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May 19, 2016  
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BEFORE THE SURFACE TRANSPORTATION BOARD

THE ATLANTA DEVELOPMENT  
AUTHORITY D/B/A INVEST ATLANTA  
and ATLANTA BELTLINE, INC.

FINANCE DOCKET NO. 35991

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RESPONSE OF INTERESTED PARTIES IN OPPOSITION TO  
VERIFIED PETITION FOR A DECLARATORY ORDER AND  
REQUEST FOR EXPEDITED CONSIDERATION

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Counsel for Interested Parties under  
5 U.S.C. § 554(c)(1)

Dated: May 19, 2016

BEFORE THE SURFACE TRANSPORTATION BOARD

THE ATLANTA DEVELOPMENT  
AUTHORITY D/B/A INVEST ATLANTA  
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RESPONSE OF INTERESTED PARTIES IN OPPOSITION TO  
SECOND SUPPLEMENT TO THE VERIFIED PETITION FOR A DECLARATORY  
ORDER AND REQUEST FOR EXPEDITED CONSIDERATION

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Pursuant to 5 U.S.C. § 554(c)(1), CYNTHIA VICK; GORDON B. RAGAN, JR.; JANE G. POWELL; LORAN M. POWELL; ELIZABETH A. ALBERT; MICHAEL LOVING; DAWN SMITH; RODERICK SMITH; ROBIN TUBBS; JASON GODWIN; STEVEN R. GREEN; STACEY E. CLAY; SANDY FLORES; CHRISTOPHER DRAPER; DENNIS SABO, JR.; LAURA M. SHEPARD; ANGELA FOX; HANNIBAL HEREDIA; PATRICIA S. JONES; JAY JONES; DONNA M. FITZMAURICE; PATRICK J. FITZMAURICE; SAMANTHA C. BONTRAGER; DEWAYNE M. BONTRAGER; MOLLY TAYLOR; JOSH B. TAYLOR; THOMAS R. MARKOVIC; MEGAN COCHARD; MATTHEW R. COCHARD; AMANDA K. SAPRA; NEIL K. SAPRA; MARGARET N. CORBETT; NICOLAS ALBANO; ERIC BYMASTER; FULTON D. LEWIS, III; S. NEIL RHONEY; TOM PHILPOT; ANNA L. LENTZ; KURT LENTZ; LEE S. PRINCE; LOUISE P. MULHERIN; and, JEFF CULLEY (collectively, the “Flagler Owners”)<sup>1</sup> file and submit this response, as interested parties, in opposition to the *Second Supplement to the Verified Petition for a Declaratory Order* (the “Second Supplement”) filed by The Atlanta Development Authority d/b/a Invest Atlanta (the “Authority”) and Atlanta BeltLine, Inc. (“ABI”) on May 13, 2016, respectfully requesting that

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<sup>1</sup> Mary Lou Saye, Earl Saye, and Alan B. Patricio no longer join in this matter as interested parties under 5 U.S.C. § 554(c)(1) and hereby withdraw their entrance in this matter.

the Surface Transportation Board (the “Board”) deny the Second Supplement and the relief sought therein.

In the Second Supplement, the Authority and ABI renew their request for expedited consideration of *Verified Petition for a Declaratory Order Expedited Consideration Requested* (the “Petition”) based on two conclusions: (1) the Board has all relevant information necessary to render a decision on the Petition, and (2) a decision by the Board will aid the resolution action filed by the Authority and ABI in the Superior Court of Fulton County styled The Atlanta Development Authority d/b/a Invest Atlanta and Atlanta Beltline, Inc., Civil Action File Number 2016CV273389 (the “Superior Court Action”).<sup>2</sup> Such conclusions completely fail to justify the unnecessarily expeditious review of this docket at the expense of discovery and oral argument that remain necessary to address the lack of evidence critical to the resolution of the issues before this Board and the objections raised by the Flagler Owners.

**I. Expedited review is inappropriate as the record is incomplete requiring the Board to grant discovery and oral argument.**

In support of their first conclusion, the Authority and ABI assert that “all relevant documents are in the record, and accordingly no discovery or oral testimony is necessary.”<sup>3</sup> The “record” consists solely of the pleadings and exhibits thereto filed to date with the Board. In addition to the pleadings, the Authority and ABI assert that Norfolk Southern Railway Company’s (“Norfolk Southern”) letter filed in this docket on March 14, 2016 (the “Norfolk Southern Letter”) is dispositive of this matter, as Norfolk Southern purportedly “confirm[ed] that it retains its common carrier obligation” of the line of railroad known as the Northeast Quadrant located in Fulton County, Georgia (the “Northeast Quadrant Line”).<sup>4</sup> These arguments are

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<sup>2</sup> See, the Second Supplement.

