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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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AB 1305X  
NORTH COAST RAILROAD AUTHORITY  
— ABANDONMENT EXEMPTION —  
IN MENDOCINO, TRINITY, AND HUMBOLDT COUNTIES

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**REPLY OF NORTH COAST RAILROAD COMPANY, L.L.C. IN OPPOSITION TO  
NORTH COAST RAILROAD AUTHORITY'S REQUEST FOR AN  
EXEMPTION FROM THE PROVISIONS OF 49 U.S.C. § 10904**

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**ATTORNEYS FOR NORTH COAST  
RAILROAD COMPANY, L.L.C.**

Dated: August 16, 2021

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North Coast Railroad Company, L.L.C. (“NCRCo”) hereby replies in opposition to the North Coast Railroad Authority’s (the “Authority”) “Motion for Exemption”<sup>1</sup> from the Offer of Financial Assistance (“OFA”) provisions at 49 U.S.C. § 10904. As explained herein, the Authority has failed to satisfy the strict standards for such an exemption. The Authority has instead attempted impermissibly to have the Surface Transportation Board (the “Board”) pre-judge the merits of prospective OFAs in this proceeding before they have been filed, an undertaking neither sanctioned under the Congressional OFA mandate nor supported by applicable Board precedent.

**INTRODUCTION**

“It is well settled that an OFA should take priority over a trail use proposal because of the strong Congressional intent to preserve rail service *wherever possible.*” *1411 Corporation — Abandonment Exemption — In Lancaster County, Pennsylvania, AB 581X* (STB

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<sup>1</sup> On a minor note, a party seeking relief from a provision of 49 U.S.C. subtitle IV subtitle is generally expected to do so pursuant to a petition for an exemption, rather than a motion. NCRCo will address the Authority’s exemption request as a “Petition.”

served Sep. 6, 2001) 6. (“*1411 Corporation*”) (emphasis supplied).<sup>2</sup> Faced with a clear public policy counter to its exemption objectives, the Authority simply ignores applicable law and instead focuses on considerations that are irrelevant to its request for relief (but are very relevant to OFAs that will be filed later in this proceeding). First, the Authority glosses over whether there is a compelling public purpose that should supersede the OFA process here, and it appears that there is none. Second, the Authority fails to show that its proposed alternative use of the Line—an interim trail arrangement—meets the standard for an OFA exemption. Accordingly, the Petition should be denied in keeping with *1411 Corp.* and other cases discussed below.

### **BACKGROUND**

On May 14, 2021, the Authority filed a Notice of Exemption (the “Notice”) to abandon 175.84 miles of rail line between Willits, California, and Korblex, California, with branches to Carlotta, California; Korbel, California (the “Korbel Branch”); and Samoa, California (collectively, the “Line”) pursuant to the class exemption procedures of 49 C.F.R. § 1152.50. Concurrent with the Notice, the Authority (prematurely) requested issuance of a Notice of Interim Trails Use (“NITU”) under 49 C.F.R. § 1152.29, with the Authority itself designated as the trail sponsor. The Authority seems to have believed that the Board lacks jurisdiction over a portion of the Line, and, in response, the Board on June 9 placed the proceeding held in abeyance (the “Abeyance Order”) pending resolution of uncertainty about the jurisdictional status of the Korbel Branch, which evidently is owned by the Arcata & Mad River Railroad (“AMRR”), vaguely identified as a “subsidiary.” *See* Abeyance Order.

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<sup>2</sup> *Aff’d sub. nom. Borough of Columbia v. Surface Transp. Bd.*, 342 F.3d 222 (2003).

This reasonable concern about the Korbel Branch and, in turn, AMRR was not good enough to prompt the Authority to focus on those jurisdictional issues as it should have. Instead, less than two weeks later, the Authority asked the Board to lift the Abeyance Order, arguing that resolving the status of that line segment and the owning railroad is insufficient basis for delaying action on the balance of the abandonment. In the process, the Authority effectively dismissed the Board’s concern about the Korbel Branch. As another party to this matter has observed, in its “rush . . . the Authority [through its demands for immediate issuance of an NITU and concurrent request for Board acceptance of the Authority’s notice that a trails use agreement has been reached<sup>3</sup>] appears to be trying to circumvent the OFA process without having sought a waiver and [is] intending to deny interested parties in an opportunity to participate in the proceeding.”<sup>4</sup> Evidently made aware of the procedural shortcoming of its past OFA strategy by way of the MCR Letter Filing, and in an attempt to address that shortcoming, the Authority has filed the instant Petition.

