

February 7, 2012

*via electronic filing*

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

**ENTERED  
Office of Proceedings**

FEB 07 2012

**Part of  
Public Record**

231810

**RE: Finance Docket No. 35583, Eastern Alabama Railway LLC –  
Petition for Declaratory Order**

Dear Ms. Brown:

On February 6, 2012, Eastern Alabama Railway LLC (“EARY”) filed an Appeal of the Surface Transportation Board’s (“STB”) January 27, 2012 decision (“Decision”) in the above-captioned docket.<sup>1</sup> The Appeal is so riddled with factual and legal inaccuracies that the Utilities Board of the City of Sylacauga (“Utilities Board”) is preparing a comprehensive reply (“Reply”) that it will file on or before Monday February 13, 2012 pursuant to 49 CFR §§ 1011.2(a)(7) and 1011.6(b). The degree of mischaracterization and misrepresentation in the unverified Appeal is simply astonishing, as the Utilities Board will show in its Reply. Nonetheless, in advance of that Reply, it is crucial for the Surface Transportation Board (“STB”) to be aware of one procedural matter and two key facts, as described below.

First, although EARY requests an extension of the procedural schedule adopted in the Decision,<sup>2</sup> the Appeal filing made by EARY does not and cannot provide such an outcome. In other words, absent action by the STB, EARY’s Opening Statement is still due February 8, 2012. In the Decision, the STB decided to consider this declaratory order proceeding under the modified procedures of 49 CFR Part 1112.<sup>3</sup> Under the modified procedures, the “filing of

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<sup>1</sup> Counsel for the Utilities Board received an e-mail copy of the Appeal on Friday, February 3 at 6:40 pm, but the Appeal was not filed until Monday, February 6.

<sup>2</sup> EARY’s delay tactics are visible even in its Appeal which was filed effectively more than a week after the STB issued its Decision and does not include any legal precedent or case cites in support of its request.

<sup>3</sup> The Decision was signed by the Acting Director of the Office of Proceedings, a permissible use of his authority. The STB can delegate various responsibilities to the Director of the Office of Proceedings, including whether to institute a declaratory order proceeding, whether to use the

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motions or other pleadings will not automatically stay or delay the established procedural schedule.” 49 CFR § 1112.2. EARY did not even mention the modified procedures rule or seek a stay of the procedural schedule in its Appeal. If EARY fails to file its Opening Statement on February 8th, EARY “will be deemed to be in default and to have waived any further participation in the proceeding.” 49 CFR § 1112.3.

Second, EARY blatantly misrepresented the history of this dispute in its Appeal. EARY stated that “[i]f the Utilities Board were truly interested in any of the claims it makes, it would have entered an agreement with EARY in lieu of bringing the condemnation action.” Appeal at 6. The truth is that EARY and Rail America started the dispute by seeking to impose new exorbitantly higher rents with high fixed percentage escalation provisions and other onerous terms on the Utilities Board’s existing and new crossings. The Utilities Board has tried to resolve this sewer line issue at various steps in the process and it did file an Application for an “utility occupancy” using the standard form and procedure established by EARY’s parent RailAmerica. See Exhibit 1 (Application). The Utilities Board paid RailAmerica a non-refundable fee of \$4000 as part of this Application. It was RailAmerica and EARY that refused to process the Application by suspending it indefinitely. See Exhibit 2 (letter). The Utilities Board will show in its Reply that all of the remaining allegations by EARY are equally false or misleading and that the Utilities Board has never impeded rail service or posed any safety risk as EARY’s unsubstantiated Appeal alleges.

Third, EARY makes an unsupported statement that the new sewer service for the IKO manufacturing facility is not really needed by April 2012 because “EARY has not heard” about the start of IKO operations and a “local contractor does not know when the sewer is needed.” Appeal at 3-4. Presenting a lack of knowledge as a probative fact exemplifies the extraordinary weakness of EARY’s overall position in this case and shines light on EARY’s delay tactics. In its Reply to EARY’s Petition, the Utilities Board submitted a verification for its assertion of the April start date, which was based on a direct request by IKO to have sewer service ready by April. The IKO request is attached as Exhibit 3.<sup>4</sup>

In the Appeal, EARY claimed that the procedural schedule is overly expeditious and, for the first time in this case, EARY mentioned that it wanted to engage in discovery at the STB. EARY waited seven weeks before raising the issue of discovery, and this not until over a week after a procedural schedule had already been issued by the STB. Discovery is not warranted in

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modified procedure, and the establishment of dates for filing statements in modified procedure cases. See 49 CFR §§ 1011.6(c)(1), 1011.6(c)(3), and 1011.7(a)(2)(vi).

<sup>4</sup> The e-mail exchange involves a preliminary estimate of the sewer cost increase as a result of avoiding the EARY track, but the Utilities Board has since learned that the cost increase will be even greater due to the need for an additional pump station.