<sup>3</sup> See, Id. at 2.

<sup>4</sup> See, Id. at 2.

completely disingenuous, the record is not complete, and discovery and oral argument are necessary to ensure a complete understanding of the underlying facts of this matter.

The record before the Board in this action with regard to the purported conveyance of the Northeast Quadrant Line from rail carrier Norfolk Southern Railway Company (“Norfolk Southern”) to non-rail carriers Ansley North BeltLine, LLC; Ansley South BeltLine, LLC; Piedmont BeltLine, LLC; North Avenue BeltLine, LLC; Corridor Beltline, LLC; and, Corridor Edgewood, LLC (collectively, the “Mason Entities”), is strictly limited to the factual averments set forth in the Petition and the purported vesting deeds of the Mason Entities.<sup>5</sup> Such limited and unverified averments and documents are not sufficient to allow the Board a full and complete review of facts and circumstances surrounding the transaction from Norfolk Southern to the Mason Entities. Simply, the record is completely void of credible evidence that demonstrates the transaction between Norfolk Southern to the Mason Entities is exempt from 49 U.S.C. § 10901(a)(4) by virtue of State of Maine, Department of Transportation – Acquisition and Operation Exemption – Maine Central Railroad Company, 8 I.C.C.2d 835 (1991), and its progeny.

The veracity of the factual averments set forth in the Petition should be called into question due to the fact that the Petition is only verified by Paul F. Morris as President and Chief Executive Officer of ABI as the “Special Agent” of the Authority. It is undisputed that neither the Authority, nor ABI were parties to the transaction between Norfolk Southern and the Mason Entities. Furthermore, Mr. Morris did not join ABI until July, 2013 – eight years after the transaction that is at issue in this matter.<sup>6</sup> It is not credible to assert that Mr. Morris possesses the

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<sup>5</sup> See, the Petition, see also, *Response of Interested Parties in Opposition to Verified Petition for a Declaratory Order and Request for Expedited Consideration* (the “Response”), see also, *First Supplement to the Verified Petition for a Declaratory Order* (the “First Supplement”), see also, the Second Supplement.

<sup>6</sup> <http://beltline.org/about/the-atlanta-beltline-people/abi-staff-and-board/>

personal knowledge to affirm the factual averments set forth in the Petition, as the Authority and ABI served absolutely no role in the transaction between Norfolk Southern and the Mason Entities for the Northeast Quadrant Line.<sup>7</sup>

The record simply does not include any documentation reflecting the underlying agreements between Norfolk Southern and Mason Entities. Specifically, the record does not include any purchase and sale agreements, amendments to such agreements, correspondence offering context to the transaction between Norfolk Southern and the Mason Entities, or the deed of original conveyance from the United States Congress of the Northeast Quadrant Line before this Board.<sup>8</sup> Furthermore, there is no documentation in the record related to the post-conveyance interaction between Norfolk Southern and the Mason Entities to indicate whether Norfolk Southern “retained (1) a permanent, irrevocable, and exclusive freight rail operating easement, and (2) sufficient interest and control over the [rail line] to permit it to carry out its common carrier obligation.” New Jersey Transit Corporation – Acquisition Exemption – Norfolk Southern Railway Company, 2013 WL 1247853, 3 (S.T.B.) (2013).

This Board observed in Central Puget Sound Regional Transit Authority – Acquisition Exemption – Certain Assets of City of Tacoma in Pierce County, Washington, 2015 WL 480409, 2-3 (S.T.B.) (2015), that an examination of these relevant agreements is necessary to “determine whether there are any impediments to the continuation of common carrier freight service by [the rail carrier] on the [rail line] being transferred to [the non-rail carrier].” As observed in State of Maine, the Board’s analysis of the transaction of the Northeast Quadrant Line from Norfolk Southern to the Mason Entities must be fact specific and include a close examination of particular facts and circumstances surrounding the conveyance. See, State of Maine, 8 I.C.C.2d

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<sup>7</sup> See, the Petition.

<sup>8</sup> See, Id.

at 838. Accordingly, discovery and oral argument are necessary to ensure a complete understanding of the underlying facts of this matter prior to rendering a decision upon the issues before this Board.

