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KARL MORELL



November 22, 2005

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BY HAND DELIVERY

The Honorable Vernon Williams
Surface Transportation Board
1925 K Street NW
Suite 715
Washington, DC 20423-001

ENTERED
Office of Proceedings

NOV 22 2005

Part of
Public Record

Re: STB Docket No. AB-290 (Sub-No. 262), Norfolk Southern Railway
Company -- Abandonment -- In Beaufort County, North Carolina

Dear Secretary Williams:

Attached for filing are the original and ten copies of the Motion To Dismiss
Or Reject Abandonment Application. Also enclosed are 3 discs containing the Motion.

Please time and date stamp the extra copy of the Motion and return it with
our messenger.

If you have any questions, please call me.

Sincerely,

Karl Morell

Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD



STB DOCKET NO. AB-290 (SUB-NO. 262)

NORFOLK SOUTHERN RAILWAY COMPANY
-- ABANDONMENT --
IN BEAUFORT COUNTY, NC

MOTION TO DISMISS OR REJECT
ABANDONMENT APPLICATION

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Attorney for:
PCS PHOSPHATE COMPANY, INC.

Dated: November 22, 2005



BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. AB-290 (SUB-NO. 262)

NORFOLK SOUTHERN RAILWAY COMPANY
-- ABANDONMENT --
IN BEAUFORT COUNTY, NC

MOTION TO DISMISS OR REJECT
ABANDONMENT APPLICATION

PCS Phosphate Company, Inc. ("PCS") hereby moves the Surface Transportation Board ("Board") to dismiss or reject the abandonment application filed by Norfolk Southern Railway Company ("NS") on November 17, 2005 (the "Application"), in this proceeding.

SUMMARY

NS seeks to abandon a 4.6-mile line of railroad located between Milepost WL-26.7 and Milepost WL-31.3, near Lee Creek, Beaufort County, North Carolina (the "Line"). The Line is the only rail access to the phosphate mine and processing plants owned and operated by PCS at Lee Creek ("Aurora Facility"). The Aurora Facility contains one of the largest phosphate mines in the world. During the 12-month period of April 1, 2004 through March 31, 2005 ("Env. Base Year"),¹ **3,706,237 tons** of products moved to and from the Aurora Facility. Of that amount,

¹ The Env. Base Year was the time period used by NS in its Environmental Report. The Base Year utilized by NS in the Application is July 1, 2004 through June 30, 2005 and will be referred to in this Motion as the "Base Year".

2,134,756 tons, or about **58 percent** of the total traffic moved by rail. During the Env. Base Year, the Line handled approximately 21,350 loaded rail cars, or approximately 4,641 cars per mile. The volume of rail traffic moving to and from the Aurora Facility is projected to increase in the coming years and mining reserves at the site are estimated to sustain operations through 2060 and beyond. In addition, a new shipper is expected to locate along the Line with anticipated additional rail traffic. *See Exhibit 1.*

As should be readily apparent, this is not a normal abandonment proceeding where a railroad seeks to abandon a light density rail line which has become unprofitable or marginally profitable as traffic volumes have declined. Rather, NS seeks to abandon a rail line that handles significant and increasing volumes of traffic. As explained below and as a cursory review of the Application will attest, NS has ulterior motives in pursuing the Application. NS is not seeking to walk away from an unprofitable rail line. Rather, NS is attempting to use the Board to welsh on a contractual commitment it has to PCS.

PCS respectfully urges the Board to dismiss or reject the Application for any one of five reasons. First, the Board should not intercede in the ongoing contract dispute between the parties. As NS readily admits in the Application, it is seeking to use the Board's abandonment procedures to gain an advantage over PCS in a pending proceeding before the United States District Court for the Eastern District of North Carolina. Not content with simply seeking authority to abandon the Line, NS asks that the Board declare PCS's court complaint preempted. Still not content, NS further requests that the Board void the agreements between NS and PCS that are the foundation of the litigation. This is a basic contract dispute properly subject to Federal court litigation.

Second, NS's stated purpose in filing the Application is PCS's need to have the Line relocated by mid-2007 to accommodate future mining operations. A relocation project such as the one contemplated at the Aurora Facility, however, does not come within the purview of the Board's jurisdiction. The Board does not have jurisdiction over the abandonment component of the planned relocation because the project will not disrupt service to shippers.

Third, CSX Transportation ("CSXT") has trackage rights over the Line. As the Board well knows, a railroad may not abandon a rail line until all tenant railroads have received authority to discontinue operations over the line. Given the unique circumstances of this proceeding, the Application should be dismissed and NS precluded from re-filing unless and until CSXT joins in the effort to abandon the Line.

Fourth, the Application is premature and, if granted, would allow NS to stop service over, and maintenance on, the Line more than a year before the relocated line is operational.

Finally, even if the first four obstacles to abandonment were overlooked, the Application should nevertheless be rejected on grounds that the Application and the accompanying Environmental Report fall woefully short of complying with the Board's rules.

I. THE APPLICATION IS A PLOY TO GAIN ADVANTAGE IN A PENDING COURT PROCEEDING

PCS owns and operates the largest integrated phosphate mining and processing plant in the world. PCS owns or has mineral rights on approximately 70,000 acres of land located near Aurora, North Carolina. The Aurora Facility consists of mining and processing operations which were constructed by PCS's predecessors in the mid-1960s. The Aurora Facility currently has the capacity to produce 6 million tons of phosphate rock per year. PCS estimates that the land surrounding the Aurora Facility contains more than 350 million tons of phosphate rock.

On October 26, 1964, the Board's predecessor, the Interstate Commerce Commission ("ICC"), issued a decision authorizing the construction and operation of a line of railroad from Chocowinity, NC to the Aurora Facility by the Norfolk Southern Railroad Company, one of NS's predecessors.² See *Norfolk S. Ry. Co. Construction and Operation*, 324 I.C.C. 371 (1965). Shortly thereafter, PCS negotiated a series of agreements with NS that included five Deeds of Easements (the "Relocation Agreements").³ The Relocation Agreements granted NS the requisite easements to construct the Line over PCS land. As pertinent here, the Relocation Agreements contain a series of covenants whereby NS agreed to relocate the rights-of-way and the rail line constructed by NS if PCS subsequently determines that the Line interferes with the anticipated mining or processing operations at the Aurora Facility.

