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April 13, 2012

VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, D. C. 20423

re: STB Docket No. AB-1095 (Sub-No. 1), Paulsboro Refining Company
LLC -- Adverse Abandonment -- SMS Rail Service, Inc.,
in Gloucester County, NJ

Dear Ms. Brown:

Attached is the Reply of SMS Rail Service, Inc., to Petition of Paulsboro Refining
Company LLC for Waivers and Exemptions.

If you have a question concerning this filing or if I otherwise can be of assistance,
please let me know.

Sincerely yours,


Fritz R. Kahn

cc: Eric M. Hocky, Esq.

SURFACE TRANSPORTATION BOARD

STB Docket No. AB-1095 (Sub-No. 1)

PAULSBORO REFINING COMPANY LLC
-- ADVERSE ABANDONMENT --
SMS RAIL SERVICE, INC., IN GLOUCESTER COUNTY, NJ

REPLY OF SMS RAIL SERVICE, INC.,
TO PETITION OF PAULSBORO REFINING COMPANY LLC
FOR WAIVERS AND EXEMPTIONS

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Attorney for

SMS RAIL SERVICE, INC.

Dated: April 13, 2012

SURFACE TRANSPORTATION BOARD

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SMS Rail Service, Inc. ("SMS"), pursuant to 49 C.F.R. §1104.13(a), replies to the Petition of Paulsboro Refining Company LLC ("PRC") for Waivers and Exemptions, filed March 26, 2012, as follows:

1. SMS is well aware that the Board normally grants applicants seeking the adverse abandonments of a rail carriers waivers of some of the requirements of its abandonment regulations, 49 C.F.R. Part 1152. *See* STB Docket No. AB-1010, *CSX Transportation--Adverse Abandonment--in Shelby County, TN*, served October 10, 2007; STB Docket No. AB-549, *City of Rochelle, Illinois--Adverse Discontinuance--Rochelle Railroad Company*, served June 5, 1998. Nevertheless, SMS feels obliged to take exception with several of the waivers and exceptions which PRC seeks.

2. To begin with, SMS is offended by PRC's representation in footnote 1 on page 2 of its Petition. PRC is not the prior owner of the refinery where the railroad lines operated by SMS are situated, the Valero Refining Company -- New Jersey. Contrary to the assertion that "On December 13, 2010, Valero changed its name to Paulsboro Refining Company LLC ("PRC")", Valero Energy Corporation, the owner of Valero

Refining Company -- New Jersey, on December 17, 2010, sold its Paulsboro refinery to PBF Holding Company, which named the facility the Paulsboro Refining Company LLC.

3. On page 2 of its Petition, PRC makes light of the proposed changes in the operation of the railroad lines within the Paulsboro refinery, stating that PRC "determined that it no longer needed SMS to provide common carrier service, and that it preferred to do its own intra-plant switching through the services of a private non-carrier switching contractor (as it does at other refinery locations)." PRC fails to identify the non-carrier switching contractor which PRC proposes to use. It is Savage Companies of Salt Lake City, Utah ("Savage"). Unlike SMS, Savage will use locomotives which have not been inspected by the Federal Railroad Administration, operated by uncertified engineers and uncertified conductors. Far from being insignificant, the proposed change in operators will diminish the safeguards for the service rendered on the railroad lines in question.

4. Both the form of notice, 49 C.F.R. §1152.21, and the draft *Federal Register* notice, 49 C.F.R. 1152.22(h)(i), call for the telephone number of the applicant's representative, in addition to his name and address. No reason is offered by PRC why this requirement should be waived. The waiver request should be denied.

5. 49 C.F.R. §10903(a)(3) states that, if there is no agency station and terminal on the line to be abandoned, the applicant is to post a copy of its notice of intent at any agency station through which business for the involved line is received or forwarded. PRC contends that it should be excused from doing so, because it will be mailing copies of its notice of intent to CSX Transportation, Inc. and Norfolk Southern Corporation, presumably to someone in the law department of each of the railroads. That in no way fulfills the posting requirement. The agency station through which business for the

involved line is received or forwarded is the Paulsboro Yard of the Consolidated Freight Corporation, and no reason is offered by PRC why its notice of intent should not be posted there. The waiver request should be denied.

