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

Re Offers of Financial Assistance – Advance Notice of Proposed Rulemaking –
Docket EP-729.

Dear Ms. Brown:

The following comments are submitted by the Rails-to-Trails Conservancy in response to the Advance Notice of Proposed Rulemaking (“ANPR”) issued in the above-referenced matter. This ANPR was intended to solicit comments regarding this Board’s implementation of 49 U.S.C. § 10904, governing Offers of Financial Assistance (“OFA’s”).

Interest of Rails to Trails Conservancy

Rails-to-Trails Conservancy (“RTC”) is a national nonprofit conservation organization founded in 1985. Headquartered in Washington, D.C., with four regional field offices located in California, Florida, Pennsylvania, and Ohio, RTC’s mission is to create a nationwide network of trails from former rail lines and connecting corridors to build healthier places for healthier people.

RTC serves as the national voice for more than 160,000 members and supporters, 30,000 miles of rail-trails and multi-use trails, and more than 8,000 miles of potential trails waiting to be built, with a goal of creating more walkable, bikeable communities in America. Since 1986, RTC has worked from coast to coast, supporting the development of thousands of miles of rail-trails – in every state – for millions to explore and enjoy, creating connections between towns and suburbs, linking communities along vibrant corridors in much the same way as the railroads did in their heyday.

RTC’s concerns about the misuse of the OFA process date back to 1994, when RTC opposed an OFA of \$10 submitted by an entity called “the Seattle, Lake Shore, and Eastern Railroad,”

which was formed by the National Association of Reversionary Property Owners (“NARPO”) – an ideologically driven anti-trails organization -- to thwart plans by the City of Seattle to railbank a 3.57 mile rail segment adjoining the Burke-Gilman Trail, in Seattle, Washington. Burlington Northern Railroad -- Exemption -- King County, Washington, AB-6 (Sub-no. 357X), served April 22, 1994. In 1996, in its comments to this Board in Ex Parte 537, concerning proposed rule changes to implement the Interstate Commerce Commission Termination Act, RTC urged this Board develop criteria that would prevent the abuse of the OFA process by anti-trail groups or salvage companies posing as railroad operators. See Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 49 U.S.C. 10903, STB Ex Parte No. 537, served Dec. 24, 1996. RTC was also a party to the proceeding, cited in the ANPR, in which the STB rejected an OFA tendered by an entity formed by adjacent property owners to thwart King County, Washington’s plans to convert the former Lake Sammamish railroad corridor into a trail, See Redmond-Issaquah Railroad Preservation Ass’n [RIRPA] v. STB, 223 F.3d 1057 (9th Cir.2000).

Presently, RTC is a party to the long-running dispute over the Harsimus Branch in Jersey City, NJ, in which an abandonment proceeding was belatedly initiated by Conrail years after its unlawful *de facto* abandonment of the line following litigation brought by RTC and Jersey City, among others, over whether the corridor was subject to STB abandonment jurisdiction. See City of Jersey City v. Conrail, 968 F.Supp.2d 302 (D.D.C. Sept. 30, 2013), sum. aff’d, No. 13-7175 (D.C. Cir. Feb. 19, 2014). Jersey City’s plans to preserve this historic line for continued public use are and have been delayed for nearly a decade by the litigation tactics of a private developer who seeks to destroy the property, and a rail operator who has now tendered an OFA to thwart the City’s plans. See Consolidated Rail Corp. – Ab. Ex. – in Hudson County, NJ, AB 167-1190X.

**The OFA Process Should Consider the Public Need and Interest
in Trails and Greenway Projects In Weighing Evidence
of Shipper Need for Rail Service**

The OFA process was intended by Congress to facilitate, where possible, the continued operation of railroad lines proposed for abandonment. As a result, as one court pointed out, “the STB has been consistent in continuing to require that an OFA ‘be for continued rail service on a line that otherwise would be abandoned and that the offeror be financially responsible.’” RIRPA v. STB, 223 F.3d at 1062 (citations omitted). Numerous past STB decisions have rejected OFAs where the offeror lacked a demonstrated intent and financial ability to provide for continued rail service.

