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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36447

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

**DELTA SOUTHERN RAILROAD, INC.’S MOTION TO DISMISS PROCEEDING AND
REQUEST TO HOLD PROCEEDING IN ABEYANCE**

EXPEDITED CONSIDERATION REQUESTED

Delta Southern Railroad, Inc. (“DSR”) hereby moves for dismissal of this proceeding on the basis that the Feeder Line Application filed by Lake Providence Port Commission (“LPPC”) fails to set forth a basis for an order from the Surface Transportation Board (“Board”) under 49 U.S.C. § 10907 compelling the dispossession of DSR-owned railroad lines. As shown herein, the Feeder Line Application is fatally defective because it does not (and, frankly, cannot) allege any DSR service inadequacies – much less provide any detailed evidence required to support such allegations – and thus on its face cannot satisfy the statutory requirements for relief. DSR also hereby requests that this proceeding be held in abeyance pending disposition of this Motion and currently-unresolved discovery issues bearing on DSR’s ability adequately to defend itself against LPPC’s taking efforts.

BACKGROUND

On November 12, 2020, LPPC filed its Feeder Line Application pursuant to 49 U.S.C. § 10907 and the corresponding Board regulations at 49 C.F.R. part 1151 seeking to

dispossess DSR of a 20-mile railroad line (and associated ancillary trackage) extending between mileposts 471.0 and 491.0, in East Carroll and Madison Parishes, Louisiana (the “Line”).

Southeast Arkansas Economic Development District (“SEAEDD”), represented in this proceeding by the same counsel as LPPC, joined in the effort on November 12, 2020, by requesting with LPPC expedited consideration and acceptance of the Feeder Line Application. LPPC supplemented its Feeder Line Application on December 22, 2020 in response to a Board order served on December 11, 2020, after which, by order served on January 15, 2021, the agency initiated this proceeding and prescribed a procedural schedule for subsequent filings.

Although DSR has engaged in discussions concerning renovation of the Line, DSR thus far has concluded that the desired track renovations as to the long-dormant Line are unjustified and unwarranted. Unhappy with DSR’s reluctance to commit to the corridor concept as they want, LPPC and SEAEDD have concluded that, in order to get their way, they must solicit the Board’s assistance to condemn the Line, and they have asked the Board to hasten such a condemnation effort. LPPC acknowledges that, to succeed in taking the Line, its Feeder Line Application must demonstrate that the “public convenience and necessity” (the “PC&N”) would “require or permit” the forced transfer under 49 U.S.C. § 10907(c).

As explained in the Feeder Line Application: (1) the corridor project is intended to facilitate the movement of through traffic among NLA and DSR; (2) NLA has a direct connection with Union Pacific Railroad Company (“UP”) at McGehee, but lacks a direct connection with The Kansas City Southern Railway Company (“KCSR”); and (3) DSR has a direct connection with KCSR at Tallulah but no direct connection with UP. Upon completion, LPPC envisions that the corridor project could alter traffic flows by offering NLA customers an

NLA-DSR-KCSR alternative to an existing NLA-UP-KCSR route, and DSR customers with a DSR-NLA-UP service alternative to the existing DSR-KCSR-UP route.

The entire 20-miles of the Line that is the subject of LPPC's Feeder Line Application has no active customers. Indeed, there have been none on the Line for more than three years. DSR is not aware of, and has not been approached by, any prospective customers seeking to originate or terminate traffic from any point along the Line. The Feeder Line Application does not identify any customer that seeks to originate or terminate traffic at any point along the Line.