Second, the assertion that the Norfolk Southern Letter purportedly confirmed that it retained its common carrier obligations completely fails to apply any critical thought to the merits of the arguments asserted by the Flagler Owners in the Response.<sup>9</sup> As the record is completely void of any purchase and sale agreements, amendments to such agreements, correspondence that offers context to the transaction between Norfolk Southern and the Mason Entities, or the deed of original conveyance from the United States Congress of the Northeast Quadrant Line, the Norfolk Southern Letter is not a substitute for conducting discovery in this matter. Moreover, such argument asks this Board to shirk its duties and render a decision based merely upon the Norfolk Southern Letter without more, and completely ignores the lack of evidence critical to the consideration and resolution of the issue before this Board. Accordingly, the Board should deny the Second Supplement's renewed request for expedited review of the Petition, as discovery and oral argument are necessary to ensure a complete understanding of the underlying facts of this matter.

As such, this Board should comply with State of Maine and allow discovery of the "facts and circumstances" of this case in order to best determine whether the transaction of the Northeast Quadrant Line from Norfolk Southern to the Mason Entities is exempt from 49 U.S.C. § 10901(a)(4) by virtue of State of Maine. See, State of Maine, 8 I.C.C.2d

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<sup>9</sup> See, the Norfolk Southern Letter.

**II. The pending Superior Court Action is irrelevant to the consideration of expedited review as the Board, not the Fulton County Superior Court, has jurisdiction over this matter.**

In the Second Supplement, the Authority and ABI conclude that a decision by this Board shall be dispositive of the issues presented in the Superior Court Action.<sup>10</sup> However, such conclusion is completely irrelevant, as it fails to note that the Fulton County Superior Court lacks jurisdiction to render a decision on the merits of the issues before it. Simply, this argument is a veiled attempt to circumvent the discovery process and obfuscate the merits of the issues presented before the Board in this action.

On May 6, 2016, the Flagler Owners served the Authority and ABI with a Notice of Abusive Litigation Letter detailing the STB's exclusive jurisdiction over this matter (the "Abusive Litigation Letter").<sup>11</sup> In the Abusive Litigation Letter, the Flagler Owners pointed to the United States District Court of the Eastern District of California in Yreka Western R. Co. v. Tavares, WL 2116500 (2012), which concluded that the STB possesses exclusive jurisdiction to determine the application of 49 U.S.C. § 10901 of the United States Code:

The jurisdiction of the [STB] over transportation by rail carriers, including the abandonment of rail facilities, is exclusive, and remedies under the Interstate Commerce Commission Termination Act, 49 U.S.C. §§ 10501-11908, are extensive and preempt remedies provided under federal or state law.

See, Yreka Western R. Co. v. Tavares, WL 2116500 at Page 3 (2012).<sup>12</sup>

In Yreka, the Court further noted that "[i]t is difficult to imagine a broader statement of Congress' intent to preempt state regulatory authority over railroad operations' than that contained in 49 U.S.C. § 10501 (b))." See, Id. at 3 (quoting, CSX Transp., Inc. v. Ga. Pub. Serv. Comm'n, 944 F.Supp. 1573 1581 (N.D.Ga. 1996)). Additionally, the Court conceded that

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<sup>10</sup> See, the Second Supplement.

<sup>11</sup> See, the Abusive Litigation Letter attached hereto as "Exhibit A."

<sup>12</sup> See, Id. at 2.

“[g]iven the STB’s vast and unique experience in dealing with such matters, it is far better suited than any court to uniformly apply national rail policy.” While the Court found that it lacked the jurisdiction to reach an outcome dispositive of the issues presented, it expressed that the “defendants could file a declaratory action in front of the STB” to determine the application of 49 U.S.C. § 10901 of the United States Code. See, Id. at 5.

Clearly, the Authority and ABI have already filed with the Board such an action as recommended by the Court in Yreka, and although framed as an action to quiet title, the Superior Court Action asks the Fulton County Superior Court to decide the exact issues pending before this Board.<sup>13</sup> See, Id. Accordingly, the Board and not the Fulton County Superior Court has jurisdiction over these proceedings. As such, the Board owes no deference to or consideration of the Superior Court Action and should instead complete a close examination of particular facts and circumstances of the subject conveyance from Norfolk Southern to the Mason Entities as required under State of Maine. See, State of Maine, 8 I.C.C.2d

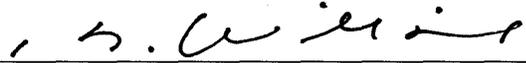
As the Fulton County Superior Court is without jurisdiction to reach the merits of the Superior Court Action, the argument that expedited review is necessary to resolve those issues before it is purely an exercise in gamesmanship. Accordingly, such argument completely fails to justify the unnecessarily expeditious review of this docket at the expense of discovery and oral argument to address the lack of evidence critical to the consideration and resolution of the issues before this Board.