At the same time, past STB decisions also support granting exemptions from the OFA process or dismissing OFAs where the record demonstrates that the right-of-way is needed for a valid public purpose. Past decisions by the Board, for example, have recognized and granted

exemptions from the OFA provisions where the asserted continued public need for freight rail service was outweighed by the demonstrated public need to use the right of way for a light rail commuter passenger project. Norfolk S. Ry.—Aban. Exemption—in Norfolk and Virginia Beach, Va., AB 290 (Sub-No. 293X) (STB served Nov. 6, 2007), pet. for review dismissed, sub nom. Riffin v. STB, No. 07-1483 (D.C. Cir. Apr. 22, 2009); Consolidated Rail Corp.—Aban. Exemption—In Hudson Cnty., N.J., AB 167 (Sub-No. 1190X) (STB served May 17, 2010), aff'd mem., Riffin v. STB, No. 10-1150 (D.C. Cir. May 27, 2011).

In another case, the Board recognized the appropriateness of an OFA exemption where the public purpose of replacing a deteriorating, overburdened highway outweighed the commercial need for rail service. BNSF Ry.—Pet. for Decl. Order, FD 35164, et al., slip op. at 9-10 (STB served May 20, 2009), pet. for review denied in relevant part, dismissed in part, sub nom. Kessler v. STB, No. 09-1161 (D.C. Cir. Mar. 15, 2011). This Board's decisions also suggest that the public need for access to public schools should be weighed against commercial need in evaluating OFAs. CSX Transp. – Ab. Ex. – in Glynn County, GA, AB 55-687, served July 9, 2009.

However, this balancing does not appear to be undertaken where the public project involves a planned trail or greenway. Rather, past decisions by this Board appear to accord trail projects less protection from OFAs, and have declined to exempt proceedings from the OFA process notwithstanding comparably weak demonstration of shipper need. For example, in 1411 Corp.—Abandonment Exemption --in Lancaster County, PA, STB Docket No. AB-581X, served Sept. 6, 2001, aff'd, Borough of Columbia v. STB, 342 F.3d 222 (3d Cir. 2003), this Board denied a motion for an OFA exemption sought by Shawnee Run Greenway, Inc. (Shawnee), which had acquired an option to buy the corridor for use as a trail, and allowed a salvage yard operator to file an OFA. In that context, the STB failed to weigh the need for continued rail service proffered by this single business against the public's interest in a using the corridor as a trail or greenway.

RTC concurs with the comments filed by Jersey City that this Board should give appropriate weight to demonstrated interest by qualified parties to preserve and use the corridor for a planned trail and greenway when evaluating the commercial need for rail service in the context of OFAs. This authority is well within the discretion conferred on this Board by Congress to make a determination “that one or more financially responsible persons (including a governmental authority) have offered financial assistance.” 49 U.S.C. § 10904(d)(1). As discussed below, trails and greenways are valuable public infrastructure projects on par with highways and commuter transit or light rail projects, and should be considered as such when balancing these projects against the evidence of commercial need for continued rail service.

In addition, RTC shares Jersey City's concern that the unlawful sale and *de facto* abandonment of STB-regulated rail lines undercuts the interests of the public, including shippers,

railroad operators, and other public entities supporting valuable alternative public uses of railroad corridors, as occurred in See Consolidated Rail Corp. – Ab. Ex. – in Hudson County, NJ, AB 167-1190X, supra. While the illegal action in that case contravenes this Board’s policy on the Consummation of Rail Line Abandonments that Are Subject to Historic Preservation and Other Environmental Conditions, Ex Parte 678, served April 23, 2008, among other policies, this Board has yet apply these policies in a manner that appropriately addresses and remedies this serious problem.

Trail and Greenways Are Valuable Public Infrastructure Projects That Enhance Public Transportation Systems and Improve Quality of Life for the Communities That They Serve

It should now be well accepted that trails and greenways are valuable public infrastructure projects that provide economic, quality of life, health, accessibility, and mobility benefits to the communities in which they are located. According to the database maintained by RTC, today, more than 22,000 miles of rail-trails grace our nation, and more than 8,000 miles of potential rail-trails are waiting to be built. The vast majority of these trails are well-loved and heavily used. Running through urban, suburban and rural landscapes, these essential recreation and transportation corridors provide safe access to jobs, schools and cultural centers, while improving the health of communities, protecting greenspace and boosting local economies.

As trails have become ubiquitous and trail use has become a regular part of life for millions of Americans, their many benefits have become widely recognized.¹ Trails encourage recreation, increase mobility, catalyze economic development, protect open space, enhance quality of life, spark tourism and improve public health. Trail development is a single strategy that can produce these multiple benefits by improving the economic, social and environmental health of a place and the personal health of its people. Trails help to create healthier places for healthier people.

