



KAPLAN KIRSCH ROCKWELL

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Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

Re: *Maryland Transit Administration – Abandonment Exemption – In Somerset County, MD, Docket No. AB-590 (Sub No. 1X)*

Dear Ms. Brown:

Attached is the Maryland Transit Administration's ("MTA") Response to the STB's Decision of February 11, 2015, in the above-captioned proceeding requesting additional information and legal analysis.

Sincerely,

Allison I. Fultz
Counsel for the Maryland Transit Administration

cc: Byron Smith

**BEFORE THE
SURFACE TRANSPORTATION BOARD
Washington, DC**

Docket No. AB 590 (Sub-No. 1X)

**MARYLAND TRANSIT ADMINISTRATION
– ABANDONMENT EXEMPTION –
IN SOMERSET COUNTY, MD**

RESPONSE TO ORDER FOR ADDITIONAL INFORMATION

Communications with respect to this document
should be addressed to:

Charles A. Spitulnik
Allison I. Fultz
Christian L. Alexander
KAPLAN KIRSCH & ROCKWELL
1001 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036
(202) 955-5600
cspitulnik@kaplankirsch.com
afultz@kaplankirsch.com
calexander@kaplankirsch.com

Counsel for Maryland Transit Administration

Dated: March 13, 2015

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**MARYLAND TRANSIT ADMINISTRATION
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RESPONSE TO ORDER FOR ADDITIONAL INFORMATION

In response to this Board’s February 11, 2015, decision (“February 11th Decision”) in the above referenced docket, the Maryland Transit Administration (“MTA”) hereby provides additional information and analysis regarding MTA’s requested exemption for the abandonment of 14.57 miles of rail line in Somerset County, Maryland, making up part of what was known as the Crisfield Branch (the “Line”). Specifically, MTA responds to the Board’s order to: (1) address and provide detailed support for whether the Line has been abandoned or is instead subject to exemption pursuant to the Board’s rules regarding acquisition by a state of lines abandoned or approved for abandonment; (2) address whether revocation of the Board’s blanket exemption for state-acquired railroad lines is necessary before the Board can exempt the Line from its abandonment procedures; and (3) discuss the benefit to the public of the proposed use of the right-of-way for electrical transmission lines and how this proposal is consistent with the Board’s precedent for granting exemptions from offers of financial assistance (“OFAs”) and public use conditions. *Maryland Transit Administration – Abandonment Exemption – In*

Somerset County, MD, STB Docket No. AB 590 (Sub-No. 1X), slip op. at 2 (Service Date Feb. 11, 2015).

MTA's responses to the Board's request are summarized below, with detailed discussion in the following sections of this Response:

- (1) The Line has not been abandoned and is still subject to the STB's jurisdiction because, as demonstrated in MTA's previous filing and below, (a) the Line was only *approved* for abandonment before MTA acquired it, but was not fully abandoned pursuant to applicable federal law, and (b) MTA has not demonstrated an intent to abandon the Line since that time.

- (2) MTA does not believe partial revocation is the appropriate mechanism for instituting abandonment procedures here because under MTA's current regulatory posture there is no exemption to revoke. MTA acquired the Line through the categorical exemption provided under *Common Carrier Status of States, State Agencies & Instrumentalities, & Political Subdivisions*, 363 I.C.C. 132 (1980) ("*Common Carrier Status*"), *aff'd sub nom Simmons v. ICC*, 697 F.2d 326 (D.C. Cir. 1982), which exempted states from the Board's acquisition procedures for lines acquired after they were already abandoned or approved for abandonment. Because these lines have already been authorized for abandonment, states do not require any additional authority to abandon and thus *Common Carrier Status* does not grant an exemption from such authority. MTA has followed the STB's exempt abandonment procedures because they are the only means for initiating railbanking of a line and believes such action is appropriate in light of the scope of the exemption granted in *Common Carrier Status*.

(3) Granting a petition for exemption from the Board's OFA and public use provisions is appropriate here because the resulting use of the Line for public trail and electrical transmission purposes is a valid public purpose, and there is no overriding public need for continued rail service. In particular, the proposed transmission line will enhance electrical grid stability by providing redundancy in the system, and will not result in the loss of rail service, as the Line has remained in an inactive state for over 30 years, with no demand anticipated in the future. In contrast, not granting the exemptions would put at risk the proposed use for transmission purposes.

