfoil and Mr. Killen presented project reports on construction in progress and in design. DOTD sent a Notice of Award with Funding 19 Jul 2021 in the amount of \$5,000,000 (balance remaining \$2,021,386) for the Port Construction & Development Priority Program (PCDPP) application for the Multimodal Freight Corridor Improvements. HDR and Buchart Horn submitted an INFRA application for Railroad Rehabilitation 1 Mar 2019. US DOT awarded 10.5 million in Federal appropriations 20 July. HDR was selected as the engineering firm for the INFRA project. Bids for the Arkansas portion of the railroad rehabilitation were opened 29 July with Queen City Railroad Construction having the lowest bid at \$6,270,029.00. A Preconstruction Meeting was held 26 August in Lake Village where the contracts were signed. As a result of the bid going over the estimated cost by \$1,223,286, a portion of funding in Segment D was moved to cover those higher costs. A joint EDA grant application is being prepared to account for the funding moved from Section D and other rail work to be done due to the original reduction in the INFRA grant. A Feeder Line Application was filed with the Surface Transportation Board 10 Nov 2020 to acquire the 20 miles of track from MP 471 to MP 491. STB has directed the parties to participate in mediation. The Commission approved the project report on a motion by Mr. Lensing and seconded by Mr. Clement.

In other business, Mr. Killen and Mr. Gilfoil presented updates on the electrical substation, and other business. On a motion by Mr. King and second by Mr. Buntyn, the Commission authorized the President to execute an Assignment of Agspring's leases. The Commission authorized the President to execute a Estoppel Statement with Greenfield Grain, LLC on a motion by Mr. Lensing and second by Mr. Clement.

The Commission adjourned at 9:13 a.m. on a motion by Mr. Clement and seconded by Mr. Lensing.

James A. Thom, IV
President

Attest:

Francis X. Lensing
Secretary