The Feeder Line Application also does not identify any customer located on either NLA or DSR that requires strictly local DSR-NLA interline service – that is, a customer whose traffic would originate on a point on DSR or NLA, and, in turn, would terminate on NLA or DSR. Finally, to the extent that LPPC's Feeder Line Application conveys an interest in an alternative to existing NLA-UP-KCSR and DSR-KCSR-UP interline routings, LPPC has not offered a single customer on either DSR or NLA that has alleged – much less has testified – that the current interline route available to it is inadequate. (Ironically, the Feeder Line Application rarely uses the word “inadequate” at all, appearing only three times, by DSR's count, in the entire 301-page filing, and then only in section headings and in quoting legislative history.) For example, NLA's Daniel Robbins (not a shipper) alleges interest in NLA-DSR-KCSR routings, but neither the customers he ties to his allegations nor Mr. Robbins himself testifies that an existing NLA-UP-KCSR route is inadequate. Mr. Robbins incorrectly asserts (belied by maps included with the Feeder Line Application) that access to KCSR service via UP is “unavailable” to NLA customers.

I. ARGUMENT

II. Motion to Dismiss

A. LPPC has not alleged, much less established, that any customer on the Line is suffering from inadequate DSR service – an essential element of a feeder line application.

Because LPPC's Feeder Line Application has been submitted under Section 10907(c)'s PC&N standards, LPPC, as the applicant, has the burden of "proving that the public convenience and necessity require or permit the sale of a particular railroad line." 49 U.S.C. 10907(c)(2). To meet its PC&N burden, LPPC must provide "detailed evidence that permits the Board to find" that *all* of the following circumstances exist:

- DSR "refuses within a reasonable time to make the necessary efforts to provide adequate service to *shippers who transport traffic over*" the Line;
- "the transportation over" DSR's Line "is inadequate for the *majority of shippers who transport traffic over*" the Line;
- "the sale of" DSR's Line "will not have a significantly adverse financial effect on" DSR;
- "the sale of" DSR's Line "will not have an adverse effect on the overall operational performance of" DSR; *and*
- "the sale of" DSR's Line "will be likely to result in improved railroad transportation *for shippers that transport traffic over*" the Line.¹

The record is abundantly clear that *there are no customers on the Line*, an essential component of a successful feeder line application. No prospective customer has demanded service to or from any point on the Line. As LPPC knows (and as is reflected in the

¹ 49 U.S.C. § 10907(c)(1)(A)-(E) (emphasis added). The five-part standard is repeated, nearly verbatim, in the Board's regulations set forth at 49 C.F.R. § 1151.3(a)(11)(i)(A)-(E), excepting, for example, that the regulation adds the term "detailed evidence."

Feeder Line Application), no customer is receiving transportation over the Line, and no such service is needed. LPPC has not alleged, and cannot demonstrate, that DSR has refused, or is refusing, to provide adequate service to on-Line shippers. For that matter, no prospective customer has come forward claiming that DSR has rebuffed its efforts to secure service to or from a point on the Line. Because LPPC's Feeder Line Application fails to allege or show that any shipper has requested service to or from a point on the Line or that DSR has refused to make the necessary efforts to provide such service, the Board must dismiss this proceeding.²

Dismissal is especially warranted because LPPC has sufficient information on existing or prospective customers to have demonstrated service inadequacy if it existed, but it has come up with nothing.³ As the Board recently has explained, allegations of service inadequacy require "specific evidence from any potential shippers,"⁴ but here none has been offered.

B. Even if Section 10907 were intended to remedy overhead route inadequacies for customers not located on the Line itself, the Feeder Line Application fails to allege, much less demonstrate, any such service inadequacy as is necessary to obtain relief under the statute.

Section 10907(c) is aimed at protecting service to customers located on a line segment that would become the subject a feeder line application – customers with traffic originating or terminating on the line segment at issue. But even if the statute were to be interpreted much more broadly to protect *overhead* service, LPPC has failed to allege, much less

² *KCVN, LLC, et al. – Feeder Line Application – Line of Union Pacific Railroad Company Located in Pueblo, Fremont, Chaffee, Lake, and Eagle Counties, Colo.*, FD 36386 (STB served Mar. 13, 2020), 5 (citing *Fiehrer – Feeder Line Appl. – Line of BNSF Ry. Between Helena & Great Falls, Mt.*, FD 34947, slip op. at 5 (STB served Aug. 29, 2007)).