MTA respectfully requests that the Board grant MTA's request for exempt abandonment in order to allow the proposed railbanking to take place. MTA does not believe revocation of the exemption granted in *Common Carrier Status* is necessary for it to pursue an exempt abandonment in order to establish railbanking, but if the STB believes such revocation is warranted, MTA requests revocation in the alternative. Under these circumstances, MTA also requests that the Board simultaneously allow MTA's Notice of Exempt Abandonment in this proceeding to become effective immediately, as MTA has satisfied all of the requirements for that exemption. In either event, MTA respectfully requests that the Board expedite its action in this matter in order to avoid further delay and potential risk to the proposed transaction.

BACKGROUND

On November 26, 2014, MTA (a) filed a verified Notice of Exemption pursuant to 49 C.F.R. Part 1152, Subpart F for abandonment of the Line in the above-referenced docket, and (b) filed a separate petition seeking exemption from OFAs and public use provisions on the basis that the Line is intended to be railbanked and used for other public purposes. On December 30, 2014, the Board imposed a housekeeping stay "to provide additional time for the Board to fully

consider the arguments presented.” *Maryland Transit Administration – Abandonment Exemption – In Somerset County, MD*, STB Docket No. AB 590 (Sub-No. 1X) (Service Date Dec. 30, 2014).

On February 11, 2015, the STB issued a decision directing MTA to provide further information regarding the Line and its requested exemption by. Specifically, the February 11th Decision directed MTA to (1) address and provide detailed support for whether the Line has been abandoned or is instead subject to exemption pursuant to the Board’s rules regarding state acquisition of lines abandoned or approved for abandonment; (2) address whether revocation of the Board’s blanket exemption for state-acquired railroad lines is necessary before the Board can exempt the Line from its abandonment procedures; and (3) discuss the benefit to the public of the proposed use of the right-of-way for electrical transmission lines and how this proposal is consistent with the Board’s precedent for granting exemptions from OFAs and public use conditions. *Maryland Transit Administration – Abandonment Exemption – In Somerset County, MD*, STB Docket No. AB 590 (Sub-No. 1X), slip op. at 2 (Service Date Feb. 11, 2015).

ARGUMENT

1. The Line was not Abandoned and is Subject to the Exemption Granted in *Common Carrier Status*

The Board first directs MTA to “address whether the Line previously was abandoned, either at the time it acquired the Line from Penn Central Corporation or at some point thereafter.” February 11th Decision, slip op. at 2 (citing *Walkersville So. R.R. – Operation Exemption – Line Owned by the State of Md.*, FD 32329, slip op. at 1 n.1 (ICC served Sept. 30, 1993)). The Board further orders MTA to provide “detailed facts and legal analysis” to support its position in the event MTA believes that the Line has not been abandoned and instead is subject to the Board’s exemption of rail lines acquired by states subsequent to abandonment or

approval of abandonment. *See* February 11th Decision, slip op. at 2 (citing *Common Carrier Status*).

As set forth in MTA’s Notice of Exemption in this proceeding¹ and as discussed in additional detail below, MTA maintains that the Line has not been abandoned.

Although the line discussed in *Walkersville* shares certain elements in common with the Line that is the subject of this proceeding, the ICC’s characterization, in passing, of that line as being “abandoned” does not establish that the Line was abandoned before MTA acquired it. Both lines were excluded from the United States Railway Association’s Final System Plan for Restructuring Railroads in the Northeast and Midwest Region Pursuant to the Regional Rail Reorganization Act of 1973 (1975) (“FSP”) and were acquired through the same transaction in 1982. *See* FSP vol. II, p. 135 (discussing the Frederick Line); January 8, 1982 Deed Between Penn Central Corporation, Baltimore and Eastern Railroad Company, and State of Maryland, 13-23. However, although the ICC in *Walkersville* stated that the “abandonment was authorized and effected without further Commission approval,” *Walkersville*, slip op. at 1, the decision cites no documentation effecting the abandonment, as Section 304(b) of the Regional Railroad Reorganization Act of 1973 required. Pub. L. 93-236, 87 Stat. 985 (the “3R Act”) (codified at 45 U.S.C. § 744(b)(1)) (requiring abandoning entity to provide 30 days written notice to various entities listed at Sec. 304(a)(1)(C) of the 3R Act)). As with the Line, MTA has no information regarding whether a notice of abandonment was actually sent to the State for the *Walkersville* line pursuant to the 3R Act, Section 304(a)-(b), codified as amended at 45 U.S.C. § 744(a)-(b). Because the State purchased the Line, which had been approved for abandonment in the FSP, but has located no evidence of any prior consummation of abandonment and did not provide notice

