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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 30186

**TONGUE RIVER RAILROAD COMPANY, INC. – RAIL CONSTRUCTION
AND OPERATION – IN CUSTER, POWDER RIVER AND
ROSEBUD COUNTIES, MT**

**TONGUE RIVER RAILROAD COMPANY'S
REPLY TO PETITION FOR RECONSIDERATION**

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Dated: February 14, 2013

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The Surface Transportation Board (“STB” or “Board”) should deny the Petition for Reconsideration filed on January 25, 2013 by Northern Plains Resource Council and Rocker Six Cattle Company (hereafter collectively referred to as “NPRC”). Rehashing the baseless arguments made in its Petition to Revoke Supplemental Application (hereafter “Petition to Revoke”), NPRC now asks the STB to reconsider its decision served January 8, 2013 (“January 8 Decision”) accepting Tongue River Railroad Company’s (“TRRC”) December 17, 2012 Supplemental Application to Construct and Operate a common carrier rail line between the Colstrip Subdivision of BNSF Railway Company (“BNSF”) and the Ashland/Otter Creek area (hereafter “Application”). Indeed, the Petition for Reconsideration attaches as support the Petition to Revoke and accompanying November 2012 Report of Power Consulting and verified statement of NPRC witness Mr. Gerald W. Fauth III. In its Petition for Reconsideration, NPRC also requests the Board to strike the Application, vacate the procedural schedule adopted in this proceeding and require TRRC to submit a new application.¹

¹ Petition for Reconsideration at 5.

The Petition for Reconsideration presents no credible basis for reconsidering the STB's January 8 Decision to accept the Application and process it according to the procedural schedule previously established in this proceeding.² NPRC contends that the STB erred as a matter of law by accepting an application that was purportedly inadequate and by accepting the Application less than 20 days after it was filed. These contentions are groundless. As shown below, the Petition for Reconsideration is without merit and should be denied.

I. NPRC's Claim that the STB Erred by Accepting a Purportedly Inadequate Application is Baseless

First, pointing to the arguments raised in its Petition to Revoke, NPRC argues that the STB materially erred by accepting an allegedly inadequate application. Petition for Reconsideration at 3-4. NPRC wrongly claims that TRRC's Application was inadequate because it proposed "an entirely new route, the Colstrip Alignment" and "hid[] the true intent of the project to transport coal to west coast terminals for transport." *Id.* at 3.

With respect to NPRC's allegation regarding TRRC's preferred route, the Colstrip Alignment, TRRC explained in its January 28, 2013 Reply to the Petition to Revoke (hereafter "TRRC Reply") at 6 that TRRC opted for the Colstrip Alignment based on further review of the Colstrip Alignment's relative advantages vis-a-vis the 1986 approved rail line between Miles City, MT and the Ashland/Otter Creek, MT area, including the Colstrip Alignment's much shorter length, its operational feasibility and its apparent environmental advantages. Further, a Colstrip Alignment had been previously analyzed by the ICC in the original *TRRC I* proceeding, and the Board's Office of Environmental Assessment ("OEA") had previously stated its intent to analyze such a routing as an alternative in this reopened proceeding. TRRC Reply at 7. Given

² See *Tongue River Railroad Company, Inc. – Rail Construction and Operation – in Custer, Powder River and Rosebud Counties, Mont.*, STB Docket No. 30186 (served Jan. 8, 2013).

that a Colstrip Alignment has been previously analyzed (as noted in the January 8 Decision) and will be analyzed going forward, TRRC's expressed preference for the Colstrip Alignment is certainly not a basis for rejecting the Application.

NPRC's offensive assertions regarding TRRC's "true intent" as to the ultimate destination of the coal – that it is bound for export terminals on the west coast – are similarly groundless and certainly provide no basis for rejecting the Application. As explained in TRRC's Reply at 11, the Application correctly recognizes that the coal market is dynamic and notes in several places that coal transported by the Tongue River rail line could be exported and could be used for domestic power generation or for coal conversion projects. What percentage is exported and what percentage is used domestically will, as the Application states, be dictated by the market forces that are in play several years from now when the Otter Creek mine and the railroad are fully permitted and become operational following development/construction. TRRC's assertions regarding the ultimate destination for coal transported on the Tongue River rail line were reasonable. It is NPRC's categorical assertions that the coal will definitely move to the west coast for export that are overstated.³