³ See *id.*, 6.

⁴ *Id.*

demonstrate with detailed evidence, that current and readily-available routing options not involving DSR are inadequate. Overhead service over DSR is therefore unnecessary, just preferred. Shippers on NLA seeking access to KCSR-served points already have a route via UP at McGehee (and from there to the UP-KCSR interchanges at Monroe or Shreveport, Louisiana), and DSR shippers seeking access to UP-served points already possess a route via KCSR at Tallulah, and from there via KCSR to the aforementioned KCSR-UP interchanges. So, even assuming that Section 10907(c) were interpreted to extend to “overhead routes,” no shipper on NLA has contended that existing through routes via UP are inadequate to support feeder line relief, and no DSR shipper has claimed that existing through routes via KCSR are inadequate.⁵ DSR cannot be accused of providing inadequate overhead service where adequate route alternatives are available.

While some believe that the proposed corridor project might improve shipper routing options – Daniel Robbins of NLA, MPPC’s Patrick Terry Murphy, and Epstein Gin Company, L.P. (“Epstein”) – none has offered a shred of evidence to show or prove that current shipper overhead routing options via KCSR or UP are inadequate. NLA claims that it has four prospective shippers on its line that “cannot be served” absent “gaining access to [KCSR].” V.S. Robbins, par. 7. How is it that these customers do not already have adequate access to KCSR via

⁵ The Feeder Line Application includes a supporting statement from the Madison Parish Ports Commission (“MPPC”). To the best of DSRs’ knowledge, MPPC is not a rail shipper; it provides facilities and services to businesses that are. MPPC does not purport to offer its statement at the behest, or direction, of any shipper(s) at the port. And while MPPC supports LPPC’s corridor objective, neither MPPC nor any rail-dependent businesses operating at the port contends that the current DSR service route to UP (via KCSR) is inadequate, much less *demonstrates* with “detailed evidence” how the existing DSR service route is inadequate.

UP? Neither Robbins nor NLA's potential customers can say,⁶ leaving us with conclusory statements rather than the required detailed evidence of an existing service inadequacy. Mr. Murphy, on the other hand, acknowledges that DSR's service "is generally regarded as adequate" (V.S. Murphy, par. 4), and in discussing his knowledge of existing and prospective customers, never demonstrates that any customer's current routing options are inadequate to necessitate the taking of DSR's Line. And, finally, Epstein's support letter complains about the inadequacy of NLA service to NLA's interchange with UP at McGehee, mentioning a derailment on NLA that prompted Epstein to explore routing traffic over DSR. (Epstein Letter, unnumbered page 2). At most, Epstein baldly states that its current interline routing option via UP to reach KCSR and/or Mexico "will not work" (id., unnumbered page 3), although it never explains why that is so, and it does not substantiate why or how an alternative route over DSR would "work." Perhaps Epstein is hinting at a problem with NLA service or UP interline service that could be corrected without victimizing DSR. Epstein's service issues are likely to be resolved by INFRA grant funding for NLA.

C. The Feeder Line Application would seek to persuade the Board to act based upon a false premise, as LPPC knows.

Support letters such as Epstein's underscore a startlingly false premise woven into the Feeder Line Application. Specifically, the Feeder Line Application and some of the entities who have written in support of it contend that, unless DSR's Line is included in the track rehabilitation efforts, SEAEDD will lose all of the grant funding it has been awarded under a

⁶ In fact, Mr. Robbins indirectly acknowledges that UP and KCSR can and do cooperate in through routings initiated on NLA or DSR (V.S. Robbins, par. 8, detailing UP-KCSR routings and interchanges), further exposing the fact that an NLA-DSR route for overhead traffic over either short line railroad is not essential for traffic to access KCSR or UP indirectly.