¹ Verified Notice of Exemption, Maryland Transit Administration – Abandonment Exemption – In Somerset County, MD, STB Docket No. AB 590 (Sub-No. 1X) (Filed Nov. 26, 2014).

of abandonment itself, MTA believes the Line had not been previously abandoned prior to the State's acquisition.

A. The Line was not Abandoned Prior to Acquisition

The STB retains jurisdiction over the Line and other Eastern Shore rail lines acquired by the State in 1982. These lines were only *approved* for abandonment before acquisition, not fully abandoned, before the State acquired them in 1982, and have been preserved as railroad rights-of-way since that time. This position is supported by the fact that abandonment of lines excluded from the FSP required notice to state and local governments before abandonment became fully effective, 45 U.S.C. § 744(b), and we have no record of such a notice being issued before the State's purchase of the Line in 1982 or subsequently. Furthermore, contemporaneous discussion of the Eastern Shore lines indicates that it was the State's intent *not* to abandon the Line and others like it, but instead to preserve them for future rail use. For example, a 1973 report by the State specified:

[T]he State is, in general, opposed to the abandonment of rail service or facilities that are of present or potential value to Maryland residents. . . . The State's objective in facing the proposed PCTC [Penn Central Transportation Company] abandonments is to seek to preserve many of the services or facilities that the PCTC proposes to abandon.

Maryland Department of Transportation, *Railroad Abandonments In Maryland: Final Report* (May 30, 1973), *quoted in* Interstate Commerce Commission, *Evaluation of Eight Light-Density Rail Lines in Maryland*, 42 Fed. Reg. 20396, 20398 (Apr. 19, 1977) ("ICC Report").

Subsequent State reports during and after publication of the FSP reinforce the State's position that rail lines would be preserved. *See* ICC Report at 20404 ("Essentially, 'the State's long-term strategy [was] . . . to preserve all existing rail rights-of-way and to promote and improve the rail network to meet the transportation needs of Maryland's residents, industry and agriculture." *Quoting* Maryland Department of Transportation, *Maryland State Rail Plan, Phase*

II (December 1975)); *id.* (“On those lines where service terminated effective April 1, 1976, the State will pursue the possibility of purchase of the right-of-way by State or local interests to protect the potential for ultimate reuse of the property.” *Quoting* Maryland Department of Transportation, *Maryland State Rail Plan* (Aug. 1976)). The ICC Report also noted benefits from preserving inactive rights-of-way: “A state may have quite distinct interests in the preservation of a right-of-way and the preservation of operations over it. Even if a right-of-way has little present potential, its dismantling could have a serious future impact on the area in which it is located.” *Id.* at 20410.

With respect to the Crisfield Branch in particular, both the State’s rail plans and the ICC Report advised preservation of the right-of-way. *See id.* at 20402 (quoting Maryland Department of Transportation, *Transportation Economics of Railroad Branch Lines*, February 1, 1975, which discusses the strategic significance of the line for a proposed maritime facility) and 20415. Although the ICC Report indicated some uncertainty regarding abandonment, its discussion is cursory, and the document expressly states that it generally did not reflect the official opinion of the ICC.²

Several factors militate against reading *Walkersville* to conclude that the Line has been abandoned. First, in *Walkersville*, the issue before the ICC—whether or not to grant an operation exemption—did not require it to determine whether the line in question had been abandoned. The statement regarding abandonment in that decision thus constitutes non-binding dictum.

