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ENTERED
Office of Proceedings
November 25, 2013
Part of the Public Record

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Sender's E-Mail: jbb@blackburncarter.com

November 25, 2013

Via U.S. First Class Mail and Email

Jeremy M. Berman
Union Pacific Railroad Company
1400 Douglas Street, Stop 1580
Omaha, Nebraska 68179

RE: STB Finance Docket No. 35781; Brazos River Bottom Alliance – Petition for
Declaratory Order – In Robertson County, Texas

Dear Mr. Berman:

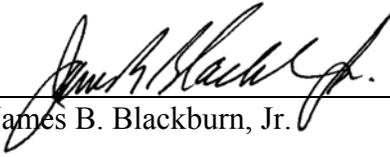
Enclosed please find a copy of BRAZOS RIVER BOTTOM ALLIANCE'S MOTION
TO COMPEL DISCOVERY FROM UNION PACIFIC RAILROAD COMPANY in connection
with the above styled/captioned matter.

Should you have any questions please contact my office at (713) 524-1012.

Sincerely,

BLACKBURN CARTER, P.C.

by


James B. Blackburn, Jr.

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35781

BRAZOS RIVER BOTTOM ALLIANCE – PETITION FOR DECLARATORY ORDER – IN
ROBERTSON COUNTY, TX

**BRAZOS RIVER BOTTOM ALLIANCE’S MOTION TO COMPEL DISCOVERY
FROM UNION PACIFIC RAILROAD COMPANY**

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BEFORE THE SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35781

BRAZOS RIVER BOTTOM ALLIANCE – PETITION FOR DECLARATORY ORDER – IN
ROBERTSON COUNTY, TX

MOTION TO COMPEL UNION PACIFIC RAILROAD COMPANY

I. BACKGROUND

On October 24, 2013, the Brazos River Bottom Alliance (“BRBA”) filed a Petition for Declaratory Order asking the Surface Transportation Board (“STB” or “Board”) to institute a declaratory proceeding in order to determine whether Union Pacific Railroad Company (“UPR”) must obtain Board approval pursuant to 49 U.S.C. § 10901(a) to construct new lines in Robertson County, Texas. UPR proposes to build new rail lines in Robertson County, Texas, in the heart of some of Texas’s most productive agricultural land.

BRBA has requested a declaratory order that UPR’s proposed rail lines in Robertson County are new rail lines within the meaning of 49 U.S.C. § 10901, requiring approval by the Board. In the Petition, BRBA also requested discovery from Union Pacific on critical factual points for determining the character, purpose, and effect of UPR’s proposed new railroad lines. In their Reply filed on November 13, 2013, UPR argued that BRBA’s request for discovery should be denied.

II. LEGAL STANDARD

A party “is entitled to discovery necessary to develop a full record for [a] proceeding.” *Reasonableness of BNSF Railway Co. Coal Dust Mitigation Tariff Provisions*, Finance Docket

No. 35557, 2012 WL 735637, *2 (March 5, 2012). When a party does not fully respond to discovery requests, a motion to compel may be filed. 49 C.F.R. § 1114.31.

Discovery is proper when it deals with “any matter, not privileged, which is relevant to the subject matter involved in a proceeding.” 49 C.F.R. § 1114.21(a)(1). “The requirement of relevance means that the information might be able to affect the outcome of a proceeding.” *Waterloo Railway Company – Adverse Abandonment – Lines of Bangor and Aroostook Railroad Company and Van Buren Bridge Company in Aroostook County, Maine*, STB Docket No. AB-124 (Sub-No.2), slip op. at 2 (Nov. 14, 2003). Furthermore, it “is not grounds for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” 49 C.F.R. § 1114.21(a)(2).

III. ARGUMENT

The character, purpose, and effect of the new rail lines will determine whether the new lines fall within §10901 or whether they fall within the exemption at § 10906. *See e.g., Texas & P. Ry. v. Gulf, Colo. & S.F. Ry.*, 270 U.S. 266, 278 (1926); *United Transp. Union-Illinois Legislative Bd. v. S.T.B.*, 169 F.3d 474, 478 (7th Cir. 1999); *Brotherhood of Locomotive Engineers v. U.S.*, 101 F.3d 718, 728 (D.C. Cir. 1996). Members of BRBA sought to meet with UPR on multiple occasions to discover the purpose and effect of the Robertson County project. Nothing fruitful came of these attempts. As a result, BRBA knows little about the project other than from a few scant news articles and UPR’s own self-serving characterizations of the project.