Federal Railroad Administration-administered Infrastructure for Rebuilding America (“INFRA”) grant, including funding that would be dedicated to track rehabilitation on currently-active portions of NLA and DSR.⁷ That frequently-raised “all-or-nothing” INFRA grant claim is completely false, and LPPC knows that it is untrue. Attached as Exhibit A to this Motion to Dismiss is a series of emails between the FRA (again, the administrator of the INFRA grant) and SEAEDD advising the grant applicant (SEAEDD) several months before the feeder line application was filed that, if LPPC is not able to acquire DSR’s line, and no funds are committed to the rehabilitation of that line segment, then *FRA will still permit the disbursement of INFRA funds for the rehabilitation of all other lines that are within the scope of the project*. As the exchange set forth in the emails supplied in Exhibit A establish, only components of the INFRA Grant project that are not actually undertaken would be deobligated. By falsely claiming that the Board must act here to protect against the loss of all INFRA funding, LPPC has badly undercut its credibility.

III. Request to Hold Proceeding in Abeyance

In light of DSR’s Motion and the ongoing, unresolved discovery dispute with NLA (now before the Board as of late last week), DSR respectfully requests that the Board order

⁷ See, e.g., *Application*, p. 4 (“receipt of INFRA Grant Funds is contingent upon a commitment to rehabilitate the entire corridor.”); *id.*, at 11 (“rehabilitation of that 20-mile stretch of the Corridor is essential. Hence, the failure to commit to the full rehabilitation of the Corridor could result in the loss of INFRA Grant funding, which would likely lead to the abandonment of the Corridor”); Verified Statement of Wyly Gilfoil, LPPC’s Port Director (*Application*, Ex. 6), 6 (“failure to upgrade [DSR’s Line] could jeopardize the INFRA Grant”); Verified Statement of Patrecia L. Hargrove, SEAEDD’s Executive Director (*Application*, Ex. 3), 8 (“failure to rehabilitate the [Line] conflicts with the SEAEDD’s INFRA Grant Application as it would prevent the full reopening of the entire corridor . . . this could jeopardize the INFRA Grant funds...”).

this proceeding held in abeyance. Such an abeyance order, pending a Board ruling on this Motion and (if necessary) LPPC's Motion for Protective Order and DSR's Petition for a Subpoena, will allow for the orderly prosecution of this case without undue prejudice to DSR. As the Board may appreciate, DSR is confronted with mounting a defense against the extreme act of a forced taking that, if permitted to occur, could be calamitous to DSR and its customers. As a small business, the costs DSR has incurred in defending itself against LPPC's and SEAEDD's bullying are substantial, and the proceeding has siphoned resources that could be committed to better use. For that matter, the Board must be careful to assure that the proceeding it has instituted warrants continued consideration and the dedication of substantial resources where it is very clear at this point that LPPC has not pleaded a case upon which it is entitled to relief under the controlling statute. And, finally, even if the Board were to overlook the feeder line statute's standards and were to press ahead with adjudication of LPPC's application anyway, then the Board must at a minimum hold the proceeding in abeyance to resolve outstanding discovery issues to ensure that DSR has a full and fair opportunity to present evidence and argument in opposition to the Feeder Line Application and the valuation evidence that LPPC has introduced into the record in its case-in-chief.

IV. Request for Expedited Consideration

Finally, DSR urges expedited consideration of its Motion and request for abeyance. Such expedited action is warranted, since, absent a promptly-issued abeyance order, DSR must present its case in opposition to the Board on March 16, 2021, potentially without the benefit of critical information from NLA, which NLA has thus far refused to provide in response to discovery.

CONCLUSION

Whatever options may be available to LPPC to advance its rail corridor vision – including even-handed negotiations with DSR to explore arrangements that are mutually advantageous to both parties, and not potentially ruinous to DSR – a Board-ordered taking of DSR property is not among them, as the facts set forth in LPPC’s Feeder Line Application already show. LPPC’s frustrated desire for a new through route for railroad traffic movements on LPPC’s own, dictated terms is not a basis for dispossessing DSR of its railroad assets under governing law. Rather, to force such a taking, LPPC needed, at a minimum, to provide detailed evidence of inadequate DSR service to shippers, and it has not.