² *See id.* at 20407 n. 29 (“On April 1, 1976, service was officially abandoned on USRA Lines Numbers 142, 145, and 163 [the Crisfield Branch]. Abandonment of the properties remains uncertain, but the Maryland Department of Transportation has the first right to purchase any abandoned rail properties within the State.”). Here, the Line’s status is referred to both as “abandoned” and “uncertain”. Given this varying characterization of the Line’s regulatory status, the ICC Report is far from dispositive, either for or against abandonment. First, the ICC Report was a report, not an ICC Board decision. ICC Report at 20396 (“It should also be noted that this is a staff report of the Rail Services Planning Office. It has not been officially adopted by the Interstate Commerce Commission and does not necessarily represent the Commission’s viewpoint.”). Second, the footnoted statement does not cite any specific authority in support of its statement regarding abandonment.

Second, the *Walkersville* decision only includes a cursory and unsupported statement that abandonment “was authorized and effected without further Commission approval” because it was not included in the FSP.

B. The Line has not been Abandoned Subsequent to Acquisition

Although MTA could have abandoned the Line subsequent to acquisition, the facts support the conclusion that it has not done so, and thus the Line remains subject to the Board’s jurisdiction.

Although since 1997 the STB has required rail line owners to file a notice of consummation of abandonment in order to fully effectuate abandonment and remove the line from the STB’s jurisdiction, *see* 49 C.F.R. § 1152.29(e)(2), states owning lines exempted from the STB’s acquisition and abandonment provisions pursuant to *Common Carrier Status* need not, and normally do not, file a notice of consummation when they fully abandon such lines. *See Beaufort R.R. Co. – Modified Rail Certificate*, STB Finance Docket No. 34943, slip op. at 5 (Service Date Mar. 19, 2008). Instead, for abandonment of lines covered by the exemption granted in *Common Carrier Status*, and all lines before 1997, the STB will rely on traditional common law factors for determining the intent of a state rail line owner to abandon a line.³

Determining an owner’s intent to abandon involves evaluating whether concrete actions indicate such an intent, including cessation of operations, cancellation of tariffs, salvaging of the

³ In 1997, the STB established a rule requiring railroads to provide it with notification of consummation of abandonment, which constitutes conclusive evidence of full abandonment. *See* 49 C.F.R. § 1152.29(e)(2); *Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 49 U.S.C. 10903*, STB Ex Parte No. 537 (Service Date Jun 27, 1997), slip op. at 5. Before 1984, the ICC also required an abandoning railroad to send a letter to the ICC within one year of authorization of abandonment confirming that abandonment had been fully exercised, although other factors, described above, could also indicate abandonment. *See Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 49 U.S.C. 10903*, STB Ex. Parte No. 537, 61 Fed. Reg. 11175, 11177 (Mar. 19, 1996). Unlike the STB’s post-1997 requirement, the ICC’s pre-1984 practice, which was never codified, was generally not considered conclusive evidence of abandonment, but instead was considered an additional factor in determining full abandonment. *See id.* at 11177-78; 61 Fed. Reg. 67876, 67879-80 (Dec. 24, 1996). Even after 1997, abandonment of a line subject to a modified certificate would be determined through common law indicia.

track, and relinquishment of control over the right-of-way, as well as additional evidence that shows more than merely an intent to discontinue service. *Birt v. STB*, 90 F.3d 580, 585-86 (D.C. Cir. 1996) (discussing generally the ICC's traditional common law indicia of abandonment). Other factors that have been evaluated to determine whether abandonment has occurred on lines over which service has ceased include whether the owner has continued to maintain and inspect the line, control weeds and brush, or has used rail property for non-rail purposes. *See Beaufort*, slip op. at 5-6.

MTA has maintained its ownership interests in the Line and has taken no affirmative steps to indicate an intent to abandon the Line. The State's declaration in officially-published documents, discussed above, that it acquired the Line at least in part for the express purpose of preserving it for the future restoration of rail service, and MTA's subsequent retention of its ownership interests, contravene an intent to abandon. As indicated by the ICC Report's review of the State's planning efforts during the 1970s, the State desired to preserve the Line for potential future rail service, and sought to do so by purchasing the Line after termination of service. *See ICC Report at 20402-06*. In 1982, the State followed through with its purchase of the Line at a substantial cost, and subsequently MTA has maintained its real property interest in the Line (as the successor agency to the State Railroad Administration) and control over the right-of-way. Although some factors which might be construed to indicate an intent to abandon, including removal and salvaging of track and lack of maintenance or weed control, are present, these factors are also equally consistent with an intent to effect mere termination of service, which does not automatically result in full abandonment of a line. *See Birt*, 90 F.3d at 586.

