

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 36005

**KCVN, LLC AND COLORADO PACIFIC RAILROAD, LLC – FEEDER LINE
APPLICATION – LINE OF V AND S RAILWAY, LLC, LOCATED IN CROWLEY,
PUEBLO, OTERO, AND KIOWA COUNTIES, COLORADO**

REPLY TO MOTION FOR EXTENSION OF TIME TO FILE COMMENTS

KCVN, LLC (“KCVN”) and the Colorado Pacific Railroad, LLC (“CPRR”)(together “Applicants”) hereby file this Reply to the Motion for Extension of Time to File Comments (“Motion”) filed by V and S Railway, LLC (“V&S”). The Motion should be summarily denied, as it advances no valid justification for extending the procedural schedule in this feeder line proceeding. In support of this Reply, Applicants state the following:

There is nothing in the Feeder Line Application, the Board’s actions to date, or other actions in the proceeding to date that justify any extension of the current June 14, 2016 deadline for V&S to submit verified statements and comments on the Application, let alone the 48 days V&S has requested from June 14 to August 1. The Application was filed on March 18, 2016, and none of the supposedly “voluminous Application” (Motion at 2) was labeled confidential or submitted under seal. The Application was accepted by the Board on April 15, 2016, with a suggestion that Applicants provide some additional, limited information to help the Board’s review. Thus, V&S has had over two months to review and analyze virtually the entire Application and prepare comments by the June 14 deadline. V&S greatly exaggerates the

significance of the supplemental information Applicants provided to the Board on April 29, and the fact that V&S was not able to review the confidential version of the supplemental filing until May 16, 2016 because a protective order was not yet entered. The supplemental information consisted of merely (1) a three page verified statement submitted by William S. Osborn that provided responses to the Board's suggestion that Applicants provide more detail on estimated maintenance and operating costs, and (2) a copy of the Kansas & Oklahoma Railroad's ("K&O") current insurance certificate. The confidential version of the filing was received by V&S in plenty of time for it to incorporate the additional information into any comments V&S is preparing in response to the remainder of the Application.

Moreover, and as discussed below, none of the verified statements in the Application were amended by the supplemental information. Additionally, May 16 was the deadline for other parties to submit competing feeder line applications. None were filed. As such, V&S's focus on preparing its comments on the Application will not be distracted by competing feeder line applications. There is thus no valid reason for extending the schedule based on the activities in the case to date. V&S has had the opportunity to review and analyze the virtually the entire Application since March 18, and it received the small amount of supplemental information provided by Applicants in ample time to incorporate it into any comments it is preparing by the June 14 deadline.

The Board should summarily reject V&S's only stated reason for the comment period to be extended: V&S's alleged desire to now "do discovery" in this proceeding, apparently of some or all of the third parties who provided verified statements in this proceeding including K&O, the proposed operator. Motion at 2, Note 2. While Applicants would likely oppose any request for such discovery by V&S since it would have little to do with the merits of the pending

Application, V&S's statements about potential third party discovery provide no justification for the requested extension.

First and foremost, V&S by its own admission chose to sit on its hands for over two months, despite the June 14 filing date ordered by the Board. V&S unilaterally decided, notwithstanding the Board's Procedural Order that, "it did not make sense" for it to start any efforts to seek the Board's permission to allow the third party discovery it allegedly now needs until less than a month before the deadline. Motion at 2. Given that the original Application, including the verified statements of third parties and the K&O, has remained virtually unchanged since March 18, there is no valid reason why V&S could not have started the process of trying to obtain any third party discovery then, or at latest when the Application was accepted on April 15. Indeed, if it believed there was a real need for information from the parties, it *should* have done so. Raising the issue in a timely manner would have likely meant that it would have been addressed and resolved within the schedule established by the Board. It also would have been an indication of V&S's actual interest in third party discovery, as opposed to an indication that V&S, by waiting to this late date to raise the issue for the first time, is merely attempting to delay and obfuscate the processing of the Application.

As the Board's April 15 decision established the June 14 deadline for V&S to file its reply comments, and that at the time V&S did not know whether competing applications would be filed on May 16 that it also might have to comment on, it strains credulity that V&S concluded that "it did not make sense" for it under those circumstances to start the process of pursuing discovery of third parties related to the Application until V&S received the confidential version of the supplemental filing on May 16. Be that as it may, under these circumstances,

V&S's decision to abstain from taking action until May 16 to advance its interests regarding third party discovery cannot be valid grounds for extending the schedule at this late date.