Since the passage of the Intermodal Surface Transportation Efficiency Act in 1991, pedestrian and bicycle facilities, including trails and rail-trails, have been eligible for federal-aid highway funding from the Federal Highway Administration as transportation facilities. 23 U.S.C. 133(h). The most recent transportation law – the Fixing America’s Surface Transportation Act” or the “FAST Act” – maintains this eligibility and also includes a set-aside for the State’s Recreational Trails Program (“RTP”). 23 U.S.C. §§ 133(h)(5) and (6). As a result

¹ <http://www.ncsl.org/documents/transportation/encouragingbicyclingwalking.pdf>

of these laws and other policies, in the last 25 years, America has invested more than four billion dollars to create thousands of miles of trails.²

There is compelling evidence that trails and greenways provide far-reaching benefits to communities, including public health, economic and transportation benefits, and even the effect on community pride and identity -- benefits that are quite significant given the minimal public investment involved compared to other undertakings with the same community goals.³

First, trails and greenways create healthy recreation and transportation opportunities by providing attractive, safe, accessible and low- or no-cost places to cycle, walk, hike, jog or skate. Trails help people of all ages incorporate exercise into their daily routines by connecting them with places they want or need to go.⁴ Studies have shown that communities that encourage physical activity though public investment in trails see a significant positive effect on public health and wellness.⁵

In addition to providing a safe place for people to enjoy recreational activities, greenways and trails often function as viable transportation corridors. Trails can be a crucial element to a seamless urban or regional multi-modal transportation system. Many areas of the country incorporate trails and similar facilities into their transit plans, relying upon trail facilities to "feed" people in to and out of transit stations in a safe and efficient manner. The ability to avoid congested streets and highways, and travel through natural areas on foot or by non-motorized means, is a large factor in a community's "livability."⁶

Linear greenspaces, including trails and greenways, have all the traditional conservation benefits of preserving green space, but also have additional benefits as a result of their linear

² http://trade.railstotrails.org/action/document/download?document_id=659. (July 2015. Transportation Alternatives Spending Report: FY 1992 through FY 2014. Washington, DC: Transportation Alternatives Data Exchange at the Rails-to-Trails Conservancy.)

³ Johanna Laine et al. (2014), "Cost-Effectiveness of Population-Level Physical Activity Interventions: A Systematic Review," *American Journal of Health Promotion* 29(2): 71-80.

⁴ http://activelivingresearch.org/files/ALR_Brief_PowerofTrails_0.pdf. (studies have shown that "43% of people with safe places to walk within 10 minutes of home meet recommended activity levels, while just 27% of those without safe places to walk are active enough.")

⁵ Lindsey, Greg et al. 2006. Neighborhood Correlates of Urban Trail Use. *Journal of Physical Activity and Health*. 3, S1:S139- S157 (People living within a closer physical proximity of trails have an increased likelihood of being active)

⁶ STPP. 2003b. The \$300 Billion Question: Are We Buying a Better Transportation System? http://transact.org/wp-content/uploads/2014/04/The_300_Billion_Question.pdf

nature. As tools for ecology and conservation, greenways and trails help preserve important natural landscapes, provide needed links between fragmented habitats and offer tremendous opportunities for protecting plant and animal species. They also can be useful tools for wetland preservation and the improvement of air and water quality. In addition, they can allow humans to experience nature with minimal environmental impact.

Countless communities across America have experienced an economic revitalization due in whole or in part to trails and greenways. The economic effects of trails and greenways include trail-related businesses as well as affording a desirable public amenity that makes an area attractive to new businesses. In national surveys, consumers have repeatedly chosen trails and walkability as desired neighborhood amenities, boosting local real estate values.⁷ Trails also have become sources of community identity and pride. These effects are magnified when communities use trails and greenways to highlight and provide access to historic and cultural resources. Many trails and greenways themselves preserve historically significant transportation corridors.

In sum, trails are essential elements of any active transportation system. Where trails have been prioritized, surrounding communities have benefited greatly from economic, quality of life, health, accessibility, and mobility improvements. The importance of trails as public infrastructure projects should be recognized by this Board in abandonment proceedings, particularly when confronted with the possibility that these public projects could be thwarted by an OFA that is tenuous, unsupported or that fails to make a strong case of commercial need.

Please feel free to contact me if you would like any additional information.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'A. Ferster', with a stylized flourish at the end.

Andrea C. Ferster, General Counsel
Rails-to-Trails Conservancy

⁷ <http://www.realtor.org/reports/nar-2015-community-preference-survey>