WHEREFORE, DSR respectfully moves that the subject feeder line proceeding be dismissed for LPPC’s failure to present a feeder line application upon which the Board could grant relief. And, pending consideration of its Motion (and unresolved discovery issues), DSR requests that the Board expeditiously hold this proceeding in abeyance until further Board order.

Respectfully submitted,

/s/ *Thomas J. Healey*

James D. Helenhouse

Thomas J. Healey

Fletcher & Sippel LLC

29 North Wacker Drive

Suite 800

Chicago, Illinois 60606-3208

(312) 252-1500

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

Dated: March 2, 2021

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36447

**LAKE PROVIDENCE PORT COMMISSION
– FEEDER LINE APPLICATION –
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EXHIBIT A

**FRA-SEAEDD EMAILS ON INFRA GRANT FUND AVAILABILITY IF NO GRANT
MONEY IS COMMITTED TO THE LINE THAT LPPC IS SEEKING TO ACQUIRE**

RE: SEAEDD INFRA Award

Dixon, Marc (FRA) <marc.dixon@dot.gov>

Wed 10/28/2020 3:38 PM

To: Patrecia Hargrove <phargrove@southeastarkansas.org>

Cc: Winkle, John (FRA) <john.winkle@dot.gov>

Patrecia -

Per my communications with the Federal Highway Admin. today, we should be able to start the funds transfer process next Tuesday or Wednesday.

Thanks,

Marc Dixon

Project Manager – South Central Region

Federal Railroad Administration

Office of Railroad Policy and Development

Work phone: 202-493-0614

Cell phone: 202-380-6981

From: Patrecia Hargrove [mailto:phargrove@southeastarkansas.org]

Sent: Tuesday, October 27, 2020 10:11 AM

To: Dixon, Marc (FRA) <marc.dixon@dot.gov>

Subject: Re: SEAEDD INFRA Award

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Thanks

Patrecia Hargrove

SEAEDD

870-536-1971

From: "Dixon, Marc (FRA)" <marc.dixon@dot.gov>

Date: Tuesday, October 27, 2020 at 9:09 AM

To: Patrecia Hargrove <phargrove@southeastarkansas.org>

Subject: RE: SEAEDD INFRA Award

Good morning-

There have been no changes from the version that I sent on Sept. 8 – copy of email is attached.

Thanks,

Marc

From: Patrecia Hargrove [mailto:phargrove@southeastarkansas.org]

Sent: Tuesday, October 27, 2020 9:37 AM

To: Dixon, Marc (FRA) <marc.dixon@dot.gov>

Subject: Re: SEAEDD INFRA Award

Good Morning Marc –

Can you send me the most recent version of Attachment 1. Thanks

Patrecia Hargrove
SEAEDD
870-536-1971

From: "Dixon, Marc (FRA)" <marc.dixon@dot.gov>
Date: Monday, October 26, 2020 at 1:59 PM
To: Patrecia Hargrove <phargrove@southeastarkansas.org>
Cc: "Winkle, John (FRA)" <john.winkle@dot.gov>
Subject: RE: SEAEDD INFRA Award

Patrecia -

See attached. NOTE: The period of performance start and end dates will only be on the cover sheet, which is generated during the execution process in Grant Solutions. Per our conversation last week, the current proposed period of perf. term will be Nov. 1, 2020 – July 31, 2025, assuming FHWA is able to transfer the funds within the week. If we haven't started the agreement execution process by mid-November, we'll push the dates out one month.