The Relocation Agreements provide that:

If, after ten (10) years from the date of this instrument, [PCS] determines that all or any part of said right of way and easement interferes with its anticipated mining or processing operations in the Beaufort County, North Carolina area, then [PCS] shall notify [NS] in writing of its desire that the right of way and track be moved ... and [PCS] shall provide [NS] with a right of way and easement over said new location **and [NS] at its expense shall relocate the said track on the said new right of way....**

See App. at 120 (emphasis added).⁴

After the parties entered into the Relocation Agreements, NS began constructing the rail line to the Aurora Facility. Since 1966, when construction of the Line was completed, NS has continuously provided rail services to the Aurora Facility.

² The various NS and PCS predecessors in interest involved in the origins of this dispute will be referred to as NS and PCS, respectively.

³ The Relocation Agreements are contained in Exhibit 7 to the Application.

⁴ References to the Application shall be App. at ____.

In the early 1970's, three of NS's predecessors sought authority from the ICC to merge their operations. The application was opposed by one of CSXT's predecessors. In order to remove this opposition and presumably protect their captive traffic base elsewhere, the NS predecessors agreed to grant the CSXT predecessor trackage rights to the Aurora Facility. As conceded by NS in the Application, NS opened up the Aurora Facility to competitive rail service in return for keeping other markets captive.

By 1999, PCS was conducting preliminary studies regarding the mining reserves that are accessible at the Aurora Facility. PCS concluded that the Line will interfere with the mining operations at the Aurora Facility if the Line is not relocated by mid-2007. In 2001, PCS conducted an exhaustive study of the most cost-effective and technically sound manner of relocating the Line. After holding meetings with various entities, including the North Carolina Department of Transportation ("NCDOT") and NS, PCS arrived at a final relocation proposal. On November 20, 2003, PCS formally notified NS that PCS was invoking the Relocation Agreements and requested that NS relocate the Line. A copy of the letter to NS is set forth at App. 165-66.

The letter to NS provides that:

PCS hereby notifies [NS] pursuant to the Relocation Agreements of its desire that the railroad track and right-of-way be moved to the locations specified in the enclosed engineering drawings. Such relocation must be initiated by mid-year 2005 and completed by no later than mid-year 2007. In accordance with the Relocation Agreements, PCS shall grant [NS] a right-of-way and easement for the relocated track. Pursuant to the Relocation Agreements, [NS] shall complete the railroad relocation at its expense.

NS has never disputed that the relocation of the existing rail line is required for PCS's continuing mining operations. Nor does NS dispute the fact that PCS's proposed relocation plan

is the most cost-effective proposal for relocating the Line. Rather, the only dispute between the parties is whether NS is the party responsible for paying for the relocation. Set forth at App. 172 and 173, is the letter to PCS from NS, dated February 11, 2005. The letter clearly articulates NS's motivation in filing the Application:

If PCS is not willing to fund the proposed track relocation and [NS] cannot economically justify the funding, then we must begin the abandonment process before the [Board]. Since the [Board] has exclusive jurisdiction over the abandonment of rail lines based on sufficiency of income, **[the Board's] actions will preempt any purported obligation that your company believes otherwise exists** (emphasis added).

In light of NS's refusal to abide by its contractual commitments and pay for the relocation, PCS had no option other than to file a complaint against NS. Consequently, PCS filed a complaint in the United States District Court for the Eastern District of North Carolina (the "U.S. District Court" or the "Court") on May 6, 2005 (the "Complaint"). A copy of the Complaint is attached as Exhibit 7 to the Application. NS is vigorously defending against the Complaint raising numerous affirmative defenses, including the contention that Board abandonment authority would override any obligations NS has under the Relocation Agreements. NS's Answers and Affirmative Defenses to the Complaint are attached as Exhibit 8 to the Application.

NS does not hide its ulterior motives in the Application. NS explicitly states that it is requesting the abandonment authority so that it can be relieved of its contractual obligation to pay for the relocation of the Line. Apparently concerned that the requested abandonment authority may not be sufficient to trump its contractual obligations, NS also asks the Board to declare that the Complaint is preempted. Still not satisfied, NS further asks the Board to declare certain provisions of the Relocation Agreements "void as against public policy." App. at 7. Not

surprisingly, the provisions it would have the Board void contain NS's obligations under the Agreement. NS is content to have the Board leave untouched the provisions which are of benefit to NS.

While the Board has exclusive jurisdiction over the abandonment of the Line, the Board does not have the requisite authority to interpret, reform or abrogate contracts between consenting adults or to relieve a carrier from its financial obligations under a contract in the context of an abandonment proceeding. *See e.g. Houston Belt & Term. Ry. Co. Control*, 275 I.C.C. 289, 313-14 (1950); *Handling Freight Between Ship and Cars at Ports*, 253 I.C.C. 371, 378 (1942); *Southern Pac. Co. Abandonment*, 242 I.C.C. 283, 285 (1940) ("Controversies pertaining to rights and obligations under private contracts are matters for determination by the courts"); *Missouri-Kansas-Texas R.R. Co. v. K.C.T. Ry. Co.*, 104 I.C.C. 203, 230-31 (1925) (ICC refrained from ruling on the use of a terminal facility until a court interpreted the operating agreement among the parties).

The Board should decline NS's invitation to become embroiled in the contractual dispute pending before the U.S. District Court. NS readily admits that its operations over the Line have been profitable for the last two years.⁵ App. at 12. According to NS, its operations will only become unprofitable if it is required to pay for the relocation. In other words, NS's entire case before the Board rests on NS's presumption that the U.S. District Court will rule against NS. Before the U.S. District Court, however, NS asserts 16 affirmative defenses and stridently argues that it has no obligation to pay for the relocation, regardless of whether the Line is abandoned.

⁵ NS's allegations that certain prior year operations over the Line were unprofitable have no support whatsoever in the Application.

Because NS's current operations are profitable, the Board can only grant the Application by prejudging the Complaint in favor of PCS. In so doing, the Board would necessarily need to interpret the Relocation Agreements and usurp the jurisdiction of the U.S. District Court. The Board, however, is without authority to interpret the Relocation Agreements and the Board should not interfere with the contractual dispute properly pending before the U. S. District Court.

