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**SURFACE
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October 22, 2007

VIA HAND DELIVERY

The Honorable Vernon A Williams
Secretary
Surface Transportation Board
395 E Street, S W
Washington, DC 20423-0001

220503

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OCT 22 2007

Re Finance Docket No 35094
The Kansas City Southern Railway Company – Acquisition and Operation Exemption –
Columbus and Greenville Railway Company
Expedited Consideration Requested

Dear Secretary Williams

Enclosed on behalf of The Kansas City Southern Railway Company ("KCSR") are an original and eleven copies each of a Petition for Exemption ("Petition") seeking authority for KCSR to purchase and operate a 2.23-mile line of railroad in Mississippi, which is currently owned and operated by Columbus and Greenville Railway Company ("CAGY"). The Petition is accompanied by a check in the amount of \$5,700.00 covering the filing fee for the Petition as set forth at 49 CFR 1002.2(f)(41)(vi).

For the reasons set forth in the Petition, KCSR respectfully requests expedited consideration, so that it might be able to consummate the proposed transaction as soon as possible during the fourth quarter of 2007, in order to begin track work needed on the segment being acquired.

Please acknowledge filing of the Petition by date stamping the extra copy provided for that purpose returning that copy to the courier for return to my offices. If there are any questions concerning this filing, please contact me by telephone at (202) 663-7823 or by e-mail at w.mullins@bakerandmiller.com.

ENTERED
Office of Proceedings

OCT 22 2007

**Part of
Public Record**

Sincerely,

William A. Mullins
Counsel for The Kansas City Southern
Railway Company

Enclosure

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 35094

**THE KANSAS CITY SOUTHERN RAILWAY COMPANY
— ACQUISITION AND OPERATION EXEMPTION —
COLUMBUS AND GREENVILLE RAILWAY COMPANY**



EXPEDITED CONSIDERATION REQUESTED

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**Attorneys for The Kansas City
Southern Railway Company**

DATED: October 22, 2007

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 35094

**THE KANSAS CITY SOUTHERN RAILWAY COMPANY
— ACQUISITION AND OPERATION EXEMPTION —
COLUMBUS AND GREENVILLE RAILWAY COMPANY**



EXPEDITED CONSIDERATION REQUESTED

Pursuant to 49 U.S.C. 10502 and 49 CFR Part 1121, The Kansas City Southern Railway Company ("KCSR"), a Class I rail carrier, hereby petitions the Board for an exemption from the formal requirements of 49 U.S.C. 11323, et seq., to acquire from Columbus and Greenville Railway Company ("CAGY") and operate, subject to CAGY's reservation of nonexclusive limited local trackage rights,¹ a 23-mile line of railroad extending between, at one end, a connection between KCSR's Artesia Subdivision and CAGY's main track near KCSR Milepost 230.4 and, at the other end, two connections between CAGY's main track and KCSR's Louisville Subdivision near KCSR Milepost 88.5, near West Point, MS (the "Line").² As will be shown, the proposed transaction satisfies the criteria for an individual exemption, will produce

¹ Pursuant to the agreement between the CAGY and KCSR, CAGY would be permitted to traverse the line in question via its reserved nonexclusive local trackage rights, but it would not be permitted to serve shippers on the line that had not been previously served by CAGY when it owned the line. In light of this limitation, the rights CAGY will retain will be referred to herein as "limited local" trackage rights.