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<sup>13</sup> See, the Petition, see also, the Second Supplement.

This the 19<sup>th</sup> day of May, 2016.

WILLIAMS TEUSINK, LLC



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BEFORE THE SURFACE TRANSPORTATION BOARD

THE ATLANTA DEVELOPMENT  
AUTHORITY D/B/A INVEST ATLANTA  
and ATLANTA BELTLINE, INC.

FINANCE DOCKET NO. 35991

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CERTIFICATE OF SERVICE

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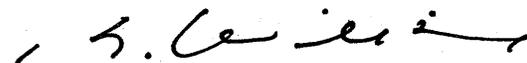
This is to certify that I have this day served counsel in the foregoing matter with a copy of the foregoing by depositing a copy of same in the United States Mail in a properly addressed envelope with adequate postage thereon, as follows:

Charles A. Spitulnik, Esq.  
Allison I. Fultz, Esq.  
Steven L. Osit, Esq.  
KAPLAN KIRSCH & ROCKWELL LLP  
1001 Connecticut Avenue, NW, Suite 800  
Washington, DC 20036

Maquiling Parkerson  
Three Commercial Place  
Norfolk, VA 23510

This the 19<sup>th</sup> day of May, 2016.

WILLIAMS TEUSINK, LLC



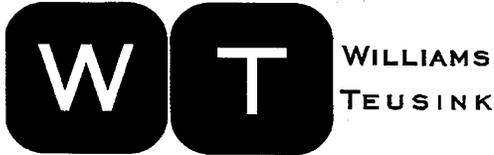
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# **EXHIBIT A**



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May 6, 2016

*Sent via Regular Mail and Certified Mail, Return Receipt Requested*

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Re: The Atlanta Development Authority d/b/a Invest Atlanta and Atlanta Beltline, Inc.  
v. Gordon Ragan, et. al.  
Superior Court of Fulton County, Georgia  
Civil Action File No. 2016CV273389

**Notice of Claims for Attorney's Fees and Expenses of Litigation for Bad Faith, Stubborn Litigiousness, and Abusive Litigation pursuant to O.C.G.A. §§ 9-15-14 and 51-7-81**

Dear Mr. Alpert and Mr. Burke:

As you know, this firm represents the certain named defendants identified in the *Entry of Appearance for Certain Defendants* filed on April 28, 2016 in the above-referenced action.

This instant action filed in the Superior Court of Fulton County, Georgia (the "Superior Court Action") is directly related to and intertwined with The Atlanta Development Authority d/b/a Invest Atlanta and Atlanta Beltline, Inc., The Surface Transportation Board, Finance Docket No. 35991, filed on January 8, 2016 (the "STB Action"). For your reference, I enclose a copy of the *Verified Petition for Declaratory Order* filed by your clients that initiated the STB Action. I also enclose for your reference our *Response of Interested Parties in Opposition to Verified Petition for a Declaratory Order and Request for Expedited Consideration*, which we filed on January 26, 2016. The STB Action remains pending before the Surface Transportation Board (the "STB").

In the STB Action, your clients seek a declaratory order from the STB that the initial conveyance of the subject rail corridor from rail carrier Norfolk Southern Railway Company ("Norfolk Southern") to The Atlanta Development Authority d/b/a Invest Atlanta's predecessor-in-title was exempt from 49 U.S.C. § 10901(a)(4) of the United States Code by virtue of State of Maine, Department of Transportation – Acquisition and Operation Exemption – Maine Central Railroad Company, 8 I.C.C.2d 835 (1991), and its progeny. See, STB Finance Docket No. 35991. The STB Action and the Superior Court Action both concern this same subject rail

corridor. The ultimate issue presented in the STB Action is who owns that rail corridor – your clients or mine.