Moreover, the logic of the Application is circular and flawed. NS would have the Board presume that the U.S. District Court will rule against NS and require NS to pay for the relocation. On the basis of that presumption, NS would have the Board grant the Application. Once the Application is granted, however, NS will proceed to the Court and argue that the Board's abandonment authority trumps the Relocation Agreements and precludes the U.S. District Court from ruling in favor of PCS. Should the Court accept NS's arguments, NS will not be required to pay for the relocation. But, if NS is not required to pay for the relocation, there can be no basis for granting the Application. NS's circular reasoning can best be avoided by dismissing the Application and allowing the Court to rule on the contractual issues.

The Board should also not interfere in the Court proceeding as requested by NS. The merits of the abandonment and the legal obligations of the parties under the Relocation Agreements are separate issues. The Board has jurisdiction over the abandonment and the U.S. District Court has jurisdiction over the proper interpretation of the Agreements. *See Regents Of The Univ. System Of Georgia v. Carroll Et Al.*, 338 U.S. 586 (1950); *Central New England Ry. Co. v. Boston & A.R. Co.*, 279 U.S. 415 (1929); and *Gulf, Mobile & Ohio RR v. Illinois Central RR Co.*, 128 F. Supp. 311 (N.D. Ala. 1954). In addressing the interplay of its abandonment jurisdiction and various agreements between the parties covering the use of the tracks, the ICC pointed out that, while it had jurisdiction over the abandonment of the use of the line, "we do not

have any further control over the agreements....” *Abandonment By C., R.I. & P. Ry.*, 131 I.C.C. 421, 429-30 (1927). The ICC pointed out that it did not have jurisdiction to extinguish the rights and obligations created by the agreements at issue. The ICC proceeded to note that “**we do not undertake to revise or reform ... contracts. We are not authorized to do so.**” *Id.* at 430 (emphasis added). The ICC further explained that since abandonment certificates are permissive only, “there would evidently be less reason for giving such certificates a controlling effect over those agreements than our mandatory orders.” *Id.* at 431.

The ICC consistently held that the abandonment authority now administered by the Board does not trump contractual obligations of the abandoning carrier. A contract is preempted only to the extent that it would usurp the Board’s authority to authorize an abandonment. Any monetary obligations the abandoning carrier may have are unaffected by the Board’s exercise of its abandonment jurisdiction and the rights and obligations of the parties are matters for a court to decide. *See, e.g., Kansas City S. Ry. Co. v. Kansas City Term. Ry. Co.*, 211 I.C.C. 291, 305 (1935) (“We cannot attempt to construe the operating agreement and say whether or not [the requested] abandonment would relieve complainants of their obligation under the agreement to make the payment in question.”); *Wisconsin Central Ry. Co. Abandonment*, 239 I.C.C. 747, 751 (1940) (“Such legal questions as there may be regarding the force of the private contract are matters for determination in the courts, and we may not give to them important weight in determining public convenience and necessity.”); *Chicago, M., St. P. & P. R. Co. Trustees Abandonment*, 240 I.C.C. 183, 185 (1940) (“We have also held that legal questions involving the effect of private contracts are matters for judicial determination rather than for consideration and determination by us where public convenience and necessity are involved.”); *Baton Rouge Bus Co. Abandonment*, 275 I.C.C. 1, 5 (1949) (“[C]arrier obligations under charter or contract are

matters which [the ICC] cannot undertake to decide...."); *Wisconsin Central R. Co. Abandonment*, 317 I.C.C. 218, 221 (1961) ("The determination of this issue involves interpretation of the terms of a contract, a function we have consistently left for settlement by the parties involved or the courts.").

NS cites numerous preemption cases and asks that the Board apply the holding of those cases in this proceeding and preempt the Complaint and void provisions of the Relocation Agreements. Sadly for NS, all of the cases it relies on are inapposite. Virtually all of the cited cases involve preemption of local or state laws that directly or indirectly seek to regulate railroads subject to the jurisdiction of the Board. PCS is not invoking any local or state laws that require NS to pay for the relocation. Rather, PCS is simply pursuing its contractual rights under the Relocation Agreements.

NS cites only two cases that involve contract issues. In *Railroad Ventures, Inc. v. Surface Transportation Board*, 299 F.3d 523 (6th Cir. 2002), the Board voided a transfer agreement because the agreement undermined continued rail service and was contrary to 49 U.S.C. § 10904. In STB Docket No. AB-33 (Sub-No. 183), *Salt Lake City Corporation – Adverse Abandonment – In Salt Lake City, UT* (not printed), served March 8, 2002, the Board refused to enforce a Franchise Agreement because the Agreement attempted to usurp the Board's exclusive jurisdiction over the abandonment of the rail line at issue. The transfer agreement and Franchise Agreement were intended to override, or had the effect of impairing, the Board's exclusive jurisdiction over offers of financial assistance and abandonments, respectively. The provisions of the Relocation Agreements at issue in the Court proceeding govern only the payment for a relocation project, a project over which the Board has no jurisdiction.

Indeed, PCS's Complaint does not ask the Court to restrain NS from seeking abandonment authority. Similarly, PCS will not argue before the Board that the Relocation Agreements prevent NS from abandoning the Line. Accordingly, neither the Court proceeding nor the Relocation Agreements attempt to interfere with, or usurp, the Board's jurisdiction. It is NS, and not PCS, that has bootstrapped the Complaint and the Relocation Agreements to the abandonment.

Much more on point to this proceeding are the decisions in *Gulf, M. & O. R. Co. Abandonment*, 282 I.C.C. 311 (1951) ("*Gulf Abandonment*") and *Delaware & H. R. Crop. Trackage Rights Modification*, 290 I.C.C. 103 (1953) ("*Delaware*"). In *Gulf Abandonment*, the applicant asked the ICC to void the trackage rights agreement governing the operations the applicant was seeking to abandon. In denying the request, the ICC pointed out that:

This Commission over a long period of years has uniformly held that it has no power to reform contracts or to relieve carriers of their financial obligations thereunder in connection with an application to abandon under [former] section 1(18) of the act.

Gulf Abandonment at 331-32.

In *Delaware*, the ICC addressed, among other things, the abandonment of trackage rights. In dismissing the application for lack of jurisdiction because of a pending court proceeding, the ICC held:

Before any decisive action may be taken it is necessary that the legal effect of the controversial language in the agreement be determined. The interpretation thereof is purely a question of law for the courts and it would be inappropriate in such a proceeding as this for us to express our views for the court's guidance on a purely legal question. We think that we should adhere to our often repeated declaration that we will not undertake to interpret or enforce contracts.

Delaware at 111.