² The above-referenced terminal mileposts are points on separate KCSR subdivisions to which the Line connects at either end (CAGY has indicated that the Line does not have mileposts of its own). The mileposts in question therefore cannot be used for purposes of calculating the actual mileage of the Line to be acquired by KCSR under this petition.

public benefits, and would not have anticompetitive consequences. Further, as discussed below, KCSR respectfully requests expedited consideration of this petition

DESCRIPTION OF THE TRANSACTION

KCSR will acquire from CAGY, subject to CAGY's retention of nonexclusive limited local trackage rights, and will operate over a line of railroad located in the State of Mississippi extending between, at one end, a connection between KCSR's Artesia Subdivision and CAGY's main track near KCSR Milepost 230 4 and, at the other end, two connections between CAGY's main track and KCSR's Louisville Subdivision near KCSR Milepost 88 5, a total distance of 2 23 route miles. Maps depicting the Line are attached as Exhibit A. Upon acquiring the Line, KCSR would assume responsibility for its maintenance, which arrangement is in the mutual interest of KCSR and CAGY. Expedited consideration is requested because KCSR has budgeted for the purchase of the Line in the fourth quarter of 2007 and hopes to be able to consummate the subject transaction within the fourth quarter of 2007. For tax and other budget reasons, the transaction needs to be consummated no later than December of this year.

PARTIES TO THE TRANSACTION

CAGY, a Class III short line rail common carrier, will be conveying the Line to KCSR. CAGY's business address is as follows: 201 19th Street North, P.O. Box 6000, Columbus, MS 39703

KCSR, the transferee, is a Class I rail common carrier, operating rail lines in the states of Alabama, Arkansas, Illinois, Kansas, Louisiana, Mississippi, Missouri, Oklahoma, Tennessee, and Texas. Its business address is as follows: P O Box 219335, Kansas City, MO 64121-9335

Any questions regarding the transaction should be directed to William A. Mullins, Baker & Miller PLLC, 2401 Pennsylvania Ave., NW, Suite 300, Washington, D.C. 20037, tel. (202) 663-7823, fax (202) 663-7849, email wmullins@bakerandmiller.com

ARGUMENT

49 U.S.C. 11324(d) sets forth the standard for approving formal applications to engage in transactions such as the one KCSR proposes here, and provides that the Board shall authorize a Class I carrier's acquisition and operation of a rail line owned by another carrier, unless the Board finds that – (1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.³ However, the Board is mandated to grant exemptions from the formal application processes of Sections 11323, et seq., where a formal application process is not necessary to carry out the rail transportation policy ("RTP") at 49 U.S.C. 10101 and the proposed transaction is either of limited scope or will not result in an abuse of market power 49 U.S.C. 10502(a).⁴ The subject transaction undoubtedly qualifies for an individual exemption from the formal prior approval requirements of Sections 11323, et seq.

³ Were the transferor and transferee in this transaction reversed such that KCSR were the transferor of the Line, CAGY, as a Class III carrier, would have been able to avail itself of the class exemption from the provisions of 49 U.S.C. 10902 provided at 49 CFR 1150.41, et seq.

⁴ See, e.g., BNSF Railway Company – Acquisition and Operation Exemption – Union Pacific Railroad Company, STB Finance Docket No. 34863 (STB served June 13, 2006) ("BNSF-UP") (BNSF Railway Company uses the individual exemption process to acquire from Union Pacific Railroad Company, subject to UP's retention of trackage rights, approximately 25 miles of rail line); Wisconsin & Southern Railroad Co. – Acquisition Exemption – Iowa, Chicago & Eastern Railroad Corporation, STB Finance Docket No. 34464 (STB served June 30, 2004) (involving the transfer of 7.33 miles of rail line, subject to the seller's retention of trackage rights), Wisconsin Central Ltd – Acquisition Exemption – Tomahawk Railway, Limited Partnership, STB Finance Docket No. 33358 (STB served June 2, 1997)

I. THE LEGAL STANDARDS UNDER 49 U.S.C. 10502 FOR AN EXEMPTION FROM THE REQUIREMENTS OF 49 U.S.C. 11323, ET SEQ., FOR THE ACQUISITION AND OPERATION OF THE LINE HAVE BEEN MET

As noted, the Board must exempt a transaction from regulation pursuant to 49 U.S.C. 10502(a) when it finds that: (1) regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101, and (2) either (A) the transaction is of limited scope, or (B) regulation is not necessary to protect shippers from the abuse of market power. The proposed transaction is fully consistent with the RTP, is limited in scope, and would not lead to an accumulation of market power under which shippers could be abused.