\* \* \*

NCRCo is a prospective, non-carrier offeror that intends to invoke the Board’s OFA procedures to acquire the Line and restore it to operating condition to support future, high-volume traffic flows. For the moment, it is sufficient to indicate that NCRCo, capitalized to the tune of \$1.2 billion, will at the appropriate point in this proceeding – (1) demonstrate (with

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<sup>3</sup> Recent Board precedent requires a supplemental filing *after* the NITU is issued which would advise the agency that a trails use agreement has been reached. *Blue Ridge Southern Railroad — Abandonment Exemption — In Henderson and Transylvania Counties, North Carolina*, AB 1306X (STB served June 28, 2021), 1 (“Although the parties indicate that they have already reached an interim trail use agreement . . . they will be given the full-one year period . . . to finalize. . . . If they reach (or have reached) . . . they shall jointly notify the Board . . .”).

<sup>4</sup> July 6, 2021 Mendocino Coast Railway (“MCR”) Letter Filing (the “MCR Letter Filing”).

specific evidence) that it is financially responsible (and it will make the requisite preliminary showing at the notice of intent to file an OFA phase of this proceeding as well); (2) explain why and how the Authority’s track rehabilitation estimate for the Line is grossly inflated for effect; and (3) provide detailed evidence of need for the Line as a railroad transportation asset, and shipper support for the same (and commitments to use the Line).<sup>5</sup> NCRCo is a well-funded, interested party with thoroughly-developed plans to restore the Line and deploy it in the transportation of high-volume shipments by rail over the Line. It must be allowed to participate in this proceeding and present its case in support of an OFA, despite the Authority’s attempt to foreclose all efforts to see the Line restored to service before relevant evidence of transportation need and access to adequate funding have even been formally presented and assessed.<sup>6</sup>

### ARGUMENT

The law has ordered a hierarchy for the disposition of railroad lines authorized for abandonment. Specifically, “an OFA to acquire rail lines for continued service takes priority . . . over interim trail use/railbanking.”<sup>7</sup> The Board requires that the OFA process be entertained first to preserve this clear preference.<sup>8</sup> As the Board has explained in an Authority-cited case,

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<sup>5</sup> To borrow a phrase, NCRCo “seriously wish[es] to operate a line into Humboldt Bay.” Petition, 20.

<sup>6</sup> *Exemption of Out of Service Rail Line*, 2 I.C.C. 2d. 146, 152 (1986) (“Indeed, we believe that the financial assistance provisions should be available when anyone who is interested in acquiring a line that would otherwise be abandoned . . . to provide continued rail service.”).

<sup>7</sup> *BNSF Railway Company — Abandonment Exemption — In Flathead County, Montana*, AB 6 (Sub-No. 495X) (STB served Aug. 14, 2017), 5.

<sup>8</sup> The preference is so strong that the ICC remedied what it formally reversed itself to allow OFAs in exempt abandonments. *Compare Exemption of Out of Service Rail Lines*, 366 I.C.C. 885, 888 (1983) (“Thus, section 10905 [the OFA process] is inapplicable by its own

“Exemption from these provisions are only *rarely granted* . . . It would be inappropriate for us to subordinate that process to a private agreement [in this case, trails use] simply because interested parties find it preferable to use such a mechanism.”<sup>9</sup> Where, as here, the abandoning carrier and prospective trails sponsor are the same, it would be particularly inappropriate to permit an OFA exemption to exclude consideration of proposals for resumed rail service by offerors whose *bona fides* cannot, and should not, yet be judged.<sup>10</sup>

Because an OFA exemption proceeding is not intended to have the Board undertake a *pro forma* assessment of the merits of a hypothetical OFA, NCRCo need not disclose the precise merits of its plan or the continuing public need for rail service on the Line until tendering its OFA.<sup>11</sup> Adherence to the Board’s abandonment and OFA procedures ensures that the merits of a proposal to acquire and restore service over a given rail line will be adjudicated in due course and in an orderly process—all the more important where there are two prospective offerors, as is the case here. Calling an as-yet-unseen OFA as “frivolous”<sup>12</sup> is hyperbole and