The Board, in turn, should adhere to the holdings of *Gulf Abandonment* and *Delaware* and not interpret or reform the Relocation Agreements. Also, as in *Delaware*, the Board should not prejudge or attempt to influence the case pending before the U.S. District Court. Rather, as the holding of *Delaware* would require, the Application should be dismissed for want of jurisdiction. If NS is successful before the U.S. District Court, there will be no need to re-file the Application. If NS is unsuccessful, it can prepare and present the Board with an actual case in controversy.⁶

II. THE BOARD HAS NO JURISDICTION OVER THE RELOCATION OF THE LINE

NS uses many euphemisms in the Application for the relocation project. NS states that it will not “rebuild the Line”, App. at 8; that a new line must be constructed “along an alternate route”, App. at 13; it does not want “to construct a replacement line”, App. at 14; PCS will retain rail service because of the “construction of the new track”, App. at 15. At page 24 of the Application, NS describes the project as “the construction of a new line over a different route between the end points of the subject Line” which, of course, is the very definition of a relocation project.

In an attempt to justify the abandonment, NS takes fundamentally inconsistent positions on the so-called construction of a new line over a different route between the end points of the

⁶ The estimated \$12.2 million cost for the relocation project must be placed in proper context. According to the Application, during the Base Year, NS handled 654,430 tons of traffic to and from the Aurora Facility. And, as previously noted, the mining reserves at Aurora are expected to last at least 55 more years. If NS continues to handle the same annual volume of traffic in the next 55 years as it handled in the Base Year, the relocation expense will come to **\$0.34** for every ton of traffic NS handles. PCS is insisting that NS pay for the relocation because NS agreed to do so in binding and valid agreements. PCS complies with its contractual commitments and it expects its business partners to do the same.

Line. In various parts of the Application, NS treats the relocated line as an industrial spur. For purposes of the Forecast Year, however, NS treats the new line as a relocated line constructed, owned and operated by NS. In other words, in an attempt to justify the abandonment of the current line, NS necessarily relocates that line to the location suggested by PCS.

The Board, however, will exercise jurisdiction over the abandonment or construction components of a relocation project, and require separate approval or exemption, only where the removal of track affects service to shippers or the construction of new track involves expansion into new territory. *See City of Detroit v. Canadian National Ry. Co., et al.*, 9 I.C.C.2d 1208 (1993), *aff'd sub nom., Detroit/Wayne County Port Authority v. ICC*, 59 F.3d 1314 (D.C. Cir. 1995). In *Southern P. Transp. Co. & S.S.W. Ry. Co. Exemption*, 363 I.C.C. 848, 850 (1981), the ICC explained the lack of jurisdiction over relocation projects:

The relocation of railroad operations frequently does not affect matters with which the Commission has a regulatory interest (such as service to shippers or intramodal competition). A railroad's decision to relocate certain operations may merely reflect practical considerations The Commission has long recognized that, although these "relocations" would ordinarily come within the purview of our jurisdiction, Congress never intended that we should review and give prior approval to relocation transactions. Therefore, even prior to Congress' adoption of exemption authority in 49 U.S.C. §10505, we have, in appropriate circumstances, entertained petitions for dismissal of applications related to relocations.

The rule that the Board lacks jurisdiction over an abandonment involving the relocation of a line which will not disrupt service to shippers has been consistently followed by the ICC and the Board and upheld by the courts. *See, e.g., City of Des Moines v. Chicago & N.W. Ry. Co.*, 264 F.2d 454 (8th Cir. 1959); *Philadelphia, N. & N.Y.R. Co. Application*, 67 I.C.C. 252 (1921); *Missouri Pac. R. Co. Trustee Construction*, 282 I.C.C. 388 (1952); *Boston & Albany R.*

Abandonment, 312 I.C.C. 458, 463-64 (1961) (abandonment and construction of parallel track by two carriers who operate over existing track to be abandoned and will operate over relocated track found not to be subject to ICC jurisdiction); *Union Pacific RR Co. – Petition – Rehabilitation of MO-KS-TX RR*, 3 S.T.B. 646 (1998).

A map of the relocation project is attached as Exhibit 2. As the map readily demonstrates, the relocated line will run essentially parallel to the existing line, the relocated line will be used to serve the Aurora Facility at the end of the relocated line just as the existing line is used today to serve that Facility and there are no shippers located on the portion of the existing line that will be relocated. Therefore, the incidental abandonment of the Line as part of the relocation project is not subject to the Board's jurisdiction. Accordingly, the Application should be dismissed on grounds that the Board has no jurisdiction over this matter.

III. THE APPLICATION IS PREMATURE

As previously noted, the relocation project is scheduled to be completed by mid-2007 in order to accommodate mining operations. Until such time, the Line will continue to be needed to serve the existing mining operations. NS has elected to file its Application on November 17, 2005. Under the Board's rules, the Board is obligated to issue a final decision by March 7, 2006. *Aban. And Discon. Of R. Lines And Transp. Under 49 U.S.C. 10903*, 1 S.T.B. 894, 897 (1996). NS asserts that it "does not intend to consummate the abandonment of the Line" until PCS sets the date for the removal of the track. App. at 14. The Board, however, is powerless to require continued operations once an application is granted other than as provided for in Section 10904. *See 49 U.S.C. § 10904(d)(1)*; Docket No. AB-1 (Sub-No. 142), *Chicago And Northwestern Transportation Company – Abandonment – Between Norwood And Madison, MN* (not printed), served March 11, 1983. Moreover, NS has asked "to be relieved of its common carrier

obligation to maintain and to provide rail service over the Line.” App. at 6. Thus, once the abandonment authority becomes effective, NS can stop serving PCS and stop maintaining the Line, which will jeopardize all rail service to Aurora for well over a year, since CSXT is not permitted to perform maintenance on the Line. Indeed, NS specifically asks the Board to rule that it can discontinue service and stop maintenance on the Line upon the effective date of the Board’s decision. App. at 69-70. Consequently, at a minimum, the Application must be dismissed as being prematurely filed. The Application demonstrates that NS’s current operations are profitable and, as NS acknowledges, those circumstances will not change until mid-2007. Consequently, NS will suffer no harm by having its Application dismissed.