2. Revocation of the Exemption Granted in *Common Carrier Status* is not Necessary for the Board to Effect the Proposed Abandonment Exemption

The Board also directed MTA to address whether revocation of the exemption provided by *Common Carrier Status* “would be necessary prior to the Board determining whether to publish the requested Notice of Exemption under 49 C.F.R. Part 1152 Subpart F—Exempt Abandonments.” February 11th Decision, slip op. at 2.

MTA does not believe that partial revocation is necessary to pursue a railbanking proceeding for the Line because the applicable exemption under *Common Carrier Status* does not include an exemption from the STB’s abandonment requirements.

The exemption provided in *Common Carrier Status* addresses acquisition and establishes the modified certificate process. Typically, where a trail sponsor has sought to railbank a line subject to exempt acquisition and abandonment under *Common Carrier Status*, the termination of the modified certificate has served as the trigger for a potential trail sponsor to request a notice or certificate of interim trail use. *See, e.g., Maryland & Delaware R.R. Co. – Certificate of Interim Trail Use and Partial Termination of Modified Rail Certificate*, STB Docket No. FD 29830 (Service Date Nov. 5, 2010) (“*Maryland & Delaware*”). Here, although there has been no modified certificate issued for the Line, the Line remains subject to STB jurisdiction as a line approved for abandonment but not yet abandoned. Theoretically, given that no additional regulatory steps are *required* for MTA to abandon the Line, it is possible that the Board would accept an un-prompted request for interim trail use from a trail sponsor for the Line. However, because such a request would not provide an opportunity for MTA as owner of the Line to express its intent to abandon, here MTA has acted consistently with the railbanking rules at 49 C.F.R. § 1152.29 in order to maintain clarity as to the status of the Line.

In its February 11th Decision, the Board cited a decision issued the same date that MTA filed its Notice of Exemption in this proceeding. *See* February 11th Decision, slip op. at 2 (citing *Caldwell R.R. Comm'n – Exemption from 49 U.S.C. Subtitle IV*, FD 32659 (Sub-No. 1) (STB Served Nov. 26, 2014)). In *Caldwell*, the Caldwell Railroad Commission (“CRC”) sought a partial revocation of a prior exemption under different rules from ICC/STB procedures in order to railbank a portion of the line. The exemption at issue in *Caldwell* was broader than that granted to states in *Common Carrier Status*. Section 10502(d) of Title 49 of the U.S. Code, the provision under which CRC sought its exemption, provides that the “Board may revoke an exemption, to the extent it specifies, when it finds that application in whole or in part of a provision of this part to the person, class, or transportation is necessary to carry out the transportation policy of section 10101 of this title.” 49 U.S.C. § 10502(d).

CRC originally obtained an exemption from *all* of the provisions regulating the ownership of railroad lines provided under Subtitle IV of Title 49 of the U.S. Code. *See Caldwell County Economic Development Commission – Exemption from 49 U.S.C. Subtitle IV*, ICC Finance Docket No. 32659, slip op. at 9 (Service Date July 20, 1995). In contrast, the exemption provided under *Common Carrier Status* addressed acquisition by states of rail lines abandoned or approved for abandonment and established the modified certificate as an abbreviated mechanism for the start-up and termination of freight service. *Common Carrier Status* did not provide states with an exemption from the STB’s abandonment procedures, and no such exemption is found in the Board’s regulations. *See* 49 C.F.R. Part 1150, Subpart C. Instead, the ICC stated that “[w]e are exempting States from our regulatory requirements concerning *acquisition of lines not fully abandoned*.” 363 I.C.C. at 135 (emphasis added). The ICC also exempted operators “from filing start up and abandonment applications,” *id.* at 136, but

did not state anywhere that it was exempting states from abandonment requirements. The reason for this omission is likely that no abandonment exemption or authority is necessary—the lines subject to the regulation were by definition approved for abandonment by statute, making additional regulatory exemption unnecessary. *See Common Carrier Status*, 363 I.C.C. at 134-35 (“The scope of this exempted transaction is limited. Both exemptions will apply only to rail lines which have been approved for abandonment.”). The Line was clearly approved for abandonment pursuant to the requirements of the 3R Act but not fully abandoned, as discussed above. *See* 45 U.S.C. § 744(b)(1); FSP vol. I, p. 225.