Discovery is absolutely necessary in this case because no factual record exists. There are open factual questions that will affect the outcome of the Board’s determination whether UPR’s proposed new rail lines are railroad lines requiring Board authorization, or merely a spur track, exempt from STB jurisdiction.

A. Relevant fact questions exist regarding UPR’s proposed new rail lines, necessitating discovery.

The determination of whether new rail lines enable a carrier to penetrate or invade a new market, and thus requiring Commission authorization, is highly fact-specific, and the STB uses a case-by-case analysis that considers the line’s intended use, history, and physical characteristics. *Bristol Industrial Terminal Railway-Lease & Operations Exemption*, 1992 WL 214288 (I.C.C. Sept. 1, 1992) (No. 32106); *The New York City Econ. Development Corp.—Petition for Declaratory Order*, STB Finance Docket No. 34429, 2004 WL 1585810, *5 (July 15, 2004).

The aim of BRBA’s discovery and request for production is to develop the factual record necessary to undertake this case-by-case analysis.

1. The STB looks at a number of factors to determine the purpose and effect of rail lines: for example, the amount of traffic, the number of shippers, and the rail’s length and cost.

In order to understand the purpose and effect of new trackage, the STB has looked at several factors. The specific factors depend on the facts of the case. In one case, the Board stated that the factors “that have been considered include the amount of traffic over the line, whether there was regularly scheduled service, the number of shippers, whether there are stations on the line, and whether the line was constructed of light rail.” *Chicago & North Western Transp. Co.—Abandonment Exemption—in McHenry County, IL*, 1987 WL 383740, 3 I.C.C.2d 366 (STB Jan. 6, 1987). Also, a “line is not a spur if it is used to move traffic in interstate commerce.” *Id.* at *2.

In another case, the factors considered included whether the trackage meets the demands of one shipper; whether it will be used for switching and be incidental to line haul movement; and the rail’s length and cost. *Chicago Great Western Ry. Co. v. Illinois Cent. R. Co.*, 275 F.Supp. 909 (N.D. Iowa Nov. 8, 1967); *see also The New York City Econ. Development Corp.—Petition for Declaratory Order*, STB Finance Docket No. 34429, 2004 WL 1585810, *6.

There is no factual record for the STB to evaluate any of these various factors. Union Pacific's arguments in their Reply to BRBA's Petition for Declaratory Order do not constitute "evidence" in support of any of these factors. For example, Union Pacific cites a press release (*see* Reply, p.7, note 3) in support of its claims, but this certainly cannot be a sufficient basis for a STB decision.

BRBA has appropriately served discovery on UPR in support of developing the facts necessary for the STB to critically evaluate these various factors. For example, BRBA's Discovery Request #2 requests "[a]ll documents concerning Union Pacific's proposed new rail lines and rail facilities nearby, and within 7 miles of, Mumford in Robertson County, Texas, including all documents that discuss the purpose and effect of the new proposed trackage." This request tracks the exact language of the test the Board uses to determine whether track is classified as rail line rather than spur track. *See Texas & P. Ry. v. Gulf, Colo. & S.F. Ry.*, 270 U.S. 266, 278 (1926); *United Transp. Union-Illinois Legislative Bd. v. S.T.B.*, 169 F.3d 474, 478 (7th Cir. 1999).

2. Factual information for the various factors is simply not before the STB.

Discovery will create a factual record for the STB to make a determination. To claim, as UPR does, that this discovery request will not provide the Board with relevant information is disingenuous and false. Discovery is proper when it deals with "any matter, not privileged, which is relevant to the subject matter involved in a proceeding." 49 CFR § 1114.21(a)(1). Additionally, UPR states that "BRBA...does not argue that the yard will physically connect to a new customer." Reply at 28. But BRBA cannot possibly make such an argument, because BRBA does not have information about this factual point. For this very reason, discovery is necessary. BRBA must have the opportunity to probe the factual parameters supporting their claims in the Petition for Declaratory Order.