Thanks,

Marc Dixon
Project Manager – South Central Region
Federal Railroad Administration
Office of Railroad Policy and Development
Work phone: 202-493-0614
Cell phone: 202-380-6981

From: Patrecia Hargrove [<mailto:phargrove@southeastarkansas.org>]
Sent: Monday, October 26, 2020 12:13 PM
To: Dixon, Marc (FRA) <marc.dixon@dot.gov>
Cc: Winkle, John (FRA) <john.winkle@dot.gov>
Subject: Re: SEAEDD INFRA Award

Marc –

Can you send me the final grant agreement draft. Thanks

Patrecia Hargrove
SEAEDD
870-536-1971

From: "Dixon, Marc (FRA)" <marc.dixon@dot.gov>
Date: Monday, October 5, 2020 at 3:06 PM
To: Patrecia Hargrove <phargrove@southeastarkansas.org>
Cc: "Winkle, John (FRA)" <john.winkle@dot.gov>
Subject: RE: SEAEDD INFRA Award

Patrecia-

Does SEAEDD have any more questions? Is SEAEDD okay with the proposed footnote that we added to Attach. 2 – SOW?

Thanks,

Marc Dixon
Project Manager – South Central Region
Federal Railroad Administration
Office of Railroad Policy and Development
Work phone: 202-493-0614
Cell phone: 202-380-6981

From: Patrecia Hargrove [mailto:phargrove@southeastarkansas.org]
Sent: Tuesday, September 29, 2020 11:49 AM
To: Dixon, Marc (FRA) <marc.dixon@dot.gov>
Subject: Re: SEAEDD INFRA Award

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Thanks

Patrecia Hargrove
SEAEDD
870-536-1971

From: "Dixon, Marc (FRA)" <marc.dixon@dot.gov>
Date: Monday, September 28, 2020 at 3:23 PM
To: Patrecia Hargrove <phargrove@southeastarkansas.org>
Cc: "Winkle, John (FRA)" <john.winkle@dot.gov>
Subject: RE: SEAEDD INFRA Award

Patrecia-

See Attach. 1, Part II, *Section 6 -Grant Amendment* – excerpt below – for information about grant amendments, including scope changes. GARF is not explicitly named as it's just the name (or acronym) of a form/tool that FRA currently uses.

- **Excerpt of Section 6. Grant Amendments:**
 - a. *Other than close-out, modifications to this Agreement may be made only in writing, signed by an Authorized Representative for FRA and the Grantee, and specifically referred to as an amendment to this Agreement.*
 - b. *Required modifications include, but are not limited to, the following:*
 1. *the Project's activities differ from those described in the Statement of Work;*
 2. *changes to the Project Performance Period or the Federal Funding Period;*
 3. *the Project's "Other Federal Funds" increases from the amount listed in the Approved Project Budget;*
 4. *the Project's "State Funds," "Local Funds," or "Other Funds" decrease from the dollar amounts listed in the Approved Project Budget regardless of whether the Non-Federal Contribution remains the same; or*
 5. *the "INFRA Grant Amount subject to 23 U.S.C. 117(d)(2)" changes from the amount listed in the Approved Project Budget.*

c. FRA may accept or reject proposals from the Grantee under section 5(c) and this section, and in doing so may elect to consider only the interests of the DOT.

Regarding a citation for the de-obligation of unspent federal funds, it's implied in Attach. 1, *Section 21 - Reimbursement Payment by FRA* – excerpt below. FRA will reimburse grantees for eligible and actual expenses incurred and paid by a grantee. The SOW of the grant agreement defines the Project's eligible/allowable activities. Thus, if a grantee is not able to complete the activities in the SOW and/or a grantee submits a SOW modification request that FRA rejects, then a grantee should not seek reimbursement for costs not incurred. Moreover, FRA would not send a grantee a check for any unspent federal funds (i.e., a grantee doesn't get to profit off of an INFRA grant). So, one of the final closeout tasks includes FRA de-obligating any unexpended funds to bring the grant's balance to \$0.00.

- **Excerpt from Section 21. Reimbursement Payment by FRA.**

Unless otherwise approved by FRA, FRA will disburse funds to the Grantee on a reimbursable basis, whereby the Grantee will be reimbursed for actual expenses incurred and paid, after the submission of complete and accurate invoices and payment records. The Grantee's request for payment will be made to FRA through the Department of Transportation's Delphi invoicing System and will be acted upon as set forth in this section.

