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VIA E-FILING

Cynthia T. Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

ENTERED
Office of Proceedings
April 19, 2017
Part of
Public Record

Re: Norfolk Southern Railway Company – Abandonment Exemption – In Roanoke, Virginia, AB-290 (Sub-No. 389X)

Dear Ms. Brown:

Norfolk Southern Railway Company ("NSR") hereby replies in opposition to the late-filed Notice Of Intent To File An Offer of Financial Assistance ("OFA NOI") filed by Thoroughbred Energy & Environmental Corporation ("TEEC") on April 13, 2017. For the reasons explained herein, the Board should reject TEEC's OFA NOI as untimely, deficient, and contrary to the policy objectives underlying the offer of financial assistance ("OFA") process; and, allow the abandonment exemption to take effect as scheduled on April 22, 2017.

The OFA NOI was untimely and should be rejected. On March 3, 2017, NSR filed a Verified Notice of Exemption for NSR to abandon rail service over approximately 0.5 miles of rail line extending from milepost R 4.0 to milepost R 4.5 (the "Line"). Notice of the exemption was served and published in the Federal Register on March 23, 2017 (82 Fed. Reg. 14,938)("March 23rd Decision"). Pursuant to 49 C.F.R. §1152.27(c)(2)(i), formal notices of intent to file an offer of financial assistance were due no later than April 3, 2017. The TEEC OFA NOI was filed on April 13, 2017. It is thus untimely. Consistent with precedent, it should

¹ The OFA NOI also requests an extension of the 30-day period for submitting an OFA to enable the potential offeror sufficient opportunity to review and analyze the material provided by NSR. If the Board declines to accept the late filed OFA NOI, the Board need not address this issue. However, if the Board accepts the OFA NOI, NSR objects to the 30-day tolling of the deadline for submitting an OFA.

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be rejected.² Rejecting the OFA NOI is also consistent with 49 CFR §1152.25(d)(5) that requires the rejection of any pleading filed after its due date unless good cause is shown why the pleading was filed late. Here, TEEC has not offered good cause for being late.

In addition to being untimely, the Board should reject the OFA NOI because the request is deficient. TEEC's request does not satisfy the requirements of 49 C.F.R. §1152.27(c)(2)(i), which requires a potential OFA offeror to indicate "the type of financial assistance they wish to provide (i.e., subsidy or purchase)." TEEC failed to specify the type of assistance it intended to provide.³

Finally, the OFA NOI should be rejected because it is contrary to the policy objectives underlying the existing and proposed OFA processes⁴ that an OFA should be for the purpose of providing continued rail service.⁵ Indeed, in the NPRM, the Board has proposed amending 49 C.F.R. §1152.27 to require offerors to demonstrate in their OFA that continued rail service on the line the offeror seeks to subsidize or purchase is needed and feasible.⁶ Here, TEEC fails to demonstrate that its proposed OFA would be for continued common carrier service, nor could it. There are no existing or potential shippers on the Line. TEEC does offer vague assertions about

² See Illinois Central Railroad Company – Abandonment Exemption – In Champaign County, IL, AB 43 (Sub-No. 189X) (STB served May 11, 2015) ("Illinois Central") (Director rejected a notice of intent that was filed 10 days late). On appeal, the STB noted that rejecting untimely notices of intent to file an OFA was consistent with precedent, but nonetheless reversed the Director's decision because the potential offeror provided extenuating reasons as to why the deadline was not met. Illinois Central, (STB served July 2, 2015). Here, TEEC has provided no explanation as to why it could not have met the April 3 deadline.

³ Rejecting the OFA NOI is also consistent with other OFA precedent that has made clear that the statute requires that abandonment regulations (specifically the OFA provisions) be strictly enforced, including adherence to procedural timeframes. See General Railway Corporation d/b/a Iowa Northwestern Railroad-Abandonment Exemption - In Osceola and Dickinson Counties, IA, AB-1067 (Sub-No. 2X), slip op. at 2 (STB served October 24, 2008) ("Allowing the late filing of an OFA over the owning rail carrier's objection would be contrary to Congress's direction to streamline the abandonment and OFA process. See also R.R. Ventures, Inc. v. Surface Transp. Bd., 299 F.3d 523, 531 (6th Cir. 2002); see also Mid-Michigan Railroad, Inc. - Abandonment Exemption - In Kent, Ionia, and Montcalm Counties, MI, AB-364 (Sub-No. 14X), slip op. at 5 (STB served Sept. 26, 2008).

⁴ See Offers of Financial Assistance, EP 729, slip op. at 1 (STB served Sept. 30, 2016) ("NPRM").

⁵ Los Angeles County Metropolitan Transportation Authority—Abandonment Exemption—in Los Angeles County, California, AB 409 (Sub-No. 5X), slip op. at 3 (STB served June 16, 2008).

⁶ See NPRM at 19.

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the needs of a nearby short line, Roanoke Southern LLC, ("RSLLC") and its owner the Virginia Museum of Transportation ("VMT"). Both allegedly desire to establish a viable common carrier short line operation on the Roanoke Belt Line.⁷ Yet, neither RSLLC, VMT, nor the City of Roanoke have opposed the abandonment nor submitted any statements in support of TEEC's OFA NOI. Indeed, the City of Roanoke has filed in specific opposition to the requested relief. Furthermore, even if RSLCC's needs are legitimate concerns, these concerns are not primarily for continued freight service, but rather for the desire to establish a passenger tourist operation on the Line, which service is not even subject to the Board's jurisdiction.⁸ The Board should not condone a late-filed notice of intent in order to facilitate excursion train service, especially when doing so would frustrate the City of Roanoke's greenspace development plans and would not benefit any existing or potential shippers.⁹

Put simply, TEEC has provided no basis for a waiver of Section 1152.27(c)(2)(i). As such, and for the reasons explained herein, the Board should deny TEEC's late filed OFA NOI and permit NSR's abandonment class exemption to take effect as currently scheduled on April 22, 2017.

Sincerely,



William A. Mullins
Norfolk Southern Railway Company

cc: Parties of Record
Greg Summy
Laura Hoag

⁷ OFA NOI at 3-4.

⁸ Roanoke Southern, LLC -- Acquisition and Operation Exemption -- Norfolk Southern Railway Company, FD 35976 (STB served Dec. 31, 2015).

⁹ The one shipper mentioned by TEEC, Associated Asphalt ("AA"), likewise does not provide a justification for accepting the late filed OFA NOI. AA is not even located on the Line, will continue to receive rail service, and has not submitted any letter in support of TEEC's request.