IV. THE LINE MAY NOT BE ABANDONED UNTIL THE TENANT CARRIER IS REMOVED

The Seaboard Coast Line Railroad Company (“Seaboard”), a predecessor of CSXT, was granted trackage rights to serve the Aurora Facility as a result of a settlement agreement with NS in Finance Docket No. 27078, *Carolina and Northwestern Railway Company – Norfolk Southern Railway Company and Southern Railway Company Control*; and Finance Docket No. 27079, *Carolina and Northwestern Railway Company and Southern Railway Company Securities*. The overhead trackage rights, which extend from Greenville, NC to the Aurora Facility, were authorized in Finance Docket No. 28252, *Seaboard Coast Line Railroad Company – Trackage Rights – Over Norfolk Southern Railway Between Greenville and Lee Creek in Pitt and Beaufort Counties, NC*.

In the Application, NS laments at length over the CSXT trackage rights and CSXT’s ability to operate over the Line at lower costs. App. at 9-11, and 19-20. NS implies that the trackage rights were imposed by the ICC as part of the now discredited “DT&I” conditions. As

the Board well knows, trackage rights were not part of the standard DT&I conditions. Indeed, NS reluctantly acknowledges that the trackage rights were part of a settlement agreement between Seaboard and NS and were intended to remove Seaboard from the merger proceeding and eliminate the possibility that Seaboard would receive conditions even more onerous to NS. App. at 19-20.

NS fails to point out that PCS's predecessors did not ask to have CSXT admitted to the Aurora Facility nor were they involved in negotiating the trackage rights fee. In exchange for the CSXT trackage rights, NS presumably received benefits elsewhere and has enjoyed the fruits of those benefits over the years.

NS also laments that it could not possibly have foreseen in 1965 and 1966, when it agreed to pay for the relocation, that CSXT would gain access to the Aurora Facility. NS is, of course, correct. However, NS was, or should have been, aware of its contractual commitments in the Relocation Agreements when it negotiated the trackage rights Agreement. Thus, if circumstances have changed since 1966, as NS suggests, the changes are of NS's own making.

The Board and the ICC have consistently held that the landlord carrier may not consummate an abandonment until all tenant carriers have discontinued their operations over the line at issue. Where, as here, the tenant carrier has not joined in the filing with the landlord carrier, the abandonment filings have been handled in various ways depending on the unique facts of each case.

For example, in STB Docket No. AB-32 (Sub-No. 82), the application was initially rejected because it failed to join a necessary party that held authority over the line. *See* STB Docket No. AB-32 (Sub-No. 82), *Boston And Maine Corporation – Abandonment – In Hartford And New Haven Counties, CT* (not printed), served November 14, 1997, slip op. at 1, note 1

(“*Boston and Maine*”). In Docket No. AB-88 (Sub-No. 6), *Bessemer and Lake Erie Railroad Company – Abandonment and Discontinuance of Trackage Rights In Erie County, PA* (not printed), served May 6, 1994, the ICC withheld abandonment authority until the tenant carrier discontinued its operations over the line. In Docket No. AB-33 (Sub-No. 77X), *Union Pacific Railroad Company – Abandonment Exemption – In Solano County, CA* (not printed), served December 15, 1992 and February 16, 1993, the ICC delayed processing the notice of exemption until the tenant railroad filed to discontinue its trackage rights.

In other cases, the landlord was granted only discontinuance authority until the tenant was authorized to discontinue its operations over the line. See, e.g., *Missouri Pac. R. Co. – Aban. – Osage, Lyon & Morris Count., KS*, 9 I.C.C.2d 1228 (1993) (“*Missouri*”); STB Docket No. AB-57 (Sub-No. 40X), *Soo Line Railroad Company, D/B/A Canadian Pacific Railway – Abandonment Exemption – In Hennepin County, MN* (not printed), served June 26, 1998 (“*Soo Line*”); Docket No. AB-167 (Sub-No. 1121X), *Consolidated Rail Corporation – Abandonment Exemption – In Clark County, OH* (not printed), served June 10, 1994 (“*Conrail*”); Docket No. AB-1 (Sub-No. 231X), *Chicago And North Western Transportation Company – Abandonment Exemption – In Hennepin County, MN* (not printed), served June 26, 1990 (“*CNW*”).

Given the unique circumstances in this proceeding, the Board should follow the line of cases that would call for dismissal or rejection of the Application and not entertain a re-filing until CSXT joins in the request. Because CSXT’s trackage rights authorize it to serve the Aurora Facility and because CSXT handles a significant volume of traffic over the Line, CSXT is an indispensable party to any proceeding involving the abandonment of the Line. In the Env. Base Year, NS and CSXT collectively handled about 2,134,756 tons of traffic, or approximately 21,350 loaded cars, over the Line. PCS fails to see how the Board can rationally decide the

merits of NS's abandonment and CSXT's discontinuance in isolation of each other.⁷ Moreover, as explained below, the Board cannot possibly prepare a credible Environmental Assessment of the overall abandonment of the Line if the two proceedings are handled in isolation.

This proceeding is readily distinguishable from those where the Board processes the abandonment case and simply withholds the ability of the landlord carrier to consummate until the tenant has discontinued its operations. For example, in *Missouri*, no traffic had been handled over the line to be abandoned by either the landlord or the tenant in well over two years. Consequently, granting the discontinuance of the trackage rights was a forgone conclusion and the discontinuance proceeding would necessarily not present any unique or additional environmental issues. In those circumstances, it is, of course, appropriate for the Board to grant the abandonment and simply preclude the consummation until the discontinuance is also authorized. Similarly, in *Soo Line*, the abandonment and subsequent discontinuance did not adversely affect service to the only shipper on the line and there were no environmental consequences to the discontinuance. In *Conrail and CNW*, the tenant only had overhead trackage rights.

Accordingly, the Board should dismiss the Application for failure to join a necessary party. At a minimum, the Application should not be processed until the intentions of CSXT are made known to the Board and the parties.

⁷ PCS's concern over having to defend against the abandonment and the discontinuance in isolation is not hypothetical. In the Answers to the Complaint, in the Historic Report and in the Application, NS claims that the agreement between NS and CSXT that lead to the trackage rights requires CSXT to file for discontinuance of the trackage rights if NS abandons the Line. See Historic Report at 17 and App. at 11.