However, you and your clients now frame ownership of the subject rail corridor as a claim for quiet title in the Superior Court Action. Yet the claims presented in the Superior Court Action simply seek the resolution of the exact issue currently pending in the STB Action – who owns the subject rail corridor – your clients or mine. As such, the STB and not the Fulton County Superior Court has exclusive jurisdiction over this matter.

For your reference, I enclose a copy of Yreka Western R. Co. v. Tavares, WL 2116500 (2012), in which the parties sought to resolve whether the plaintiff had properly abandoned a railroad line, and additionally, whether the proposed sale of that railroad line to a non-rail carrier required the approval of the STB pursuant to 49 U.S.C. § 10901 of the United States Code. The United States District Court of the Eastern District of California in Yreka concluded that the STB possesses exclusive jurisdiction to determine the application of 49 U.S.C. § 10901 of the United States Code:

The jurisdiction of the [STB] over transportation by rail carriers, including the abandonment of rail facilities, is exclusive, and remedies under the Interstate Commerce Commission Termination Act, 49 U.S.C. §§ 10501-11908, are extensive and preempt remedies provided under federal or state law.

See, Yreka Western R. Co. v. Tavares, WL 2116500 at Page 3 (2012). The Court further noted that “[i]t is difficult to imagine a broader statement of Congress’ intent to preempt state regulatory authority over railroad operations’ than that contained in 49 U.S.C. § 10501 (b).” See, Id. at 3 (quoting, CSX Transp., Inc. v. Ga. Pub. Serv. Comm’n, 944 F.Supp. 1573 1581 (N.D.Ga. 1996)).

In support of this conclusion, the Court in Yreka relied upon the analysis of the STB in State of Maine, Department of Transportation – Acquisition and Operation Exemption – Maine Central Railroad Company, 8 I.C.C.2d 835 (1991), and its progeny for guidance related to the STB’s approval for the sale of railroad lines to non-rail carriers pursuant to 49 U.S.C. § 10901 of the United States Code. The Court noted that “[d]efendants have pointed to no case where a court, rather than the STB, was the first to decide whether an acquisition by a non-railroad carrier would interfere with a common carrier’s ability to provide rail services over the line.” See, Id. at 5. The Court noted that “[g]iven the STB’s vast and unique experience in dealing with such matters, it is far better suited than any court to uniformly apply national rail policy.” While the Court found that it lacked the jurisdiction to reach an outcome dispositive of the issues presented, it expressed that the “defendants could file a declaratory action in front of the STB” to determine the application of 49 U.S.C. § 10901 of the United States Code. Id. at 5.

The Superior Court Action filed by you and your clients concerns the exact fact pattern and issue presented in Yreka. See, Id. Here, your clients have already filed the STB Action petitioning the STB for a declaratory order to determine whether they own the subject rail corridor - the same dirt at issue in the Superior Court Action. As Yreka clearly establishes, the

STB has the exclusive and plenary authority to determine whether Norfolk Southern conformed to those procedures required by the STB under federal law and accordingly who owns the subject rail corridor. As such, the STB and not Fulton County Superior Court has jurisdiction in the above-referenced action. See, Yreka Western R. Co., WL 2116500.

Accordingly, the Superior Court Action is preempted by the STB Action and lacks any substantial justification under fact or law, constitutes abusive litigation with malice, and is without substantial justification. In light of the pending STB Action and jurisdiction of the STB, it is clear that this action against my clients is intended solely to harass, annoy, and intimidate them into an unwarranted settlement. It is more than obvious that your clients chose to file the Superior Court Action in bad faith given the pending STB Action. As such, the Superior Court Action constitutes stubborn litigiousness.

This correspondence shall serve as official notice that my clients will seek claims for attorney's fees and expenses under O.C.G.A. §§ 9-15-14 and 51-7-81 against your clients, your firm, and you personally, including, but not limited to filing a lawsuit and motion for all fees and costs incurred if we are forced to defend against this frivolous lawsuit. I urge you and your clients to voluntarily withdraw and dismiss the Superior Court Action in order to avoid incurring penalties and liability for my clients' attorney's fees and expenses.

If the Superior Court Action is not dismissed within thirty (30) days receipt of this notice, my clients will pursue all remedies available under O.C.G.A. §§ 9-15-14 and 51-7-81, including, but not limited to commencing a separate lawsuit for abusive litigation and/or a motion seeking all attorney's fees and expenses incurred in the defense of this lawsuit.

Sincerely,

  
R. Kyle Williams

Encl.

RKW/ndb

cc: Patrick Fitzmaurice  
Matthew Cochard