

**PUBLIC VERSION – PROTECTED INFORMATION REDACTED**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

241085

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**Finance Docket No. 36025**

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ENTERED  
Office of Proceedings  
July 11, 2016  
Part of  
Public Record

**TEXAS CENTRAL RAILROAD AND INFRASTRUCTURE, INC. & TEXAS CENTRAL  
RAILROAD, LLC – AUTHORITY TO CONSTRUCT AND OPERATE – PETITION  
FOR EXEMPTION FROM 49 U.S.C. § 10901 AND SUBTITLE IV – PASSENGER RAIL  
LINE BETWEEN DALLAS, TX AND HOUSTON, TX**

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**REPLY IN OPPOSITION TO BOTH  
THE MOTION FOR LEAVE TO FILE RESPONSE TO REPLIES  
AND  
THE RESPONSE**

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Pursuant to 49 C.F.R. § 1104.13(a), Delta Troy Interests, Ltd. (“Delta Troy”) hereby replies in opposition to both the Motion for Leave To File Response to Replies (“Motion”) and the proffered Response (“Response”) filed by Texas Central Railroad and Infrastructure, Inc. and Texas Central Railroad, LLC (collectively, “TCR”) on June 20, 2016. The Surface Transportation Board (“Board” or “STB”) should deny the Motion and reject the voluminous Response as improper under the Board’s rules and exemption procedures.<sup>1</sup> Under the Board’s rules, petitioners seeking exemptions are required to submit their case-in-chief and supporting evidence with their petitions, not later after expiration of the public comment period. See 49 C.F.R. § 1121.3(a).

Alternatively, if the Board accepts the Response into the record, the Board should require TCR to redesignate all portions of the Response that are currently designated Highly

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<sup>1</sup> See 49 C.F.R. §§ 1104.13(c) and 1121.3(a).

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Confidential as either Confidential or Public.<sup>2</sup> TCR's excessive use of the "Highly Confidential" designation is contrary to the intent and purpose of the Protective Order entered by the Board, as well as established Board practice. TCR's expansive use of the Highly Confidential designation appears to be deliberately designed to shield critical information provided in support of its proposed high speed rail line from public review and scrutiny. After the re-designated Response is filed, the Board should permit interested parties to file responsive comments.

With regard to TCR's assertion in the Response that the Board has jurisdiction over TCR's purely intrastate rail line, Delta Troy strongly disagrees and refers the Board to Delta Troy's earlier filings and also the reply filings submitted by Texans Against High Speed Rail, Inc. in this proceeding. The remainder of TCR's Response simply repeats the positions already asserted by TCR in its Petition and, thus, Delta Troy refers the Board to its pleadings previously submitted.

**I. TCR's Late Request to Support Its Petition for Exemption With Voluminous New Evidence Is Prejudicial and Should Be Denied.**

It is procedurally improper and highly prejudicial for TCR to follow its 50-page Petition for Exemption with an 11th hour, 888-page unauthorized and substantially redacted "Response" that is intended to support its deficient Petition for Exemption. Replies to replies are not permitted, and the exemption process does not enable petitioners to have a "rebuttal."<sup>3</sup> Further, TCR's actions plainly violate the Board's rule that "[a] party filing a petition for exemption **shall provide its case-in-chief, along with its supporting evidence, workpapers, and related documents at the time its files its petition.**"<sup>4</sup> TCR has failed to adequately explain why it

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<sup>2</sup> Material in double brackets {{ }} is designated Highly Confidential under the Protective Order in this proceeding.

<sup>3</sup> See, e.g., 49 C.F.R. §§ 1104.13(c) and 1121.3(a).

<sup>4</sup> 49 C.F.R. § 1121.3 (emphasis added).

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withheld substantial relevant information from its Petition, and is only now submitting hundreds of additional pages of evidence after the Board’s authorized comment period expired. Coupled with TCR’s excessive use of the “Highly Confidential” designation with respect to the new material, one can only conclude that TCR deliberately intends to hide relevant information from public scrutiny. TCR’s tactics make a mockery of the Board’s rules which are intended to provide a fair, impartial, and transparent process for reviewing new rail line construction proposals.

Even if TCR were permitted to have a rebuttal (which it is not), it is equally improper for TCR to submit voluminous new evidence in support of its Petition for Exemption. “[N]ormally we do not look favorably upon parties failing to present all of their arguments at the outset of a proceeding.”<sup>5</sup> For example, in rate reasonableness cases, the Board has long recognized that new evidence should not be submitted on rebuttal.<sup>6</sup> Moreover, the vast quantity of new information submitted by TCR confirms that an exemption is inappropriate for TCR’s proposal and that the construction application process (and legal standard) should be utilized instead. See Delta Troy’s Reply in Opposition to the Petition for Exemption (filed May 31, 2016) at page 12-22. Acceptance of the substantial new evidence at this late date, and without authorized replies, would be highly prejudicial.

**II. If the Board Accepts TCR’s Response, It Should Require TCR to Fix Its Improper Over- Use of the “Highly Confidential” Designation.**

The narrative portion of the Response has significant redactions on pages 28-29 and 37-38, and minor redactions on pages 24 and 25. All appendices of the Response – over 800 pages

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<sup>5</sup> Railroad Ventures, Inc. – Abandonment Exemption - between Youngstown, OH and Darlington, PA, in Mahoning and Columbiana Counties, OH and Beaver County, PA, STB Docket No. AB-556 (Sub-No. 2X), slip op. at 12 (served Dec. 15, 2005).

<sup>6</sup> General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases, 5 S.T.B. 441, 446 (2001).