The legislative history of Section 10502 demonstrates a clear Congressional intent that the Board should liberally exercise its exemption authority to free certain transactions from the administrative and financial costs associated with filing a formal application. In enacting the Staggers Rail Act of 1980,⁵ Congress made clear its intent that the Interstate Commerce Commission, the Board's predecessor, would use its expanded exemption authority under former Section 10505 to free certain transactions and service from administrative and financial costs associated with subjecting a transaction to regulation pursuant to the formal application process:

The policy underlying this provision is that while Congress has been able to identify broad areas of commerce where reduced regulation is clearly warranted, the Commission is more capable through the administrative provisions and practices not yet addressed by Congress to determine where they can be deregulated consistent with the policies of Congress. The conferees expect that, consistent with the policies of this Act, the Commission will pursue partial and complete exemption from remaining regulation.

⁵ Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1897 (1980)

H.R. Conf. Rep. No. 1430, 96th Cong. 2d Sess. 105 (1980) ⁶ See also Exemption From Regulation – Boxcar Traffic, 367 I.C.C. 424, 428 (1983), vacated and remanded on other grounds, Brae Corp. v. United States, 740 F.2d 1023 (D.C. Cir. 1984), and H.R. Rep. No. 422, 104th Cong., 1st Sess. 168-69 (1995) (conference report accompanying the ICC Termination Act of 1995). Congress reaffirmed this policy in the conference report accompanying the ICC Termination Act of 1995, which reenacted the existing exemption provisions as Section 10502. H.R. Conf. Rep. No. 422, 104th Cong. 1st Sess. 168-169 (1995).

KCSR's acquisition and operation of the Line is the type of transaction for which the exemption provision of the Staggers Act was designed. As explained in detail below, the transaction proposed herein complies with Section 10502 and, accordingly, should be exempted from the burdensome filing requirements of obtaining formal Board approval under the application procedures of Sections 11323, et seq.

A. Application of the Formal Requirements of Sections 11323, Et Seq., Is Not Necessary to Carry Out the Rail Transportation Policy

Granting an exemption, instead of requiring burdensome regulation pursuant to the formal application process, will promote the RTP as expressed in 49 U.S.C. 10101. Specifically, the following transportation policies will be promoted by the issuance of an exemption:

⁶ The exemption provision was considered an important cornerstone of the legislation American Trucking Association v. ICC, 656 F.2d 1115, 1119 (5th Cir. 1981) ("American Trucking"). As President Carter stated upon signing the Staggers Act into law, the Act "strips away needless and costly regulations in favor of market forces, competitive market forces, whenever possible." 16 Weekly Comp. President Doc. 2225-26 (Oct. 14, 1980). The Court in American Trucking at 1119 cited the affirmative use of Section 10502 to exempt transactions, quoting from legislative history that "the Commission is charged with the responsibility of actively pursuing exemptions for transportation and service that comply with the Section's standards." The Board is further charged with removing "as many as possible of the Commission's restrictions . . ." H.R. Rep. No. 1430, 96th Cong., 2d Sess. at 105 (1980).

- To allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail [10101(1)],
- To minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required [10101(2)],
- To promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues [10101(3)],
- To ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers to meet the needs of the public [10101(4)],
- To foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes [10101(5)],
- To reduce regulatory barriers to entry into the industry [10101(7)];
- To operate transportation facilities without detriment to the public health and safety [10101(8)]
- To encourage honest and efficient management of rail roads [10101(9)]; and
- To provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part [10101(15)].