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this proceeding. STB precedent is well-established that underground sewer and water pipelines do not unreasonably interfere with rail operations, and the Utilities Board is willing to (1) follow AREMA construction specifications; (2) follow reasonable safety precautions of EARY; and (3) cooperate with EARY on a schedule of work. As the Utilities Board will show in its Reply, the Appeal should be denied because it is unfounded and an extension of this proceeding would only further waste the limited resources of the STB, not to mention those of the non-profit Utilities Board.

Under 49 CFR § 1011.6(b), the Utilities Board has 10 days to reply to the Appeal. Although the Appeal was not filed until February 6th, the Utilities Board will file its reply on Monday, February 13th. In the event that EARY fails to file its Opening Statement on February 8th, as required by the procedural schedule, EARY should be found to have waived its right to further participate in this proceeding pursuant to 49 CFR § 1112.3 and the Utilities Board's Reply to the Appeal will close the record.

If you have any questions, please do not hesitate to contact the undersigned.

Sincerely,



Sandra L. Brown

David E. Benz

*Counsel for the Utilities Board of the City of Sylacauga*

Enclosures

cc: Louis Gitomer, Counsel for EARY (via e-mail)  
Scott Williams, Counsel for RailAmerica (via U.S. first-class mail)

# **EXHIBIT 1**

To be completed by Real Estate Manager

Contract Number \_\_\_\_\_

RR Code \_\_\_\_\_

Lessee Code \_\_\_\_\_

Engineer Approval \_\_\_\_\_

Date Approved \_\_\_\_\_



# RailAmerica

Real Estate Department, 7411 Fullerton Street - Suite 110, Jacksonville, FL 32256

## APPLICATION FOR UNDERGROUND PIPELINE CROSSING OR PARALLELISM OF RAILROAD PROPERTY AND OR TRACK

*Incomplete or Inaccurate Information will delay application request*

### Section 1 - Applicant Data

#### Facility Owner

Complete Name of Applicant to appear on Legal Document:

Sylacauga Utilities Board

Applicant Mailing Address:

P.O. Box 207

Sylacauga, AL 35150

Applicant overnight Address:

1414 Edwards Street

Sylacauga, AL 35150

Applicant Billing Address:

P.O. Box 207

Sylacauga, AL 35150

Applicant FEIN or Social Security Number:

63-6005352

Applicant Contact Name & Title:

MIKE MCGINNIS (Water & Sewer Foreman)

Telephone Number:

(256)249-0372

Fax Number: (256)401-2528

Email Address: mmcginnis@sylacauga.net

Emergency Contact:

MIKE MCGINNIS

Emergency Telephone Number:

(256) 510-6535

Applicant:

- Corporation  
 Partnership  
 Sole Proprietor  
 Individual  
 Municipality  
 Developer  
 Other

If other please explain:

State of Incorporation or Partnership:

Alabama

Contact during Application

Process:

Name:

MIKE MCGINNIS

Telephone

Number:

(256) 249-0372 Fax Number: (256) 401-2528

Email Address:

mmcginnis@sylacauga.net

Section 2 - Location Data

Proposed date of Installation

12-1-11 to 5-1-12

Railroad Name:

Rail America

Nearest City:

Sylacauga

County:

Talladega

State:

Alabama

If Crossing Nearest Railroad Mile

Post (required):

1478±

Feet from Railroad Milepost

454

N S E W

Latitude/Longitude:

N 33° 10' 02.99" W 86° 18' 30.89"

Valuation Station:

MP. 454.28

Quarter, Section, Township & Range:

Township 21 South, Range 3 East, Section 3

Railroad Subdivision (required):

Hill Road

US DOT/AAR

Crossing Number:

NA

Is Crossing within a Public Road Right-of-Way?

Yes\*

No

If YES, Name of Street:

Hill Road (60' ROW)

\*If yes, road name, number and width of public right-of-way are required on drawing, incomplete information will delay the application process.

Section 3 - Pipeline Data

Crossing or Parallelism?

Crossing

If Crossing complete sections 3 and 4

Parallelism

If Parallelism complete sections 3, 4 and 5

Installation:

New

Maintenance \*

Upgrade \*\*

Replacement \*\*

Other

\*\*If revision or maintenance to existing crossing provide agreement number (Required):

Proposed Date of Installation

If Other or revision to existing facility please explain:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Product to be Conveyed:  Water  Sewer  Oil  Gas  Storm Drain

Type of Service: (Choose one)  Transmission  Distribution  Service  Other

Angle of Pipe Line Crossing the Track: 84° 13' 36" Degrees

Will facility be exclusively used by Applicant?  Yes  No\*\*\*

\*\*\*If no, list all entities who will be using this facility: \_\_\_\_\_

**Pipeline Specifications**

	Carrier Pipe	Casing Pipe
Material	D.I.	Steel
Material Specifications and Grade	CL. 350	ASTM A252
Minimum Yield Strength of material (PSI)		
Mill Test Pressure	1103	
Inside Diameter	8.55"	15.25"
Outside Diameter	9.05"	16"
Wall Thickness	.25"	.375"
Type of Seam	Push on	Welded
Laying Lengths	20 LF	40 LF
Type of Joints	Restrained Jt	Welded

Vents: 0 Number: 0 Size: 0

Seals: Both Ends:  Yes  No One End:  Yes  No

\*\*Cathode Protection:  Yes  No \*\*Protective Coating:  Yes  No

\*\* Kind \_\_\_\_\_

Type, size, and spacing of insulators or supports: EPDM, 8" x 16", @ 8' O.C.