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in total – have been redacted. Notably, all redacted material has been designated as Highly Confidential by TCR, meaning that only outside counsel and outside consultants have access to it.<sup>7</sup> The material redacted by TCR fails to meet the definition of “Highly Confidential” under either the Protective Order or Board precedent. The Board should order TCR to re-designate the Response in accord with governing law, and re-file the entire Response, just as the Board has done in prior cases where over-designation occurred.<sup>8</sup>

As described below, evaluation of the specific redactions made by TCR reveals the need for re-designation:

Pages 24-25 (n. 68).

{{ [REDACTED] }}  
[REDACTED] }} This footnote should be  
public. {{ [REDACTED] }}  
[REDACTED]  
[REDACTED] }}<sup>9</sup> A party may not redact information that is already in  
the public domain.<sup>10</sup>

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<sup>7</sup> See Protective Order at para. 5 (adopted by the Board in a decision served June 21, 2016).

<sup>8</sup> See, e.g., Central Oregon & Pacific Railroad, Inc. – Abandonment and Discontinuance of Service – In Coos, Douglas, and Lane Counties, OR, STB Docket No. AB-515 (Sub-No. 2) (served Aug. 15, 2008).

<sup>9</sup> {{ [REDACTED] }}  
[REDACTED] }}

<sup>10</sup> See, e.g., Central Oregon, slip op. at 2-3.

Page 25 (n. 69).

{{ [REDACTED]

[REDACTED]

[REDACTED] }} This footnote should be public.

Pages 28-29.

{{ [REDACTED]

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11 {{ [REDACTED]

[REDACTED] }}

12 {{ [REDACTED]

[REDACTED] }}

13 {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

14 {{ [REDACTED]

[REDACTED] }}

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]}}

As described above, all material on pages 28-29 should be re-designated public.

Pages 37-38.

{{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]}} All information on these two pages should be re-designated as public.

The Appendices

All appendices should be re-designated. {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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<sup>15</sup> {{ [REDACTED] }}

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]}}

The Board has previously found that actual internal operating costs of a railroad line in dispute in a feeder line case should be designated as Confidential, not Highly Confidential.<sup>16</sup>

{{ [REDACTED]

[REDACTED]

[REDACTED]}}

As TCR should know, selection of the proper confidentiality designation involves an “appropriate balance between legitimate access and legitimate protection.”<sup>17</sup> The extreme position taken by TCR, {{ [REDACTED]

[REDACTED]}}

reflects an utter lack of balance.

{{ [REDACTED]

<sup>16</sup> See, e.g., Central Oregon, slip op. at 4-5.

<sup>17</sup> Central Oregon, slip op. at 4.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }

Furthermore, TCR’s position effectively requires parties to expend great funds to hire outside counsel and outside experts to analyze hundreds of pages of data and materials that should not only be Confidential, but, in large part, Public. Unlike TCR, not every interested party has millions of dollars in financing to pay outside attorneys and consultants, and it would implicate serious due process concerns for such a requirement to exist. TCR is using its position as the Petitioner to stifle dissent through the legal and consultant fees that would be required to view TCR’s supporting information. This is a misuse of the Board’s protective order procedures.

Parties such as Delta Troy have a due process right to participate in government proceedings that affect them. Logan v. Zimmerman Brush Co., 455 U.S. 422, 431 (1982) (due process includes the “right to use...adjudicatory procedures”). There is an inevitable balancing that comes into play when proprietary information is at issue, but the redactions in the Response would effect a dramatic expansion of what can legitimately be designated as Highly

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<sup>18</sup> { [REDACTED] }

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Confidential. TCR’s designations preclude Delta Troy and others from meaningfully participating in this proceeding, which concerns a novel, multi-billion dollar proposal that would impact a large portion of Texas, including land owned by Delta Troy. Due process requires that the Appendices be designated as Public or, at a minimum, Confidential. See, e.g. Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (“The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965))).<sup>19</sup>

The discussion above pertains to all Appendices, and further argument regarding the individual Appendices is provided below.

Appendix A – {{ [REDACTED] }}

Appendix A should be designated Public. {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]}}

Appendix B – {{ [REDACTED] }}

{{ [REDACTED] }} Appendix B should be designated as Public, while the remainder should be designated as Confidential. {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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<sup>19</sup> See also Williston Basin Interstate Pipeline Co. v. FERC, 165 F.3d 54, 63 (D.C. Cir. 1999) (“the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation”) (internal quotation omitted).

<sup>20</sup> {{ [REDACTED]

[REDACTED]

}}



[REDACTED]

Appendix D – {{ [REDACTED] }}

Appendix D should be designated Public. {{ [REDACTED] }}

[REDACTED]

Appendix E – {{ [REDACTED] }}

The following portions of Appendix E should be Public: {{ [REDACTED] }}

[REDACTED]

The remainder of Appendix E should be Confidential at best, {{ [REDACTED] }}

[REDACTED]

**III. Conclusion.**

The Board should deny the Motion and reject the proffer of the Response, which is unauthorized and introduces hundreds of pages of new evidence without the opportunity for response. Thus, the Response is highly prejudicial. If the Board grants the Motion, the Board

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<sup>25</sup> {{ [REDACTED] }}

<sup>26</sup> {{ [REDACTED] }}

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should require TCR to re-designate and re-file the Response as described herein to fix its excessive use of the “Highly Confidential” designation.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Karyn A. Booth", written over a horizontal line.

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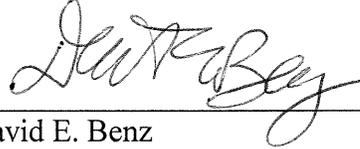
*Attorneys for Delta Troy Interests, Ltd.*

July 11, 2016

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 11th day of July 2016, I served a copy of the foregoing upon all parties of record via U.S. first-class mail, postage prepaid.

A handwritten signature in cursive script, appearing to read "David E. Benz", is written above a horizontal line.

David E. Benz