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provisions.”) *with Exemption of Rail Abandonments—Offers of Financial Assistance*, 4 I.C.C.2d. 164 (1987) (“*EP 274, Sub-No. 16*”) (“We instituted this proceeding both (1) to modify the class exemption contained in 49 C.F.R. § 1152.50 to allow the financial assistance procedures of 49 U.S.C. § 10905 to be used and (2) to amend our financial assistance procedures in 49 C.F.R. § 1152.27 to provide for their use in connection with other (individual exemptions of a rail abandonment . . .”).

<sup>9</sup> *Roaring Fork Railroad Holding Authority — Abandonment Exemption — In Garfield, Eagle, and Pitkin Counties*, AB 547X (STB served Oct. 16, 1998), 5 (emphasis supplied).

<sup>10</sup> *Id.* The fact that the Petition did not contemplate offerors beside MCR underscores the importance of the OFA process: to identify other parties who might present a case for viable restoration and operation of the Line.

<sup>11</sup> *Norfolk & Western Railway Company — Abandonment Exemption — In Hamilton County, Ohio*, AB 290 (Sub-No. 184X) (STB served May 13, 1998), 10 (“*N&W — Hamilton*”) (requiring proof of rail service merits to be submitted concurrently with the OFA).

<sup>12</sup> Petition, 3.

ungrounded in fact. There is only one way to know if an OFA is indeed frivolous—to permit the OFA process to proceed with a full and fair presentation of the relative financial data and traffic data.<sup>13</sup> The Board cannot undertake, much less complete, the Congressionally-mandated inquiry into “preserving continued rail service wherever possible” under *1411 Corporation* without allowing the OFA process to proceed.

In those rare cases where an OFA may be bypassed, it is, again, only upon the showing of “a compelling need to use the property for a valid public purpose and no overriding public need for continued rail service”.<sup>14</sup> Historically, this “compelling” use must address an issue of “paramount” public concern that retention of the Board’s jurisdiction would not otherwise facilitate.<sup>15</sup> Qualifying cases include: large-scale urban riverfront redevelopment, including the construction of not one but two professional sports stadiums;<sup>16</sup> public highway

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<sup>13</sup> *Staten Island Railway Corporation — Abandonment Exemption — In Richmond County, New York*, AB 263 (Sub-No. 2X) (ICC served June 20, 1990) [1990 WL 288308 at \*2] (“Under the OFA procedures, a potential offeror has the right to obtain necessary data before submitting its offer to purchase . . . , and the Commission ascertains whether the offer is bona fide and sets the terms and conditions if the parties cannot agree. There is no reason apparent here for deviating from the OFA procedures. SIRY would be obligated to supply ConEd with the subsidy data our rules direct, and would not be able to consummate the abandonment until the OFA process has been completed.”) *See also* 49 C.F.R. § 1152.27(a)(1)(ii).

<sup>14</sup> *Id.* (citing *N&W — Hamilton*) (the Board is to consider compelling public purpose and continued rail service needs sequentially, with the latter superior to the former).

<sup>15</sup> *N&W — Hamilton* at 8.

<sup>16</sup> *Id.*

construction;<sup>17</sup> redevelopment of a bi-state metropolitan area;<sup>18</sup> and, in multiple instances, preservation of the corridor for commuter rail use.<sup>19</sup>

Long-out-of-service rail lines, such as the Line, are not materially different under the agency's analysis. While additional information may be required as part of the OFA process to demonstrate need for the Line as a transportation asset, the Board has not foreclosed opportunities to restore service via an OFA on a currently-inactive line.<sup>20</sup>

The Authority raises no concern or issue of compelling public purpose here. Instead, it appears that the current Petition is driven by the Authority's desire for convenience and expedition. Given the Authority's casual approach to the STB's jurisdiction that resulted in the Abeyance Order, it is especially difficult to see how an exemption would be warranted. Casual consideration of garden variety trail usage (mentioned only once in the Petition,<sup>21</sup> and, again, only once the Verified Statement offered in support<sup>22</sup>) is insufficient evidence of any allegedly "paramount" public purpose that would be thwarted by a solid plan to restore the Line to service. Under the circumstances, elevating trails use over an OFA absent any other showing

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<sup>17</sup> *CSX Transportation, Inc. — Abandonment Exemption — In Pike County, Kentucky*, AB 55 (Sub No. 653X) (STB served Sep. 13, 2004).