I hope this helps.

Marc Dixon
Project Manager – South Central Region
Federal Railroad Administration
Office of Railroad Policy and Development
Work phone: 202-493-0614
Cell phone: 202-380-6981

From: Patrecia Hargrove [<mailto:phargrove@southeastarkansas.org>]
Sent: Friday, September 25, 2020 2:15 PM
To: Dixon, Marc (FRA) <marc.dixon@dot.gov>
Cc: Winkle, John (FRA) <john.winkle@dot.gov>
Subject: Re: SEAEDD INFRA Award

CAUTION: This email originated from outside of the Department of Transportation (DOT). Do not click on links or open attachments unless you recognize the sender and know the content is safe.

Hi Marc –

Can you tell me where in the grant agreement is there a provision for the scope change (GARF) discussed in item 2 of your email and

where in the grant agreement is the provision for a de-obligation of funds not used as discussed in item 3 of your email

I couldn't find these items.

Thanks

Patrecia Hargrove
Southeastarkansas.org
870-536-1971

From: "Dixon, Marc (FRA)" <marc.dixon@dot.gov>
Date: Tuesday, September 22, 2020 at 2:25 PM
To: Patrecia Hargrove <phargrove@southeastarkansas.org>
Cc: "Winkle, John (FRA)" <john.winkle@dot.gov>
Subject: RE: SEAEDD INFRA Award

Patrecia –

I'm following up on your Sept. 18 email below and our conversation from yesterday. While FRA appreciates SEAEDD's effort to draft proposed language for the grant agreement to address SEAEDD's concerns, FRA does not plan to use the language for the reasons outlined in the enumerated list below.

1. There's no need to include an expenditure restriction clause regarding the action of a non-Grantee entity because FRA's legal relationship is with SEAEDD not LPPC. I'm referring to this sentence: *"No improvements will be made and no FRA funds will be spent on the mainline of the rail located in Segment D unless LPPC acquires ownership of the same."* So, it's up to SEAEDD to do whatever is necessary (e.g., work with project partners or other entities to acquire ROW, etc.) to get the Project done. Plus, FRA is not dictating when Segment D work should start or finish. Thus, SEAEDD can wait to start Segment D work when it's ready to do so.
2. Including language that adds vague, unknown scope to the grant agreement is not the proper way to handle a scope change. I'm referring to the following sentence: *"In the event LPPC is unable to acquire ownership of the same, that portion of the Project will no longer be part of the Grant Agreement and the failure of any work to be performed to the portion of Segment D currently owned by DSR will not result in a default under the terms of the Grant Agreement and the funds allocated to that portion of the Project may be used on other improvements of the Project."*

Given the situation with Segment D, there's still a lot that needs to play out which will take some time. So, let's proceed with executing the grant agreement. Then, as project activities advance and SEAEDD determines it's not able to start construction activities in Segment D due to issues with one of the ROW owners, then SEAEDD can complete FRA's Grant Adjustment Request Form (GARF) for a scope change request. Following the same process as you experienced this past spring with SEAEDD's scope and budget modification request, FRA will coordinate with OST to review the request to make a determination.

3. Regarding the *"failure to make the improvements contemplated will not result in a default under the terms of the Grant Agreement"* language, it's not needed as SEAEDD and FRA would proceed with grant closeout after all work in Segments A, B, and C is done and all options regarding Segment D have been exhausted. FRA would de-obligate any unexpended federal funds.

At this time, FRA's is proposing to only change one part of the draft grant agreement to account for the Segment D situation: in Attach. 2 – SOW, Section II – Background, FRA is adding a footnote next to the first reference of Delta Southern Railroad (DSR). The footnote mentions that, as of the date of the Agreement (i.e., the execution date which is expected to be in late Oct./early Nov. 2020), DSR is negotiating the sale of its portion of the mainline that's to be improved under the Agreement. Since things are still in flux and there's still time for many (unknown/unexpected) changes, we don't want to remove all references to DSR. SEAEDD can use the Detailed Project Work Plan (a Task 1 deliverable) to describe the status of the Project partners. **For your review, attached is a copy of the revised draft Attach. 2 – 4 file. The footnote is on pp. 2 and is in track changes.**

Let me know if you have any questions.