6. 49 C.F.R. §1152.20(4) calls for the newspaper publication of the notice of intent at least once during each of three consecutive weeks. PRC would like to have just a single publication. In the proceedings upon which PRC primarily relies, Docket No. AB 400 (Sub-No. 5), *Palmer Ranch Holdings, Ltd., Palmer Ranch Holdings, Inc., Wynnstay Hunt, Inc., and Cheshire Hunt, Inc.--Adverse Abandonment--Seminole Gulf Railway, L.P. in Sarasota County, Fla.*, served September 21, 2011 ("*Palmer Ranch*"); Docket No. AB 1063, *Cerro Gordo County, Iowa--Adverse Discontinuance--Iowa Traction Railroad Company*, served March 16, 2011 ("*Cerro Gordo*"); Docket No. AB 107, *Stewartstown Railroad Company--Adverse Abandonment--in York County, PA*, served March 10, 2011 ("*Stewartstown Railroad*"), no such waiver was requested, and none was granted by the Board. Other than its own desire to be done with this proceeding, no reason is offered by PRC why publication of the newspaper notice of intent cannot appear at least once during each of three consecutive weeks. The waiver request should be denied.

7. PRC seeks a waiver of 49 C.F.R. §1152.22(b), a statement of the present physical condition of the line. PRC is well aware of the present physical condition of the line, for the line is an integral part of the Paulsboro refinery, as the map, Exhibit A of PRC's Petition, shows. Moreover, representatives of PRC discussed the present physical condition of the line with representatives of Savage in negotiating with Savage for its taking over of the line's operations on January 16, 2012. Similar waiver requests were

denied by the Board in *Palmer Ranch*, p. 5, and in *Stewartstown Railroad*, p. 4, and was granted in *Cerro Gordo*, p. 6, only because the physical condition of the line had been adequately addressed, obviating the need for a waiver. PRC has offered no persuasive ground for granting its waiver request. The waiver request should be denied.

8. As with the condition of the railroad line, 49 C.F.R. §1152.22(b), PRC seeks a waiver of the requirement that its adverse abandonment application include information about the service currently being rendered by SMS on the railroad line within the Paulsboro facility, 49 C.F.R. §1152.22(c). PRC, however, has most of that information, if not all of it. Section 4 of the very agreement PRC seeks to terminate, the August 31, 2000, Rail Line Service Agreement between Valero Refining Company -- New Jersey and SMS, advised PRC of the number of carloads that SMS handled on the line. PRC's Petition, at page 1, gives the length of the line within the Paulsboro facility on which SMS has been operating as "approximately 5.8 miles of railroad tracks". PRC knows just from observing the operations that SMS maintains an average of two locomotives at the Paulsboro refinery. PRC knows the volume of traffic handled on the line. PRC's Petition, in footnote 3 on page 2, discloses, "PRC currently ships or receives approximately 5900 - 6000 carloads of freight per year, and ExxonMobil ships or receives less than ten carloads of freight per year." In short, there is no reason why PRC should be granted its waiver request. Waivers of 49 C.F.R. §1152.22(c) were granted in STB Docket No. AB-290 (Sub-No. 286), *Norfolk Southern Railway Company--Adverse Abandonment--St. Joseph County, IN*, p. 5, served October 26, 2006, because the railroad line had not been operated for at least ten years' time, in *Stewartstown Railroad*, p. 3, because the line had not been used for freight service for at least 6 years' time, and in

Cerro Gordo, p. 6. because the amount of service provided on the line had been adequately addressed, obviating a need for a waiver. PRC has failed to explain why a waiver of 49 C.F.R. §1152.22(c) is warranted. The waiver request should be denied.

8. PRC states that the proposed adverse abandonment of SMS' operations within the Paulsboro facility likely will not have an adverse effect on rural and community development. It accordingly seeks a waiver of 49 C.F.R. 1152.22(e) and an exemption from 49 U.S.C. §10903(d). While the Board is to consider whether the proposed abandonment will have a serious, averse impact on rural and community development, 49 U.S.C. §10903(d) directs the Board not to authorize a rail carrier's abandonment unless it finds that the present or future public convenience and necessity require or permit the abandonment. The section, in part, reads, "A rail carrier providing transportation subject to the jurisdiction of the Board under this part may . . . abandon any part of its railroad lines . . . only if the Board finds that the present or future public convenience and necessity require or permit the abandonment . . ." In the adverse abandonment proceeding SMS will want to prove that its abandonment is neither required nor permitted by the present or future public convenience and necessity, and PRC should not be allowed to deny SMS the opportunity to present its case. The exemption request should be denied.