With no abandonment exemption having been granted under *Common Carrier Status*, the only question is whether MTA may pursue an abandonment exemption for the purposes of allowing for railbanking. Because lines subject to state acquisition under *Common Carrier Status* may be railbanked (*see Maryland & Delaware*, slip op. at 2) and because the only established mechanism for instituting railbanking is through the abandonment or abandonment exemption process, seeking an abandonment exemption is consistent with the Board’s rules and with the policy underlying STB exemptions. Accordingly, there is no relief available with respect to abandonment if MTA were to seek partial revocation of the exemption because *Common Carrier Status* did not reach the abandonment requirements.

Furthermore, MTA believes that requiring revocation of one exemption in order to obtain another under abandonment procedures for the purposes of railbanking is an unnecessary process in contravention of the policy of minimizing federal regulation and providing expeditious regulatory decisions, as provided in 49 U.S.C. §§ 10101(2) and (15). Given the STB’s exemption authority, and the unique regulatory posture of lines subject to exemption under *Common Carrier Status* as having already been authorized for abandonment, it is appropriate to

expedite the railbanking process for these lines. If, however, the Board requires MTA to request partial revocation of one exemption in order to grant another that leaves MTA in substantially the same position, MTA would so request, based on the exemption policy goals discussed below.

A. National Rail Transportation Policy Supports MTA’s Requested Exemption, Whether It is Granted Through Revocation of the Current Exemption or in Accordance with MTA’s Pending Notice of Exemption

As discussed in *Caldwell*, the Board has discretion to revoke an exemption pursuant to 49 U.S.C. § 10502(d). *Caldwell*, slip op. at 1. In particular, the Board may revoke an exemption, in whole or in part, if it finds that regulation is necessary to carry out the rail transportation policy of 49 U.S.C. § 10101. *Id.* If the STB were to conclude that revocation of MTA’s exemption under *Common Carrier Status* is required, there are at least four rail transportation policy goals enumerated at 49 U.S.C. § 10101 that support a partial revocation of the exemption covering the Line for the purposes of initiating an abandonment and railbanking proceeding. They are:

- (2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;
- ...
- (4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;
- ...
- (7) to reduce regulatory barriers to entry into and exit from the industry;
- ...
- (15) to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part.

49 U.S.C. § 10101. Here, granting the abandonment exemption, whether through partial revocation of the exemption granted in *Common Carrier Status* or in accordance with MTA’s pending Notice of Exemption, will ensure the development and continuation of a sound rail transportation system by better preserving a railroad right-of-way that MTA has diligently sought to preserve since before it acquired the Line in 1982, in keeping with national rail transportation

policy § 10101(4) and consistent with both *Common Carrier Status* and the National Trails System Act. *See Common Carrier Status*, 363 I.C.C. at 136; 16 U.S.C. § 1247(d). Allowing for construction of a trail and co-location of transmission lines will serve to strengthen public and private investment in the right-of-way and better preserve and maintain it for potential future rail use. Railbanking will provide an explicitly articulated basis for preservation of the right-of-way, given the difficulty MTA has had in attracting a willing, viable railroad to operate on the Line under the STB's modified certificate procedures.

Allowing for railbanking will also maintain the low regulatory barriers to entry for any future carrier by more securely preserving the right-of-way, in keeping with §10101(7). Granting a new abandonment exemption in order to provide the procedural trigger for railbanking will also support the goals of expeditious regulatory decision-making and resolution of this proceeding, as provided in §§ 10101(2) and (15).⁴

Revocation of MTA's current exemption without issuing a corresponding equivalent exemption would not be supported by rail transportation policy. Such a revocation would add an additional barrier to the State's use of the property, contradicting the purposes of exemption under *Common Carrier Status*. Similarly, it would hinder the expeditious handling and resolution of the proceeding, and would cause uncertainty for other states seeking to protect rail lines owned pursuant to *Common Carrier Status*.