³ NPRC also erroneously claims that the "new" route, "new" destination of the coal transported by the Tongue River rail line, and "new" owners of the TRRC constitute "new evidence and changed circumstances" that require the Application to be addressed in a new proceeding. Petition for Reconsideration at 4-5. As explained in TRRC's Reply, there is no merit to NPRC's claim that these purported differences between the original TRRC I proceeding and this reopened proceeding mean that the Application should be considered in an altogether different proceeding. TRRC Reply at 5-13, 16-18. The STB has made it clear that it will conduct a full merits review and new environmental review of TRRC's proposed rail line in this reopened proceeding. TRRC Reply at 5-6. As a result, nothing (other than delay) would be accomplished by initiating an altogether new proceeding to consider the Application.

II. NPRC's Claim that the STB Erred By "Cutting Short the 20-Day Reply Period" is Based on an Incorrect Reading of the Board's Regulations

Citing to 49 CFR § 1104.13, NPRC argues that the STB materially erred by accepting TRRC's Application before the expiration of the 20-day period supposedly provided in the regulations for parties to reply to the Application. Petition for Reconsideration at 4. NPRC's argument is based upon a mischaracterization of the cited regulation. That regulation provides in relevant part that: "A party may file reply or motion addressed to any pleading within 20 days after the pleading is filed with the Board, *unless otherwise provided.*" 49 CFR § 1104.13 (emphasis added). In this proceeding, the 20 day reply period does not apply because the Board "otherwise provided". In its November 1, 2012 decision, the Board stated that it would publish in the Federal Register a notice accepting or rejecting the application on January 9, 2013, and establish March 1, 2013 as the date for parties to reply to TRRC's Application.⁴ Thus, contrary to NPRC's claim at page 4 of its Petition for Reconsideration, the Board did not "unlawfully cut off" NPRC's right to reply to the Application. NPRC has until March 1, 2013 to submit a reply to the Application.⁵

NPRC also makes the groundless assertion that the Board may have "effectively mooted" an otherwise timely Petition to Revoke by accepting the TRRC Application in its January 8 Decision. Petition for Reconsideration at 4. Besides the fact that NPRC's Petition to Revoke is an atypical and extraordinary request (*see* TRRC Reply at 1-4), NPRC was on notice as of November 1, 2012 that the STB planned to publish in the Federal Register its notice accepting or

⁴ *See Tongue River Railroad Company, Inc. – Rail Construction and Operation – in Custer, Powder River and Rosebud Counties, Mont.*, STB Docket No. 30186 (served Nov. 1, 2012) (hereafter "November 1 Decision").

⁵ NPRC also complains that by accepting TRRC's Application, the Board "may have obviated the need for TRRC to respond in opposition" to NPRC's Petition to Revoke. However, this concern has no basis as TRRC in fact filed a reply in opposition to the Petition to Revoke.

rejecting the Application by January 9, 2013 -- which meant that it would necessarily make its decision on acceptance or rejection several days earlier (as it did, on January 4, 2013.). *See November 1 Decision* at 5. As a result, if NPRC wanted to take the unusual step of arguing that the Board should not accept TRRC's Application, it should have made its views known more than two days before it knew the STB's order accepting or rejecting the Application would be published. In any event, the Board's acceptance of the Application was not a judgment regarding the merits of the Application; it simply meant that the Board found that the Application contains the information needed for the Board to move forward. A decision on the merits will not come until after the Board reviews parties' comments on the Application due March 1 2013, TRRC's reply to those comments due April 15, 2013, and the environmental review.

CONCLUSION

For the reasons stated herein, NPRC's Petition for Reconsideration is entirely without merit and it should be denied.

Respectfully submitted,



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Tongue River Railroad Company, Inc.

Dated: February 14, 2013

CERTIFICATE OF SERVICE

I hereby certify that I have this 14th day of February 2013 served a copy of the Tongue River Railroad Company, Inc.'s Reply to the Petition for Reconsideration on all parties of record by first-class U.S. mail, postage prepaid.

A handwritten signature in black ink, appearing to read "David H. Coburn", written over a horizontal line.

David H. Coburn