B. BRBA’s discovery requests seek relevant information that will affect the outcome of this proceeding.

Parties may obtain documents that are relevant to the subject matter of a proceeding, and relevance means that the information might be able to affect the outcome of a proceeding. 49 CFR § 1114.21(a). Moreover, discovery is not limited to “the information that [a party] believes is sufficient” to prove its case. *See Seminole Electric Coop., Inc. v. CSX Transport, Inc.*, Docket No. 42110, at 2 (STB served Feb. 17, 2009). Instead, a party is generally “entitled to all relevant and potentially admissible information.” *Id.* BRBA’s ten (10) requests for production (RFP) aim to obtain information that is relevant, potentially admissible, and will affect the outcome of their Petition for Declaratory Order.

As stated, “[i]f the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad,” and the Board has jurisdiction over the construction. *Texas & Pacific Railway Co. v. Gulf, Colorado & Sante Fe Railway Co.*, 270 U.S. 266, 278 (1926). The Board and reviewing courts have stated that the use of the new trackage is important, but that the “larger purpose and effect” of a transaction or construction at issue must also be considered in determining whether Board jurisdiction obtains. *See, e.g., Brotherhood of Locomotive Engineers v. U.S.*, 101 F.3d 718, 728 (D.C. Cir. 1996). In order to determine what the “larger purpose and effect” of new trackage is, it is important to understand what activities and markets the rail lines serve, what purposes the railroad claims the new trackage will serve, what demands exist in the territory served, what other purposes the new trackage may serve based on market needs and the timing of the construction, and what the actual effects of the new trackage will be.

To this end, Petitioner BRBA made a request for ten (10) categories on documents. BRBA requested the production of the following documents:

1. Documents concerning or constituting or reflecting the earliest evidence of UPR's plans or desire or need to construct new rail lines in Robertson County, Texas.
2. All documents concerning UPR's proposed new rail lines and rail facilities nearby, and within 7 miles of, Mumford in Robertson County, Texas, including all documents that discuss the purpose and effect of the new proposed trackage.

These requests seek information clearly relevant to the proceeding at hand. Documents produced in response to RFP#1 will help demarcate when UPR first identified a need to expand in Robertson County, Texas. These documents are relevant to producing a timeline for the proposed project and determining the purpose the lines were intended to serve. Furthermore, RFP#1 is limited in scope: all BRBA has requested is the "earliest evidence" of UPR's plans to construct new trackage.

UPR's contention that RFP#2 "will not provide the Board with relevant information," UPR Reply at 28, is not defensible. This request tracks the exact language of the legal test the Board uses to determine whether track is classified as rail line rather than spur track. *See Texas & P. Ry. v. Gulf, Colo. & S.F. Ry.*, 270 U.S. 266, 278 (1926); *United Transp. Union-Illinois Legislative Bd. v. S.T.B.*, 169 F.3d 474, 478 (7th Cir. 1999). Documents produced in response to this request will necessarily affect the outcome of the proceeding.

BRBA also requested documents related to UPR's transportation of goods and traffic along its lines near Mumford in Robertson County, Texas:

3. All documents concerning the analyses of transportation of goods and traffic along the UPR rail lines of IGN (International and Great Northern) and HTC (Houston & Texas Central)—including but not limited to economic studies; traffic volume or capacity studies; or business needs to expand the rail lines—near Mumford in Robertson County, Texas.
4. All documents concerning the traffic and congestion along the UPR rail lines of IGN and HTC near Mumford in Robertson County, Texas.

Again, BRBA seeks information that is relevant to the purpose of the expansion of new lines in Robertson County. Clearly, business needs are driving the expansion, which relate to the project's purpose and effect, and those needs are relevant. They would be potential admissible before the STB. *See Seminole Electric Coop., Inc. v. CSX Transport, Inc.*, Docket No. 42110, at 2 (potentially admissible information is discoverable). In short, capacity studies and a list of goods received would build factual record about the use to which these lines are put and/or whether the new lines will allow UPR to serve new markets or new customers.