V. THE APPLICATION FAILS SUBSTANTIALLY TO COMPLY WITH THE BOARD'S RULES

A cursory review of the 810 page Application reveals numerous instances of inconsistencies and failures to comply with the Board's rules. A sample of these errors follows:

Notice of Intent: Pursuant to 49 C.F.R. § 1152.20(a)(1), the Notice of Intent ("NOI") must be served on the Board by certified mail. It does not appear NS complied with that requirement.⁸ Pursuant to Section 1152.20(a)(2), the NOI must be served on all of the specified individuals, agencies and entities. The NOI service list in the Application is not the same as the NOI service list filed with the Board on October 18, 2005. For example, the Federal Railroad Administration and the Railroad Retirement Board are not listed in the October 18th filing. Accordingly, it is unclear whether these two agencies were served with the NOI and, if so, whether the service was timely. Section 1152.20(a)(3) and (b)(3) require that the NOI must be posted at each agency station and terminal on the Line for the 30-day period before the Application is filed. PCS can find no evidence in the Application that NS complied with this requirement.

Application: NS has certified that the NOI was first published on October 19, 2005. Section 1152.20(b)(2) requires that the NOI must be fully published within the 30-day period prior to the filing of the Application. Accordingly, the Application is not timely filed since the 30-day period did not end until November 18th.⁹

⁸ NS's cover letter transmitting the NOI states that the NOI was delivered via Federal Express.

⁹ Section 1152.20(b)(1) requires that the NOI must be served no more than 30 days prior to the filing of the Application. Pursuant to this rule, NS could not timely file its Application after October 17th. Thus, NS created a dilemma for itself whereby it became impossible to timely file the Application.

In its Application, NS correctly uses data from its 2004 R-1 Annual Report to calculate On-Branch costs. In calculating Off-Branch costs, however, NS improperly uses its 2003 URCS unit costs rather than its 2004 unit costs as required by the Board's rules. Pursuant to 49 C.F.R. § 1152.32(n)(2), "[t]he procedure for determining the off-branch costs shall be based upon the URCS cost formula. This formula shall be applied to the latest Annual Report Form R-1 filed by the railroad" with two exceptions not relevant here. NS's 2004 Annual Report Form R-1 was required to be filed with the Board by March 31, 2005, and, therefore, the 2004 URCS unit costs should have been available for inclusion in its Application. In the Application, NS claims that its operations on the Line during the first three quarters of 2003 were unprofitable. *See App. at 12, note 7.* Thus, the use of the 2003 URCS unit costs in this proceeding is not only improper but also highly suspect.

In the Forecast Year calculations, NS includes \$12.2 million as a rehabilitation cost. As previously explained, the issue of who is responsible for paying for the relocation of the Line is pending before the U.S. District Court. Until the Court rules, that cost item is theoretical and, therefore, should not be included in the Forecast Year calculations. In adopting the Forecast Year column to Exhibit 1, the ICC cautioned that, if the Forecast Year costs are not adequately supported, it would presume that the Forecast Year costs are the same as the Base Year costs. *Abandonment Regulations – Costing*, 5 I.C.C. 2d 123, 134 (1988). No useful purpose would be served in processing the Application on that basis since even NS concedes that it cannot prevail with Base Year costs.

Even if PCS prevails in the pending litigation and NS is required to pay for the relocation, it cannot expense the entire amount in the Forecast Year. Relocation expenses should not be treated the same as rehabilitation expenses. Even if they were treated the same, rehabilitation

expenses should only be treated as a one-time cost where there is no certainty of future traffic. As previously noted, over 2.1 million tons of traffic currently moves over the Line and that volume is expected to increase. Accordingly, NS should be required to remove the relocation expense from the Application. At a minimum, NS should be required to await the Court ruling and, if it does not prevail, to expense the amount over the projected 55-year life of the mine.

Even if the inclusion of the relocation cost were permissible at this time, which it should not be, NS has double counted certain costs. For example, \$582,066 of the \$12.2 million relocation costs are for the removal of the existing rail line. NS, however, also includes those costs in its calculation of net liquidation value (“NLV”).

NS’s Environmental Report assumes that the bridges will be removed. It does not appear, however, that any bridge removal costs are included in NS’s NLV calculations. It is likely that, if those costs were included, the NLV would be negative.

NS has included normalized maintenance of way costs in the Base Year. The Board’s rules require that actual maintenance of way costs be used for the Base Year.

NS takes inconsistent positions on the ownership of the relocated Line. In the body of the Application, NS treats the relocated Line as if owned by PCS. In the Forecast Year calculations, the Line appears to be treated as owned by NS.

The Environmental Report identifies three bridges on the Line. The Application states there is only one bridge on the Line.

Environmental Report: The Application and Environmental Report take two fundamentally different approaches to traffic diversions. The Environmental Report assumes NS will abandon the Line and no longer handle any traffic over the Line. In the Application, NS claims that there will be no diversions from rail and characterizes the Environmental Report as

simply a “theoretical scenario”. App. at 37. The problem NS repeatedly faces in its filings is that its entire case is theoretical which, in turn, complicates its ability to comply with the Board’s rules. NS cannot have it both ways. If its case is theoretical, the Application should be summarily dismissed. If it is not, NS should be required fully to comply with the Board’s rules.

NS is seeking authority to abandon the Line. In order to do so, NS must have CSXT also removed from the Line, leaving the Aurora Facility without rail service. In the Application, NS states that it has no intention of relocating the Line. As such, NS cannot presume for purposes of this proceeding that the Line will be relocated since, according to NS, that will be a matter beyond its control.

During the Env. Base Year, approximately 2,134,756 tons of traffic moved over the Line. In the Environmental Report, NS assumes, without any explanation or support, that less than 2 percent of the rail traffic will be diverted to trucks. NS’s assumption is grossly unrealistic. Apparently, NS has selected an arbitrary volume of rail traffic that will divert to truck in order to fall below the thresholds of 49 C.F.R. § 1105.7(e)(4)(5) and (6) and thereby avoid the more in-depth analysis required by the rules.

According to the Federal Railroad Administration listing of vehicle traffic at rail-highway crossings, there are two public crossings on the Line one of which currently has 110 truck crossings a day and the other has 5 truck crossings a day. If all of the current rail traffic were diverted to truck, over 500 additional trucks a day would traverse the first crossing.¹⁰ If only the NS traffic were diverted to truck, approximately 167 additional trucks would traverse the first crossing. In the Environmental Report, NS states “[m]ovements of commodities by barge would

¹⁰ The trucks moving to and from the Aurora Facility carry on average about 23 tons per truck.

be the preferred alternative mode of transportation in the absence of NSR rail service.”¹¹ If, however, PCS’s customers currently served by NS were able to receive barge traffic, as NS assumes, NS’s traffic would have been diverted to barge long ago.