<sup>18</sup> *The Kansas City Southern Railway Company — Abandonment Exemption — In Jackson County, Missouri*, AB 103 (Sub-No. 17X) (STB served Jul. 27, 2004).

<sup>19</sup> *See e.g., Union Pacific Railroad — Abandonment Exemption — In Orange County, California*, AB 33 (Sub-No. 80X) (ICC served Nov. 1, 1993) [1993 WL 458883 at \*2] *Los Angeles County Metropolitan Transportation Authority — Abandonment Exemption — Between Arcadia and Los Angeles, California*, AB 52 (Sub-No. 75X) (ICC served Feb. 14, 1994) [1994 WL 42441 at \*3].

<sup>20</sup> *1411 Corp.* (a shipper's desire to acquire a line that had been out of service for nearly 10 years is nevertheless credible in the face of speculative and hyperbolic cost data).

<sup>21</sup> *Compare* Petition, 12 at note 14-15 *with* 49 U.S.C. § 10904(a).

<sup>22</sup> V.S. Stogner, ¶4.

of need, as the Authority would have the Board do, would be unprecedented, and it would mark an arbitrary and capricious departure from “well settled” law that strongly and consistently has favored OFAs over NITUs.<sup>23</sup>

Alarming, while the Authority pays lip service to the OFA exemption standard (implicitly acknowledging that the Authority bears a high burden to demonstrate compelling public need for the corridor to override clearly-articulated Congressional preference for preservation of a rail line for support of interstate commerce), the Authority quickly pivots away from a discussion of public need to an entirely un-sanctioned effort to pre-judge hypothetical OFAs. Nowhere, however, does the Authority point to a shred of precedent to support the proposition that an abandoning carrier can avoid the Congressional preferences of Section 10904 by arguing over prospective offeror objection that an OFA might be theoretically untenable. Instead, such a merits analysis is appropriate only at the point that an offeror has presented its OFA (assuming, of course, that the offeror has satisfied the threshold requirements of the notice of intent phase, which, here, has not yet arisen). What the Authority has done is simply to present, and repeat its badly-inflated cost of restoring service under a subsidy OFA.<sup>24</sup>

As such, the Board should give little credence to the Authority’s unsupported representations of forbidding cost, which, beyond its immateriality to the merits of the Petition, can only be examined via the Board’s OFA processes, which hasn’t started. The inclusion and rote repetition of these cost figures is nothing more than a fig leaf intended to conceal the lack of a compelling public interest basis for granting the Authority’s Petition.

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<sup>23</sup> *1411 Corp., id.*

<sup>24</sup> *See e.g.,* Petition, 5.

Logic, administrative jurisprudence, and the orderly disposition of abandonment and related OFA proceedings require denial of the Petition. It would be premature to conclude that the Line could not be restored and become economically viable. Such arguments only establish that the current owners of the Line lack the funds and will to take an entrepreneurial risk on the Line as NCRCo would do—particularly true where a public authority has no interest in financial return from a freight-moving enterprise, and evidently has been swayed by anti-railroad interests.

In the present absence of a compelling public interest warranting that the usual OFA processes be short-circuited, interested parties such as NCRCo must be afforded the opportunity to make a case for transfer of the Line under the OFA standards. If NCRCo were to prove able to satisfy the challenging standards for an offeror under Section 10904, then bypassing the OFA processes would be thoroughly short-sighted and wholly at odds with statutory and case law preferences (discussed above) for the preservation of lines that could be restored for the provision of interstate commerce. If, on the other hand, interested parties such as NCRCo were to prove unable to satisfy the OFA standards, then little, if any, harm has been done to the Authority and the interests evidently allied with it, because the unsuccessful conclusion of the OFA phase would lead directly to potential trails use arrangements.