KCSR and CAGY have contemplated for some time the eventual transfer of the Line to KCSR. Consequently, CAGY has been reluctant to engage in more than the minimum track maintenance on the Line, spending only as necessary to keep the Line safe. As a result, the Line's condition has deteriorated pending this transaction. Expeditious approval of KCSR's petition would facilitate the rehabilitation of the Line and the provision of a higher degree of track maintenance, which, in turn would foster safer and more efficient rail operations to the benefit of shippers and the public.

Even if the Board were to focus its analysis here on the standard of review for a formal application to engage in the subject transaction as set forth at 49 U.S.C. 11324(d), there would be no basis to deny the KCSR's petition because the transaction will not result in a lessening of

competition, will not create a monopoly, and will not restrain trade in freight surface transportation. While there are no active shippers on the Line, CAGY will retain limited local trackage rights to serve any such currently dormant shippers, should they again become active. In other words, if a shipper on the Line had obtained CAGY service in the past, CAGY would retain the right into future to serve that shipper if demand for service arises again. In addition, as the owner of the line, KCSR would also have the right to serve such a shipper. As such, the transaction would not reduce competition or create a monopoly, but it will result in quite the opposite: it enhances competition for any such prior online shipper.

B The Proposed Transaction Is Of Limited Scope

Because the transaction is consistent with the RTP, to meet the second element of the statutory test, KCSR needs only to establish that the proposed transaction is either of limited scope or will not result in the abuse of market power. The proposed transaction involves the transfer of 2.23 miles of rail line in a smaller rail market which is served by multiple carriers, with the seller retaining limited local trackage rights. This proposal is undoubtedly of limited scope.⁷

⁷ Although the statute allows the Board to focus on either the limited scope or market power test, and thus approve the transaction if it meets one or the other of those elements, there appear to have been very few, if any, Board decisions that relied solely on the limited scope test. In practice, the Board usually reverses the order of the Section 10502 analysis to address the "abuse of market power" factor under Section 10502(a)(2)(B) before addressing the "limited scope" factor of Section 10502(a)(2)(A), and if it finds there is no potential for the abuse of market power, the Board usually dispenses with the limited scope analysis. See, e.g., BNSF-UP, slip op at 2 (involving 25 miles of rail line); Wisconsin & Southern Railroad Co. – Acquisition Exemption – Union Pacific Railroad Company, STB Finance Docket No. 34633, slip op. at 2 (STB served Jan. 19, 2005) ("WSOR-UP") (involving the sale or lease of a total of 14 miles of rail line), Buffalo & Pittsburgh Railroad, Inc. – Lease and Operation Exemption – South Buffalo Railway Company, STB Finance Docket No. 34563, slip op. at 2 (STB served Dec. 23, 2004) ("B&P-SBR") (involving the lease of about 2 miles of rail line). Nevertheless, it is clear in this

C The Proposed Transaction Will Not Result in an Abuse of Market Power

Because the first two parts of the statutory test have been met, KCSR need not also prove that the transaction will not result in the abuse of market power. Nonetheless, as indicated in Section I-A, above, the proposed transaction would not give KCSR the ability to eliminate competition or otherwise exercise market power. The Line is operated today by a single railroad (CAGY), which will transfer ownership of the Line to KCSR but will retain trackage rights. The transaction thereby is not simply a one-for-one replacement of rail service, as occurs in most line sales that have been approved,⁸ but in theory is actually an enhancement of competition as both CAGY and KCSR will have the ability to serve any previously existing shippers on the Line.

II. EXPEDITED HANDLING OF KCSR'S PETITION IS WARRANTED

The transaction raises no anticompetitive issues, and it is well-suited for the use of the individual exemption process. As reflected in the discussion above, however, time is of the essence in consummating this rail line transfer. Specifically, KCSR, in anticipation of the transaction, has budgeted funds to be expended in the fourth quarter of 2007 to purchase the Line from CAGY.⁹ Moreover, in light of its short-term ownership interest, CAGY has been reluctant to expend funds to maintain the Line other than at the minimum necessary to maintain safe

instance that the sale of 2.23 miles of track with the seller retaining trackage rights, is of exceedingly limited scope.