Little, if any, traffic now handled by NS can be shifted to barge. That traffic will have to move by truck or not move at all. In any event, preliminary calculations show that during the Env. Base Year NS handled approximately 113,306 tons of traffic to destinations in North Carolina, South Carolina and Virginia. If the diversions to truck were simply limited to that traffic, which is very unlikely and highly conservative, about 27 additional trucks would traverse the first crossing. In summary, any credible diversion analysis will produce diversions from rail to truck well in excess of the thresholds triggering more extensive analysis.¹² Accordingly, NS must be required to perform a detailed air quality and noise analysis.

NS forwarded a draft of its Environmental Report with the faulty diversion analysis to various state and Federal agencies. In response, NCDOT estimated that the diversions to truck would produce 30,000 annual truck trips which, in NCDOT’s view, would have a deleterious impact on local roads and significantly increase public highway maintenance costs. While NCDOT’s response is attached to the final Environmental Report, NS chose to totally ignore the response.

¹¹ NS makes this self-serving and totally unsupported contention because, as NS is undoubtedly aware, the greatest potential for increased air and noise pollution is associated with diversions of rail traffic to trucks. If the Board were to accept such self-serving statements from an applicant, the burden of analyzing environmental issues would impermissibly be shifted to other parties. *Harlem Valley Transportation Ass’n v. Stafford*, 500 F.2d, 328, 335 (2nd Cir. 1974).

¹² The thresholds were set at levels over which significant impacts are expected to occur. See *Revision of Natl. Envi. Policy Act Guidelines*, 363 I.C.C. 653, 657, note 3 (1980).

NS's energy analysis is flawed in two major respects. First, it assumes unrealistically low diversions to truck. Second, it assumes a truck haul of only 4.6 miles. If one properly calculates the additional gallons of fuel consumed solely for the NS traffic currently moving to North Carolina, South Carolina and Virginia, the increase in fuel consumption would likely be in excess of 350 percent.

The Environmental Report also fails to consider feasible alternatives to abandonment. The conclusion that the abandonment will have minimal affect on regional or local transportation systems is premised on the faulty diversion analysis. NS has all but ignored the requirements of the Coastal Zone Management Act. Since coal moves over the Line, NS's response regarding the transportation of energy resources is inadequate. Because of the faulty diversion analysis, NS failed to perform a quantified air emissions analysis or a quantified noise levels analysis. The Environmental Report erroneously assumes no hazardous materials move over the Line. NS acknowledges that the Line crosses wetlands and a 100-year flood plain, but fails to address the effect of the abandonment on the wetlands or flood plain.

In *Implementation – Natl. Environmental Policy Act, 1969*, 352 I.C.C. 451 (1976), the ICC explained the importance of parties submitting detailed environmental information with their applications. Noting that its environmental analysis is largely dependent on the sufficiency of the information provided by the parties, the ICC cautioned that “we have detailed the additional information needed by the parties, and we intend to insist on strict compliance with these reporting requirements....” *Id* at 458.

Pursuant to 49 C.F.R. § 1152.24(e)(1), an application will be rejected if it does not substantially conform to Board's rules governing abandonments. The Board and its predecessor have not hesitated in rejecting faulty abandonment applications. For example, in *Boston and*

Maine, the Board rejected the application because the Forecast Year provided an inaccurate projection of the financial results of future operations and because the Environmental Report was found unacceptable. Because of the inclusion of the relocation costs, NS's Forecast Year results are equally inaccurate and, as demonstrated above, the Environmental Report is fundamentally flawed. *See also* STB Docket No. AB-32 (Sub-No. 91), *Boston and Maine Corporation – Abandonment – In Suffolk County, MA* (not printed), served August 8, 2001 (application rejected because the economic data was inconsistent and unsupported); Docket No. AB-33 (Sub-No. 58), *Union Pacific Railroad Company – Abandonment – Between Colfax and Fairfield in Whitman and Spokane Counties, WA (Tekoa Branch)* (not printed), served July 25, 1989 (application rejected because of improper indexing and other deficiencies in the application). Given the significant deficiencies in the Application and Environmental Report, the Application should be rejected by the Board.

CONCLUSION

In the Application, NS concedes that it is only seeking to abandon the Line to gain advantage in a contract dispute with PCS that is currently pending before the U.S. District Court. NS further concedes that it cannot possibly win the abandonment case before the Board unless it loses the case before the Court. NS, thus, is asking the Board to do what the Board and the ICC have refrained from doing for well over a century: prejudging or otherwise interfering in a contract dispute properly pending before a court. Accordingly, the Board should dismiss the Application and require NS to await the decision of the Court.

Alternatively, the Board should dismiss the Application on ground that the Line is being relocated pursuant to a relocation project over which the Board has no jurisdiction; that the

Application is premature; and that NS failed to join the trackage rights carrier on the Line, a necessary party to this proceeding.

If the Board elects not to dismiss the Application, the Application should be rejected for failing substantially to comply with the Board's rules governing abandonment applications.

In summary, PCS respectfully urges the Board to dismiss or reject the Application.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Karl Morell". The signature is fluid and cursive, with the first name "Karl" being more prominent than the last name "Morell".

Karl Morell
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Attorney for:
PCS PHOSPHATE
COMPANY, INC.

Dated: November 22, 2005

Ethanol project grant gets OK

WBU
08/23/05

*DOT board approves
rail spur funding for
Beaufort County*

By JONATHAN CLAYBORNE
News Editor

The N.C. Board of Transportation voted Aug. 4 to award a \$130,000 grant to Beaufort County.

The money will pay for construction of a rail spur primarily serving Agri-Ethanol Products, or AEP, of Raleigh.

The company may build an ethanol plant in the Aurora area.

The transportation board voted unanimously to award the funds, according to Tammy Denning, secretary to the board.

"The grant is contingent upon the support of the county," said Pam Davis, a rail planner with the N.C. Department of Transportation Rail Division.

A resolution of support approved Aug. 1 by the county commissioners endorsed AEP's application for the rail money, but the document does not list Beaufort County as the applicant.

Apparently, though, the county did apply for the funds after that Aug. 1 session.

The rail spur will be owned by Beaufort County, related County Manager Paul Spruill.

The county and the Town of Aurora are applying for around \$2.4 million in public funding for work around the ethanol site, Spruill noted.