Indeed, the Board's modest OFA processes would not be truly disruptive in the case of a railroad line that has been long inactive, and where, as here, there is an interest in restoring the Line (and adequate capital to be able to do so). In fact, facilitating an OFA to assess the merits of such restoration proposals is entirely in keeping with relevant administrative

jurisprudence.<sup>25</sup> Doing otherwise would incentivize other public agencies to acquire rail lines, underinvest in them, and then seek trails use for non-rail purposes, all while attempting to short-circuit private efforts to restore the subject line to service to meet a need that may be shown to exist during the OFA process. As such, barring an OFA in this proceeding would offend the federal rail transportation policy at 49 U.S.C. 10101.<sup>26</sup> In any event, given the Authority’s allegation that a successful OFA would be impossible, it is unclear why the Authority has become fixated upon obstructing efforts to restore the Line to service under Section 10904 and its underlying Congressional mandate – the Authority would seem to have nothing to fear.

Ruling out a legitimate OFA before an offeror such as NCRCo could present its case is contrary to the agency’s long-held view that railroad line preservation (and, in turn, the rail transportation policy of 49 U.S.C. § 10101) is often best accomplished by facilitating new ownership: “preserving opportunities for railroads or private individuals to provide funds for rail service contributes to a sound rail transportation system.”<sup>27</sup> Moreover, absent such circumstances, granting the Petition would result in an inequitable and imbalanced application of the OFA and trails use mandates. Specifically, the Authority should not be permitted to use the Board’s processes to retain the contiguous physical integrity of the Line (safe from any reversionary claims) by way of an “interim” trails use arrangement, where, taking the

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<sup>25</sup> *EP 274, Sub-No. 16* at 168 (“... the proposed rules . . . strike a fair balance and reasonably accommodate the interests of both potential offerors and carriers.”).

<sup>26</sup> *Id.* at 169 (“We conclude that these rules will further the rail transportation policy objectives of insuring the continuation of a sound transportation system to meet the needs of the public and reduce regulatory barriers to entry into the industry where persons are interested in providing financial assistance to continue rail service. We think these benefits outweigh the harms caused by temporarily delaying exit from the industry in this very limited number of cases.”).

<sup>27</sup> *Id.* at 167.

Authority's arguments in favor of its Petition to their logical end, the Line would never again (in the trail sponsor's view) be needed for the viable provision of common carrier service. That is, as the Authority would have it, the trails use arrangement would not be transitory (or interim)<sup>28</sup> but rather permanent. The Board should not allow the Authority to have its proverbial cake and eat it too with scant consideration for the principal purpose of Board jurisdiction—the continuation of rail service.<sup>29</sup>

### CONCLUSION

Neither the law nor the facts cited by the Authority are sufficient to sustain an exemption from Section 10904. The preference for rail service as is reflected in the statute and relevant case law discussed herein is nearly absolute, and the Authority has shown no compelling public purpose that would even begin to support the extraordinary relief it seeks. An NITU must yield to an OFA except in rare circumstances, which do not exist here. Just as the STB will not allow its jurisdiction to be used as a shield against a paramount public purpose, its jurisdiction should not be permitted to be used as a sword to subvert Congressional enactments.<sup>30</sup>

For the foregoing reasons of law, policy, logic, and sound administrative jurisprudence, the Authority's Petition should be denied.

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<sup>28</sup> *1411 Corporation, id.* at \*3 at note 14.

<sup>29</sup> *Modern Handcraft, Inc. — Abandonment in Jackson County, Missouri*, 363 I.C.C. 969, 972 (1981) (“The function of our exclusive and plenary jurisdiction over abandonments is to provide the public with a degree of protection against the unnecessary discontinuance, cessation, interruption, or *obstruction* of available rail service.”) (emphasis supplied).

<sup>30</sup> Relative to continued rail service. *1411 Corp.*, *id.*

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Dated: August 16, 2021

**CERTIFICATE OF SERVICE**

I hereby certify that, on this 16<sup>th</sup> day of August, 2021, I served copies of the foregoing **Reply of North Coast Railroad Company, L.L.C. in Opposition to North Coast Railroad Authority's Request for an Exemption from the Provisions Of 49 U.S.C. § 10904** electronically (via email) or by U.S. Mail upon each the following parties of record:

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