⁸ In fact, as previously noted, the Board has granted several individual exemptions under Section 10502(a) for transactions similar in structure to the one proposed here.

⁹ CAGY's contract with KCSR for sale of the track calls for the transfer to be completed within a short period after CAGY had moved the 1000th loaded car under the trackage rights agreement approved by the Board in Columbus and Greenville Railway Company—Trackage Rights Exemption—Kansas City Southern Railway Company, STB Finance Docket No. 34868 (notice issued Jan. 26, 2007). Accordingly, it had been uncertain when CAGY would reach that milestone, but now that it has, the parties desire to move forward quickly to effectuate the transfer. Likewise, for tax and budget reasons, KCSR needs to close the transaction by the end of December 2007.

operations CAGY has reported to KCSR that the Line is in need of, or will soon be in need of, rehabilitation as well as continued track maintenance. In assuming ownership of the Line, KCSR would undertake any rehabilitation and assume the primary obligation for maintaining it. Accordingly, expeditious action on KCSR's petition would not only facilitate KCSR's tax and budgeting needs associated with the transaction (thereby avoiding additional transactional and planning costs that KCSR would have to bear in the event of delayed approval), but it would also inure to the benefit of shippers and the general public which have an interest in an adequately-maintained and serviceable rail line.

For these reasons, KCSR specifically requests that the Board render a decision on granting the petition by no later than December 10, with the exemption taking effect on December 20. In rendering a decision by December 10, the Board would afford itself ample time to assure itself that the transaction is indeed of extremely limited size and scope and poses no threat to competition. The Board customarily has acted at least this expeditiously in other individual exemption proceedings where good cause existed for it to do so.¹⁰

If for any reason the Board believes that it would be unable to accommodate KCSR's request for expeditious handling under the timeline set forth above, KCSR respectfully requests that it so inform KCSR as soon as practicable so that KCSR may take steps to mitigate the costs and other ramifications of procedural delay. Furthermore, should any interested party file comments on the petition that the Board believes warrant further development or evaluation, KCSR requests that the Board promptly adopt a procedural schedule in accordance with the

¹⁰ See, e.g., BNSF-UP (decision granting petition for exemption served 60 days after it was filed, with exemption taking effect 30 days thereafter), WSOR-UP (decision granting petition for exemption served 30 days after petition was filed, with exemption taking effect 18 days thereafter); B&P-SBR (decision granting petition for exemption served 37 days after petition was filed, with exemption taking effect 7 days thereafter).

requested December 10 decision deadline, or inform KCSR that it will be unable to handle KCSR's petition in the requested timeframe

III. ENVIRONMENTAL ANALYSIS

A petition for exemption must comply with the Board's environmental reporting requirements, if they apply. 49 CFR 1121.3(a) As provided under 49 CFR 1105.6(c)(2)(i), however, this transaction is exempt from environmental reporting. The proposed rail line transfer will not result in significant changes in carrier operations, i.e., changes exceeding the thresholds of 49 CFR 1105.7(c)(4) or (5).

Under 49 CFR 1105.8(b)(1), the proposed transfer of the Line to KCSR is also exempt from the historic reporting requirements. KCSR's acquisition of the Line is for the purpose of continued rail operations. In addition, further Board approval would be required as a prerequisite to abandonment or discontinuance of service, and there are no plans in connection with this transaction to dispose of or alter properties subject to the Board's jurisdiction that are 50 years old or older.

IV. LABOR PROTECTION

Under 49 U.S.C. 10502(g), the Board may not exempt a rail carrier from otherwise applicable employee protection obligations. Because the proposed transaction falls under 49 U.S.C. 11323, labor protection as set forth in New York Dock Ry. — Control — Brooklyn Eastern Dist., 360 I.C.C. 60 (1979), applies. The parties to this transaction do not object to imposition of the labor protective conditions normally imposed on Section 11323 transactions.