For a time, it was unclear who would be responsible for maintaining the rail spur.

"Typically, these rail spurs

Ethanol from Page 1A

are owned privately," said Davis. "But we do have some cases in North Carolina where, maybe it's an industrial park or an area that's already owned by the county, it might be a combination (of private and public entities)."

Spruill said the county applied for the rail funds on behalf of AEP "as part of a future arrangement, should everything work, where Norfolk-Southern would have an agreement with AEP to operate and maintain the new rail infrastructure."

AEP would enter an agreement with the county, determining a maintenance relationship, Spruill related.

"Because we're using all these funding sources, the infrastructure must be publicly owned regardless of the operating relationships that exist at the end of the day," he said.

A call to Dave Brady, manag-

\$1.6 million to the county, with \$400,000 reverting to the county beginning Jan. 1, 2006, and the rest coming back over the next three years.

The county would be responsible for covering interest on the loans. The county would also grant to AEP the amount of property taxes the company would pay during the life of the agreement.

In addition, the county is helping apply for state grants on behalf of the company.

Aside from application processes already triggered by governing boards' votes, county officials hope they will be able to seek money through the N.C. Rural Center, said Thompson.

"We had to wait until the Legislature recharged their grants, which they did," Thompson said.

He added, "We're moving along."

The county had not received

additional word on any other grants as of Monday.

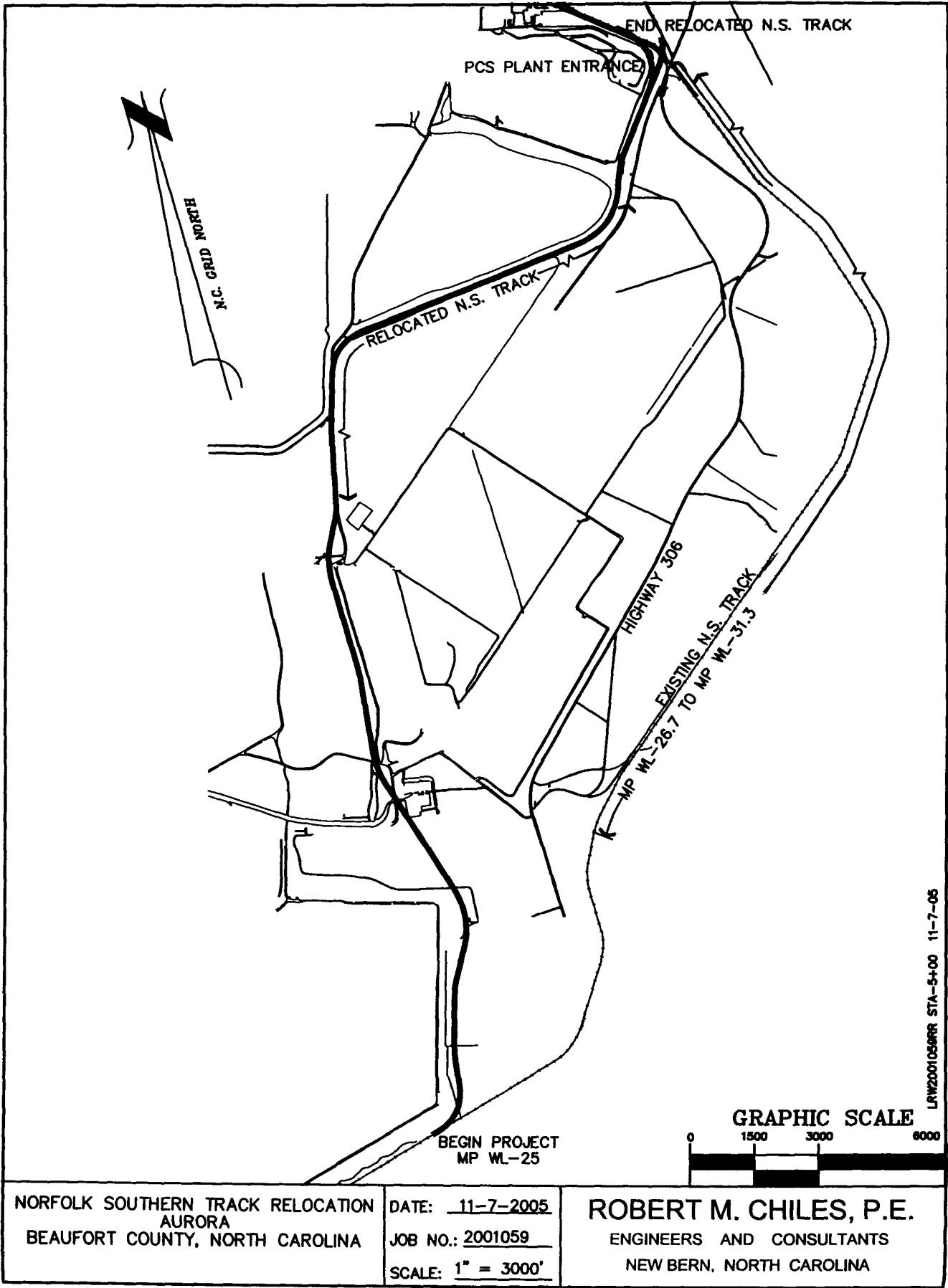
The county hasn't submitted applications for utility account funds or industrial development funds through the N.C. Department of Commerce, Spruill said. Those applications may be sent to the Commerce Department within the next two weeks, he said.

The AEP land deal has sparked controversy among commissioners and some members of the public. Critics say the county shouldn't be involved in obtaining land for a private business.

Thompson has countered the critics by saying the project is capital intensive and the company has required a certain upfront pledge of investment.

Thompson has acknowledged the land deal is unusual, going beyond packages the county historically has offered to recruited industries.

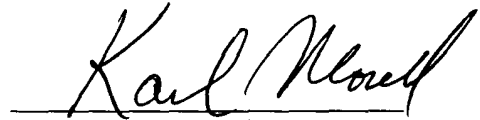
EXHIBIT 2



CERTIFICATE OF SERVICE

I hereby certify that I have this day served copies of the foregoing Motion To Dismiss or
Reject on the following party of record in this proceeding, by overnight delivery:

James R. Paschall, Esq.
Senior General Attorney
Norfolk Southern Railway Company
Three Commercial Place
Norfolk, VA 23510

A handwritten signature in black ink, reading "Karl Morell", written over a horizontal line.

Karl Morell
November 22, 2005