The ultimate purpose of MTA's Notice of Exempt Abandonment is to create a procedural opportunity for railbanking the Line. Interim trail use is only available through the STB's abandonment procedures. Although CRC's petition in *Caldwell* indicates that it sought revocation for the same reason, i.e., to initiate railbanking, this step appears unnecessary and

⁴ As noted previously, MTA believes that elimination of the need to revoke the exemption granted in *Common Carrier Status* is even more strongly supported by these rail transportation policy goals.

contrary to the intent of the filing. MTA does not believe revocation of the exemption granted in *Common Carrier Status* is necessary for it to pursue an exempt abandonment in order to establish railbanking, but if the STB believes it is warranted, MTA requests such revocation in the alternative. Under these circumstances, MTA also requests that the Board simultaneously establish the effectiveness of MTA's Notice of Exemption, as MTA has satisfied all of the requirements for that exemption.

3. The Proposed Electric Transmission Line will Provide a Public Benefit

Finally, the February 11th Decision orders MTA to “discuss the benefit to the public of its proposal to use the right-of-way to provide additional electrical access and capacity and how that proposal would be consistent with the Board’s precedent for granting an exemption from OFA and public use conditions.” February 11th Decision, slip op. at 2.

Pursuant to 49 U.S.C. § 10502, the Board must exempt a transaction from regulation when it finds that (1) regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101; and (2) either (a) the transaction is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Exemption from §§ 10904 and 10905 is appropriate here because requiring adherence to these statutes would frustrate the public benefit created by use of the Line for public trail and electrical transmission purposes. Where a right-of-way is needed for a valid public purpose and there is no overriding public need for continued rail service, the Board will grant exemptions from the requirements of 49 U.S.C. §§ 10904 and 10905. *See, e.g., Georgia Southwestern R.R., Inc. – Abandonment Exemption – In Barbour Cnty, AL*, STB Docket No. AB-1000X, slip op. at 4 (Service Date Apr. 25, 2007) (no shippers in over seven years; right-of-way to be used for public trail); *Norfolk S. Ry. Co. – Abandonment Exemption – In Norfolk and Va. Beach, VA*, STB

Docket No. AB-290 (Sub-No. 293X), slip op. at 6 (Service Date Nov. 6, 2007) (“*Virginia Beach*”) (no shippers for five years; right-of-way to be used for public transit purposes); *Union Pac. R.R. Co. – Abandonment Exemption – In Pima Cnty, AZ*, STB Docket No. AB-33 (Sub-No. 141X), slip op. at 3-4 (Service Date Feb. 16, 2000) (“*Pima County*”) (sole shipper relocated; OFA procedures would impede city’s plan to use the right-of-way for a frontage road required to expand a key interstate highway).⁵

MTA has been in extended discussions with local communities, who have expressed their desire for a public trail to be constructed on the Line. Somerset County has agreed to serve as trail sponsor for the Line. Furthermore, Delmarva Power, an electrical utility company, has approached the Maryland State Highway Administration with a proposal to use the Line as a utility corridor to improve capacity and reliability of its service on the Eastern Shore. Delmarva Power is proposing to build a new 69 kilovolt (“kV”) Transmission Line between its Kings Creek Substation near Princess Anne and its Crisfield Substation in addition to the existing 69 kV line in order to address reliability concerns in the area that are attributed to the operational constraints of a single line, and to address aging infrastructure. Currently, Delmarva’s Crisfield Substation, and Choptank Electric Cooperative’s (“CEC”) Westover and Kingston Substations are being served by a single 69 kV radial line originating from the Kings Creek Substation that is over 40 years old. This 69 kV transmission line is the only source for importing electricity into the region of Somerset County that these three substations serve. Delmarva serves 3,056 customers from Crisfield Substation, while CEC serves 832 customers from Kingston Substation

⁵ To be clear, MTA is not requesting that the Board authorize use of the right-of-way for electrical transmission purposes. The Board has previously acknowledged that public utility uses are appropriate in the context of railbanking at the discretion of the interim trail sponsor or owner of the line. *See, e.g., Kansas Eastern Railroad, Inc. – Abandonment Exemption – In Butler and Greenwood Counties, KS*, STB Docket No. AB-563 (Sub-No. 1X), slip op. at 3 (Service Date June 2, 2006) (ancillary agricultural and utility uses of a line proposed for railbanking held permissible).

and 158 customers from Westover Substation. Although diesel generators exist at the Crisfield Substation, they are not owned by Delmarva Power and they do not have the capacity to adequately support all of the electrical loads at all three substations during most conditions. Adding a new 69 kV line will provide an additional source of electric power and improve the reliability for all three substations in the event of a transmission line outage.