Location of Shut-Off Valves: N/A Number of Manholes: 0



**Plans for proposed installation shall be submitted to and approved by the Railroad and designated engineer before work can begin!**

Upon application approval, applicant agrees to reimburse Railroad for any cost incurred by Railroad incident to the installation, maintenance and/or supervision necessitated by the installation. Applicant further agrees to assume all liability for accidents or injuries that arise as a result of this installation.

Material and installation are to be in strict accordance with specifications of National Electrical Safety Code and AREMA, current edition, and requirements of the Railroad.

Prior to submission, it is recommended that any questions concerning this application should be submitted to the Real Estate Department of RailAmerica, Inc. All questions or requests for information submitted by email receive a rapid response. Other requests can be made by phone (904) 538-8365, or fax (904) 256-1428. Additional information can also be obtained at our website: [www.railamerica.com](http://www.railamerica.com).

Standard Application processing takes approximately 4-8 weeks. "Expedited processing" is available and will reduce the processing time to between 1-2 weeks at an additional cost of \$1,750.

Mail the application for proposed facility in triplicate, along with a \$1,000 Application Fee, \$1,500 Engineering Review Fee, and a \$1,500 Contractors Access/Occupancy Application Fee (all fees are non-refundable) in U.S. Funds to:

**RailAmerica, Inc.**  
Attn: Real Estate Department  
7411 Fullerton Street - Suite 110  
Jacksonville, FL 32266

**Make Check payable to the Railroad in question. W-9 Information available upon request.**

**This section must be completed in full signed and dated when submitting to the Real Estate Department for processing, incomplete or inaccurate information will delay application request. Unsigned applications will be returned to applicant for signature and submission date.**

Date: 10/25/2011 Signature: Mike Richard  
Phone Number: \_\_\_\_\_ Printed Name: Mike Richard  
Fax Number: \_\_\_\_\_ Title: GM

Contact Email Address: \_\_\_\_\_

**If installing more than one facility in the same location, a separate application MUST be completed for each new line to be installed. Applications submitted with more than one facility listed will be returned and will not be processed until all applications are returned accurate, complete and with all applicable fees.**

**IMPORTANT!**

In order for the application to be complete ALL details pertinent to the proposed installation must be completed in full and submitted along with the following documents:

	# of Copies	Amount Due	Description
<input type="checkbox"/>	2	\$1,000	Completed Wire line Application and processing fee
<input type="checkbox"/>	2	\$1,500	Engineer review fee, plans/drawings, no larger than 11 x 17. Larger drawings will incur additional engineering fees.
<input type="checkbox"/>	2	\$1,500	Completed Contractor's Access/Occupancy Application and Fee
		<b>\$4,000</b> ✓	

Standard Application processing takes approximately 4-8 weeks. "Expedited processing" is available and will reduce the processing time to between 1-2 weeks at an additional cost of \$1,750.

**Entering or working on the railroad right of way or any other railroad property without the permission of the railroad is trespassing and illegal. Violators risk the possibility of serious, even fatal, injury and will be prosecuted.**



## EASTERN ALABAMA RAILWAY

c/o RailAmerica, Inc. 7411 Fullerton Street, Suite 300, Jacksonville, FL 32256

November 7, 2011

Mr. Mike McGinnis, Water & Sewer Foreman  
Sylacauga Utilities Board  
P.O. Box 207  
Sylacauga, AL 35150

Re: 16" Sewer Pipeline Application/Sylacauga, AL

Mr. McGinnis:

On the advice of counsel, we have been instructed to suspend your application pending resolution of the condemnation action, which is currently before the federal court in Alabama, Case No. 1:11-CV-03192-RBP.

As additional information, once such resolution of the condemnation has been obtained and, if your application is reinstated, then our engineer has indicated he will request the following additional information:

1. Clarification needed on casing steel ASTM A252 must be grade 2 or better to have minimum 35,000 psi tensile strength,
2. Casing must have bituminous coating,
3. Pipeline must be vented-casing on each end outside railroad right of way, and
4. Right of way warning signs are required.

If you would like to revise the application/plans in the meantime, please return them to my attention at the address on this letterhead. Upon receipt the revisions and reinstatement of the application, they would then be resubmitted to the engineer for prompt review.

Sincerely

Donna Killingsworth, MBA  
Cable & Pipeline Transaction Manager

cc: Michael O. Bagley  
Turner Williams, Esquire

# **EXHIBIT 3**