Thanks,

Marc Dixon
Project Manager – South Central Region
Federal Railroad Administration
Office of Railroad Policy and Development
Work phone: 202-493-0614
Cell phone: 202-380-6981

From: Patrecia Hargrove [mailto:phargrove@southeastarkansas.org]
Sent: Monday, September 21, 2020 10:03 AM
To: Dixon, Marc (FRA) <marc.dixon@dot.gov>
Subject: Re: SEAEDD INFRA Award

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Hi Marc –
I am available all day. Call me at 870-395-0844. Thanks

Patrecia Hargrove
Southeastarkansas.org
870-536-1971

From: "Dixon, Marc (FRA)" <marc.dixon@dot.gov>
Date: Monday, September 21, 2020 at 8:54 AM
To: Patrecia Hargrove <phargrove@southeastarkansas.org>
Subject: RE: SEAEDD INFRA Award

Hi Patrecia –

What's your availability today? I have a meeting at 10am CT and a brief meeting this afternoon but am fairly availability otherwise.

Thanks,

Marc Dixon
Project Manager – South Central Region
Federal Railroad Administration
Office of Railroad Policy and Development
Work phone: 202-493-0614
Cell phone: 202-380-6981

From: Patrecia Hargrove [mailto:phargrove@southeastarkansas.org]
Sent: Friday, September 18, 2020 3:33 PM
To: Dixon, Marc (FRA) <marc.dixon@dot.gov>
Subject: SEAEDD INFRA Award

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Hi Marc –
After speaking with you last week concerning the issue that we are having with Delta Southern in Segment D of the scope of work for this project, the District's attorney thought it would be wise to put some language in the grant agreement to safeguard SEAEDD and FRA during this transition of property ownership between DSR & LPPC. Below is an example of some language that could be incorporated in the grant agreement and consortium agreement for this project. Please call me so we can discuss.

- In Attachment 2, Section V Description of Work, add a paragraph that states:
 - FRA acknowledges that the mainline of the rail located in Segment D is currently owned by DSR and LPPC is in the process of acquiring the same. No improvements will be made and no FRA

funds will be spent on the mainline of the rail located in Segment D unless LPPC acquires ownership of the same. In the event LPPC is unable to acquire ownership of the same, that portion of the Project will no longer be part of the Grant Agreement and the failure of any work to be performed to the portion of Segment D currently owned by DSR will not result in a default under the terms of the Grant Agreement and the funds allocated to that portion of the Project may be used on other improvements of the Project.

In Attachment 2, Section V Subtask 4a: Track Construction:

- Segment D, add a paragraph that states:
 - The rehabilitation of approximately 20 miles of track, which includes upgrading the existing Excepted track to Class 2 track, is contingent upon LPPC acquiring ownership of the mainline of the rail located in Segment D. In the event LPPC is unable to acquire ownership of the mainline of the rail located in Segment D, no improvements will be made to that section of the rail line and the failure to make the improvements contemplated will not result in a default under the terms of the Grant Agreement. Should LPPC not acquire ownership of the mainline of the rail located in Segment D, the FRA funds allocated for that portion of the Project may be spent on other improvements of the Project.

Patrecia Hargrove
Southeast Arkansas Economic Development District, Inc.
721 South Walnut Street
Post Office Box 6806
Pine Bluff, Arkansas 71611
870-536-1971 (Office)
870-536-7718 (Fax)
www.southeastarkansas.org



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CERTIFICATE OF SERVICE

I hereby certify that, on this 2nd day of March, 2021, I served copies of the foregoing Motion to Dismiss and Abeyance Request 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