CONCLUSION

As shown above, application of the formal requirements of 49 U.S.C. 11323, et seq., is not necessary to carry out the RTP, and, in fact, granting the petition would promote the RTP

Further, the transaction is unquestionably of limited scope, and that should end the exemption analysis. Nevertheless, KCSR also has shown that the proposed transaction would not enable it to accumulate or abuse market power or to engage in any other anticompetitive conduct. Finally, delay in moving forward with this transaction could impose otherwise avoidable transaction costs upon KCSR and could allow the Line to deteriorate. For these reasons, consistent with KCSR's request for expedited handling, the petition for exemption should be granted as expeditiously as possible.

Respectfully submitted,

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Attorneys for The Kansas City Southern
Railway Company

DATED. October 22, 2007

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

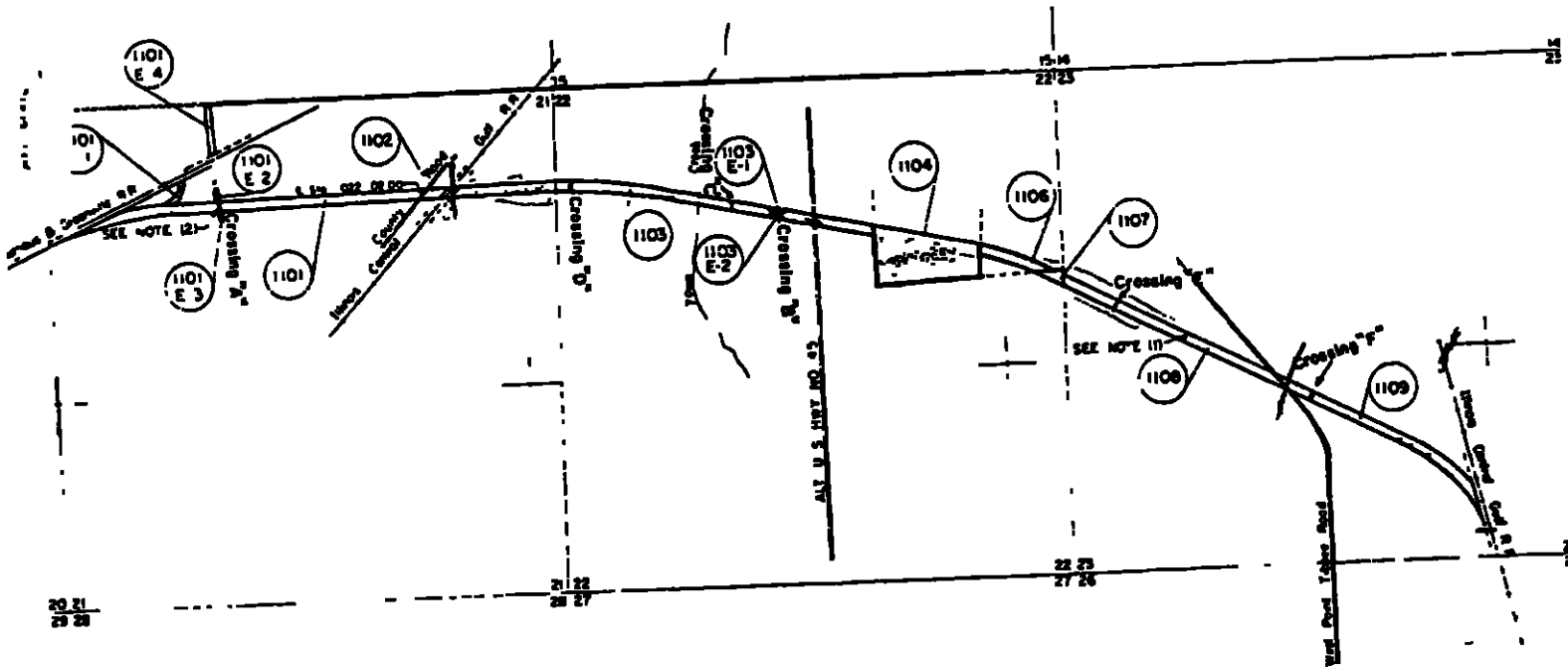
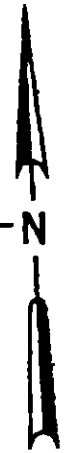
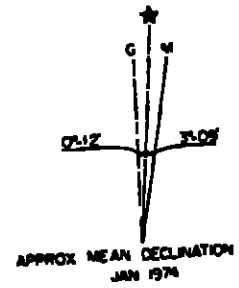
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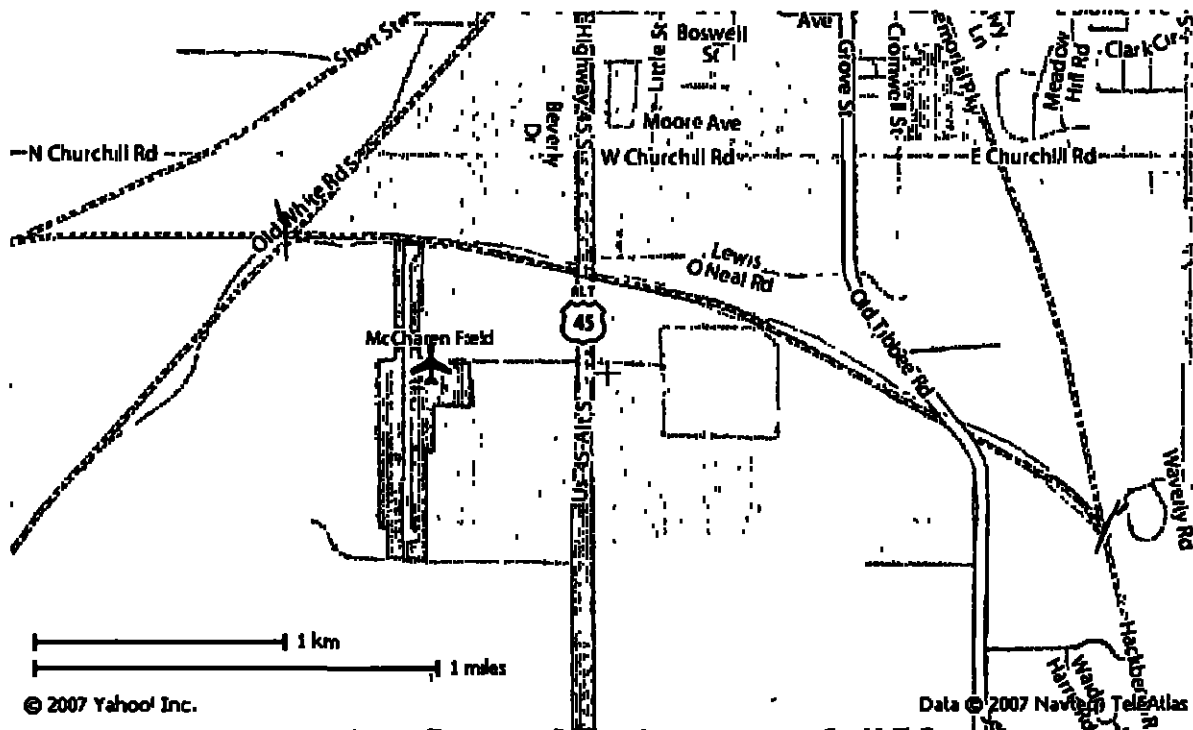
EXHIBIT A

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EXHIBIT A



YAHOO! LOCAL
Maps



When using any driving directions or map, it's a good idea to do a reality check and make sure the road still exists, watch out for construction, and follow all traffic safety precautions. This is only to be used as an aid in planning.