In addition to the aforementioned operational constraints, the age and condition of the existing 69 kV transmission line between Delmarva Power's Kings Creek and Crisfield Substations increases the probability that an unplanned transmission outage along this line could occur. The construction of the new line will not only provide an additional source of electric power to Crisfield, Westover, and Kingston Substations, but also enable Delmarva Power to take the existing line out of service for an extended duration in order to rebuild it to current standards with minimal impact to customers.

Building a transmission line within the Line's right-of-way will enhance electrical grid stability by providing redundancy in the system. Additionally, the public will benefit through a partnership with Delmarva Power, which has agreed to help maintain the corridor and fund certain trail improvements in return for non-exclusive use of the right-of-way in a manner consistent with trial use and potential future rail reactivation. Granting the exemption requested also will not result in the loss of rail service, as the Line has remained in an inactive state for many years, with no demand anticipated in the future.

In contrast, denying the exemption from the STB's OFA and public use provisions will impact Delmarva Power's construction timeline and jeopardize the proposed agreement between MTA, Delmarva Power, and Somerset County. MTA and Delmarva Power must reach an agreement regarding use of the right-of-way before Delmarva Power can commence the requisite

regulatory and permitting processes for construction of the transmission line. In order to complete the transaction, MTA and Delmarva Power agree that the STB's process for railbanking the Line must be complete. The Board has previously acknowledged the urgency of proposals for the public benefit in granting exemptions from OFA or public use conditions. *See Pima County*, slip op. at 4 (“Imposition of OFA procedures could delay the City’s land use plans and policies and development of the area.”).

The proposed transaction is of limited scope: it involves 14.57 miles of inactive, stub-ended rail line. The proposed transaction also will not result in an abuse of market power, since the Line is inactive and has not served any shippers for many years. As a result, the request for exemption from OFA and public use provisions is appropriate here.

REQUEST FOR EXPEDITED CONSIDERATION

MTA respectfully requests that the Board expedite its consideration of the requested exemption. Expedited consideration is appropriate here because delay may jeopardize the transaction, thereby preventing the resulting public benefits to accrue. *See Union Pac. R.R. Co. – Abandonment of Freight Easement – In Alameda Cnty, Cal.*, STB Docket No. AB 33 (Sub-No. 309X) and *Santa Clara Valley Transp. Auth. – Abandonment of Common Carrier Service – In Alameda Cnty, Cal.*, STB Docket No. AB 980 (Sub-No. 2X), slip op. at 5 (Service Date Feb. 26, 2013) (request for expedited consideration due to pending construction deadline granted). Furthermore, no shippers will be affected by the transaction, and there has been no opposition to the proposed abandonment and railbanking, despite a prolonged period for third parties to comment or voice their opposition. *See id.* As a result, MTA respectfully requests that the Board expedite its resolution of this matter.

CONCLUSION

In consideration of the foregoing additional information, MTA respectfully requests that the Board grant MTA's request for exempt abandonment in order to allow Somerset County to railbank the Line. If the Board finds it necessary to partially revoke its exemption for the Line in order to grant MTA's request for exempt abandonment, MTA requests both partial revocation and a new exemption in line with MTA's pending Notice of Exemption. In addition, MTA also respectfully requests that the Board exempt the proposed abandonment from the provisions of 49 U.S.C. § 10904 (OFA procedures) and 49 U.S.C. § 10905 (public use conditions). Finally, MTA requests that the Board expedite its issuance of a decision in this proceeding.

Respectfully submitted,



Charles A. Spitulnik
Allison I. Fultz
Christian L. Alexander
KAPLAN KIRSCH & ROCKWELL
1001 Connecticut Avenue N.W.
Suite 800
Washington, D.C. 20036
(202) 955-5600
csputulnik@kaplankirsch.com
afultz@kaplankirsch.com
calexander@kaplankirsch.com

Counsel for Maryland Transit
Administration

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