9. PRC asks for the waiver of 49 C.F.R. §1152.22(f), which requires the submission of information about the environmental impact of the proposed abandonment, 49 C.F.R. §1152.20(c), which requires the submission of an Environmental and Historic Report, 49 C.F.R. §1105.7, which details the requirements for an environmental report and 49 C.F.R. §1105.8, which details the requirements for a historic report. In support of

its sweeping request, PRC cites but one Board decision in which an application for a proposed adverse abandonment, as distinguished from a proposed adverse discontinuance, did not need to include the environmental and historic information, STB Docket No. AB-520, *Salt Lake City Railroad Company, Inc.--Adverse Abandonment--Line of Utah Transit Authority in Salt Lake City*, served August 26, 1999. in which one rail carrier simply replaced another rail carrier. Of course, that is not what PRC proposes. It seeks to replace a rail carrier, SMS, with a private switching contractor, Savage, and how Savage will render the service on the refinery's railroad tracks is not at all certain. Yes, as PRC states at page 9 of its Petition, the railroad tracks are expected to remain in place and not be salvaged, as if this were an adverse discontinuance proposal. The Board, however, in its Decision in Docket No. AB 1095X, *SMS Rail Service, Inc.--Adverse Discontinuance of Service Exemption--Gloucester County, NJ*, served March 2, 2012, declared, "Because SMS alone has the common carrier obligation for this line, any application filed [by PRC] should be for adverse abandonment authority." In *Cerro Gordo*, p. 5, and *Palmer Ranch*, p. 6, the Board denied the waiver requests for 49 C.F.R. §1152.22(f), 49 C.F.R. §1152.20(c), 49 C.F.R. §1105.7 and 49 C.F.R. §1105.8 and required that the applicants prepare and submit environmental and historic reports for the Board's consideration. PRC has failed adequately to state why different standards should apply to it. The waiver requests should be denied.

At page 10 of its Petition, PRC claims that its exemption requests will further certain of the provisions of the Rail Transportation Policy, 49 U.S.C. §10101. By the same token, denial of PRC's waiver and exemption requests will advance other goals and objectives of the Rail Transportation Policy, as, for example, subsection (1) to allow, to

the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail, subsection (3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board, subsection (8) to operate transportation facilities and equipment without detriment to the public health and safety and subsection (11) to encourage fair wages and safe and suitable working conditions in the railroad industry.

Finally, at page 10 of its Petition, PRC requests the Board to rule expeditiously on its Petition so that PRC will be able to evict SMS from the railroad lines within the Paulsboro refinery. The Board's action on PRC's waiver requests, however, is only an initial step in what may be a long and drawn out process before the Board and thereafter in court. What PRC might have done is what the applicant did in *Palmer Ranch*, pp. 6-7, namely, obtain a waiver of 49 C.F.R. §1152.29(e)(2), which sets a one-year time limit on the exercise of the abandonment authority that would apply if PRC's adverse abandonment application were to be granted by the Board. As the Board noted, in an adverse abandonment, the applicant usually must invoke state law to obtain control over the property, and there is no telling how long the court case might take. PRC, however, failed to heed the suggestion in one of the very decisions upon which it primarily relies, and no waiver of 49 C.F.R. §152.29(e)(2) was requested by PRC or should be granted by the Board.

WHEREFORE, as requested, some of the waiver requests and exemptions sought by the Petition of Paulsboro Refining Company LLC should be denied.

Respectfully submitted,

SMS RAIL SERVICE, INC.

By its attorney:



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Dated: April 13, 2012

CERTIFICATE OF SERVICE

I certify that I this day served a copy of the foregoing Reply on Paulsboro Refining Company LLC by e-mailing a copy to its attorney, Eric M. Hocky, Esq., at ehocky@thorpreed.com. An additional copy was mailed to him by prepaid first-class mail.

Dated at Washington, DC, this 13th day of April, 2012.



Fritz R. Kahn