Second, while V&S acknowledges the Board's regulations require V&S to ask the Board to authorize third party discovery, *Id.* at 2, note 2, the Motion presumes that the Board will freely grant V&S's requests, should it make any. This presumption is false, as the Board has infrequently granted requests for discovery from parties who are not a party to a proceeding. V&S erroneously asserts that the applicable standard for such requests is that a third party need only "have an interest in the proceeding and will be directly affected by the outcome." *Id.* citing *Ballard Terminal Railroad Company, LLC – Acquisition and Operation Exemption – Woodinville Subdivision*, STB Docket No. 35731 (served May 17, 2013). However, the cited decision itself explains that the standard is much stricter, and it also entails a balancing of the relevance of the information sought against the burden of producing the information. *Id.* at 3. Applicants maintain that if this standard was to be applied to any requested third party discovery in this feeder line proceeding, V&S could not meet it.

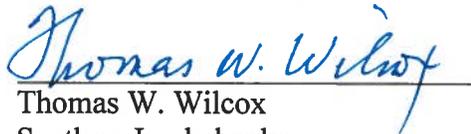
Regardless, the Motion puts the proverbial "cart before the horse" by asking the Board to extend the schedule for the sole purpose of third party discovery prior to the Board ruling on whether such discovery should even be permitted. Indeed, as of the date of this filing, V&S has not even asked the Board for permission to engage in third party discovery or advanced any reason why that discovery is necessary in this case. If the Board granted the Motion, and then V&S decided not to seek such discovery, then the extension would have been granted for no reason. Consequently, there would be clear harm to KCVN and CPRR from delaying the processing of their Application caused by V&S choosing to take no action on this issue earlier in the proceeding when it had the clear opportunity and incentive to do so.

Accordingly, the Board should summarily deny the Motion for extension of the June 14 deadline to August 1 because V&S has no valid justification for taking no action on its alleged interest in discovery from third parties when this issue could have and should have been raised by V&S and considered earlier in this proceeding. In addition to being dilatory by waiting until less than one month before its comments are due to even begin an attempt to obtain third party discovery, V&S is obviously trying to delay the processing of the Application and impose unnecessary burdens on the Applicants, the third parties who submitted verified statements in support of it, and the K&O.¹

¹ The Motion should be denied for the reason that V&S has been dilatory and unjustifiably delaying taking action, but Applicants fail to see how discovery from third parties would be necessary in any event in this proceeding. V&S indicates it intends to ask the Board to issue subpoenas to the parties who submitted verified statements in support of the Application, and K&O. The four verified statements from representatives of shippers along the Towner Line primarily provide facts regarding their respective interactions with V&S, and of their respective recollections of V&S's rate practices and operations over the line. Under the Board's feeder line rules, these statements can be countered by "verified statements and comments" from V&S that provide factual responses about V&S's practices and operations to attempt to rebut their assertions. 49 C.F.R. §1151.3(f). As for the K&O, the Board has already demonstrated in this proceeding that additional information concerning a proposed operator can be addressed through requests by the Board to Applicants to submit additional information. If V&S believes still more information is necessary concerning the K&O or the proposed operating plan for the Board to analyze the Application, then there is an existing mechanism for requesting it. Yet, V&S has made no such request either to the Board or the Applicant's counsel.

WHEREFORE, for the reasons set forth above, Applicants request that the Board expeditiously and summarily deny the Motion in all respects.

Respectfully submitted,

A handwritten signature in blue ink that reads "Thomas W. Wilcox". The signature is written in a cursive style and is positioned above a horizontal line.

Thomas W. Wilcox
Svetlana Lyubchenko
GKG Law, P.C.
The Foundry Building
1055 Thomas Jefferson Street NW
Suite 500
Washington, DC 20007
(202) 342-5248

*Attorneys for KCVN, LLC and Colorado Pacific
Railroad, LLC*

May 20, 2016

CERTIFICATE OF SERVICE

I do hereby certify that on this 20th day of May, 2016, I have served a copy of the foregoing Reply to Motion for Extension of Time to File Comments by first class mail on the following person:

Eric M. Hocky, Esq.
Clark Hill PLC
One Commerce Square
2005 Market Street, Suite 1000
Philadelphia, PA 19103
(also via e-mail)



Thomas W. Wilcox