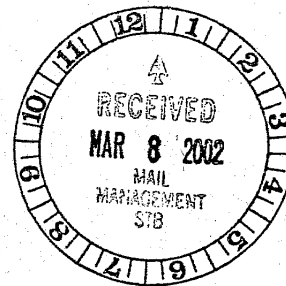


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Fee waiver requested
BY HAND

March 7, 2002

Honorable Linda Morgan, Chairman
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

RE: Finance Docket No. 34117, Pemiscot County Port Authority --
Construction of a Line of Railroad in Pemiscot County, MO
Appeal of decision denying fee waiver

Dear Chairman Morgan:

Pursuant to 49 CFR 1115.1 and 49 CFR 1117.1, I am writing on behalf of the Pemiscot Port Authority (hereafter "Pemiscot") to appeal a decision rendered by Board Secretary Vernon A. Williams in his letter dated December 10, 2001, denying Pemiscot's request for a fee waiver in the above-captioned proceeding. Pemiscot urges the full Board to reverse Secretary Williams' decision in order to prevent a clear error of judgment and to prevent manifest injustice.

As a preliminary matter, Pemiscot asks the Board to accept this late filed appeal after the December 20, 2001, due date established by 49 CFR 1115.1. Alternatively, Pemiscot requests a waiver of 49 CFR 1115.1 requiring appeals to be filed within 10 days after the date of the action taken. Board regulations and case law permit extensions of time to be granted when good cause is shown and no party would be prejudiced by the delayed submission. See, STB Docket No. AB-596, New York City Economic Development Corporation - Adverse Abandonment - New York Cross Harbor Railroad, Inc. in New York, NY (served Dec. 21, 2001) and precedent cited therein.

In support of its request, Pemiscot notes that when its counsel received Secretary Williams' letter on December 12, 2001, he immediately contacted Pemiscot's Executive Director to discuss

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appropriate action. Pemiscot sought the advice of its Congressional Delegation which in turn contacted the Board to discuss the matter. It was not until about January 9, 2002, well after the December 20, 2001, deadline for filing an appeal, that a Congressional staff aide discussed this matter with a member of the Board's Congressional staff who advised Pemiscot to file an appeal. Then some additional time passed before the aide contacted Pemiscot and this appeal could be prepared.

Pemiscot believes the following considerations warrant the grant of an extension to the filing deadline. First, the Board's own Rules of Practice (at 49 CFR 1100.3) provide for its own rules to be construed liberally to secure a just, speedy, and inexpensive determination of the issues presented. Second, uncertainty over the proper method for seeking a review of a fee waiver determination along with the intervening Christmas-New Years' Holidays resulted in a delay in bringing this appeal.¹ Finally, no one would be prejudiced by a grant of this extension inasmuch as no one opposes Pemiscot's request.

Turning to the merits of Pemiscot's request, Pemiscot representatives met with Secretary Williams on August 1, 2001, to discuss whether Pemiscot would qualify for a fee waiver. Secretary Williams advised Pemiscot that the Board had changed its traditional "no fee for a public agency applicant policy" in a policy statement dated December 2, 2000.² Nevertheless, he stated that if Pemiscot carefully followed the guidelines laid

¹ 49 CFR 1115.1 appears to be the provision most appropriate for appealing a denial of a fee waiver request because that section governs appeals from decisions of employees acting under authority designated by the Chairman and the Secretary has the delegated authority under 49 CFR 1011.8 to waive a filing fee. However, the fact that 49 CFR 1115.1 applies to cases where a hearing is required by law or Board action and fee waiver determinations do not involve hearings creates an ambiguity. Nonetheless, no other appellate provision appears applicable. To the extent that 49 CFR 1115 is not the correct appellate procedure, Pemiscot submits its request under 49 CFR 1117.1 permitting a party to seek relief not provided for in any other rule.

² STB Docket No. 542 (Sub-No. 6), Regulations Governing Fees for Services Performed in Connection with Licensing And Related Services - Policy Statement (served December 6, 2001).

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down in that decision, it would stand a good chance of getting a waiver.

Pemiscot believes that its fee waiver request dated November 16, 2001, met the policy statement's guidelines. Pemiscot stated that it is a government entity established for a public purpose, that the transaction for which authority is sought conveys a public benefit, that the project would not exist but for public funding, and that the transaction does not entail any effort to gain an advantage over another party. Moreover, Pemiscot stated that it was not acting in the capacity of a carrier or shipper.³

In denying Pemiscot's fee waiver request, Secretary Williams appeared to rely exclusively on his perception that Pemiscot would come before the Board as an entity seeking to become a rail carrier by virtue of its construction petition for exemption. While Pemiscot concedes that Secretary Williams has tremendous discretion over whether to grant a fee waiver, Pemiscot notes that his decision is inconsistent with other Board decisions granting other public agency applicants fee waivers in comparable situations.

For example, Pemiscot understands that in one construction case decided in 2001, the Board granted a fee waiver where the applicant (a consortium of counties) sought authority to construct a new rail line. The Board granted the waiver solely on the grounds that the applicant qualified as a government entity acting in the public interest. In another recent case involving a publicly owned commuter rail authority and rail line owner with a residual common carrier obligation, the Board waived the filing fee in connection with the authority's Petition for a Declaratory Order (seeking a preemption ruling). It is unfair for the Board to grant a fee waiver for one government entity rail carrier and deny it to another under similar circumstances.

Pemiscot notes that the Board's policy statement contains a provision allowing the Board to waive or reduce fees for entities

³ While Pemiscot acknowledged that it would have a "residual" common carrier obligation as the owner of the line, it would contract out operations to a short line railroad. To the extent the draft of the petition indicates that it seeks an exemption to permit it to construct and "operate" a rail line, Pemiscot will restrict its request for authority to one for construction only.

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that would not otherwise qualify where the requestor shows that the waiver or reduction is in the best interest of the public or would impose an undue hardship on the requestor. Regulations Governing Fees For Services at page 4. Pemiscot believes the fact that it is a government entity acting in the best interest of its constituency is a sufficient showing to bring it within the ambit of this provision.

Pemiscot does not ask the Board to subsidize its proposed line construction. It believes the major portion of the Board's expense in processing its petition entails compliance with applicable environmental laws and supervision of a petitioner's third party consultant. In accordance with the Board's environmental regulations, Pemiscot has engaged a third party consultant to assist the Board in preparing the environmental report. To the extent the Board incurs staff time and expense in connection with both the transportation and environmental aspects of its proposal, Pemiscot is willing to reimburse the Board for its direct costs. But Pemiscot's resources do not permit it to pay both the Board and the environmental consultant for a project funded with a limited amount of state, local, and federal money.

Pemiscot respectfully requests that the Board accept its appeal and reconsider Secretary Williams's decision denying the fee waiver.

Sincerely yours,



John D. Heffner

cc: Honorable Wayne Burkes
Mr. David Madison