BRBA argued in its Petition for Declaratory Order that UPR is attempting to penetrate new markets that have recently opened and/or are continuing to open, as well as new shippers within those markets, related to the fracking industry, coal exports, the expansion of the Panama Canal, and “near-shored” manufacturing in Mexico. A report from a consulting company specializing in railroads, R.L. Banks & Associates, was provided to support this argument. Despite spending eight pages replying to these arguments, UPR did not produce any documents responsive to RFP#5 - #8, which asked for documents related to these markets:

5. All documents concerning the fracking market in Texas and the Bakken Basin as it relates to UPR's business and to the development of new lines in Robertson County, Texas.
6. All documents concerning the coal export market in Texas as it relates to UPR's business and to the development of new lines in Robertson County, Texas.
7. All documents concerning the Mexico manufacturing market in Texas as it relates to UPR's business and to the development of new lines in Robertson County, Texas.
8. All documents concerning the expansion of the Panama Canal as it relates to UPR's business and to the development of new lines in Robertson County, Texas.

Board decisions and related case law has stated that the Board would have authority over new trackage, if proposed trackage made it possible for the railroad to “reach any new customers or territory.” *See, e.g., Brotherhood of Locomotive Engineers*, 101 F.3d at 728. BRBA has raised a fact

issue as to whether UPR's new rails in Robertson County, Texas, will make it possible for the company to "reach any new customers or territor[ies]" in these new and changing markets. The fact that UPR claims to serve all of these markets is not dispositive; if these proposed lines have the effect of extending the railroad's lines into new territory or make it possible for the railroad to reach any new customers or territory, the Board would have authority over the project. Produced documents responsive to these requests may affect the outcome of this proceeding.

As discussed below, members of BRBA have recently learned that the footprint of UPR's project in Robertson County has expanded. The Board, in determining the purpose and effect of rail lines, has considered the size of a project as a relevant factor. Furthermore, BRBA's efforts to meet with UPR to discuss the project, its purpose and effect, and reasonable alternatives, have been unsuccessful. Documents responsive to RFP#9 and RFP#10 will help identify the footprint of the project, which may aid the Board in determining its purpose and effect, and will help develop a factual record of the project's impact where none exists:

9. All documents related to UPR's actions to condemn private property within ten (10) miles of Mumford in Robertson County, Texas.
10. Any and all documents related to economic impact studies commissioned by UPR, especially as related to the impact of the agricultural and/or oil and gas activity lost as a result of the proposed project.

BRBA has only made ten (10) requests for production intended to fill out the factual record as it relates to the purpose and effect of UPR's proposed project and as it relates to the issue of whether the new rails will allow UPR to reach any new customers or territory. In response, UPR has not produced any documents.

Discovery is proper in this case, and BRBA "is entitled to discovery necessary to develop a full record for [a] proceeding." *Reasonableness of BNSF Railway Co. Coal Dust Mitigation Tariff Provisions*, Finance Docket No. 35557, 2012 WL 735637, *2 (March 5, 2012). Produced

documents will be highly relevant to the Board in ascertaining the factors; they will be relevant to the Board in determining whether, and to what extent, UPR's proposed new rail lines and rail facilities were meant to and will substantially extend the lines of UPR into new territory. A compilation and assessment of independent facts and information is needed. The Board should compel UPR to answer BRBA's requests for production.

C. UPR's self-serving statements in the Reply are not determinative.

UPR's statement that its project in Robertson County is only a "classification yard" is not determinative. As BRBA briefed in its Petition, the determination of the character of the new lines turns on the intended use of the segment, not the label of the segment. *Nicholson*, 711 F.2d at 367; *New Orleans Terminal Co. v. Spencer*, 366 F.2d 160, 165-66 (5th Cir. 1966) (track segment identified as "side" track held to require Commission approval). The use of the new lines is one factor in determining the "purpose and effect" of new trackage, but the focus on use alone cannot obscure the "larger purpose and effect" of the transaction or construction at issue. *See, e.g., Brotherhood of Locomotive Engineers v. U.S.*, 101 F.3d 718, 728 (D.C. Cir. 1996). As stated by the Court of Appeals for the District of Columbia, if switching operations "have the effect of substantially extending the...railroads' lines into new territory, then the Commission may not decline jurisdiction." *Id.* Just as the categorization of track as "switching track" does not necessarily except that track from STB's jurisdiction, neither does the categorization of track as a "classification yard" necessarily except the track from STB's jurisdiction.

Case law suggests that there are various carve-outs to the general rule that spur-track is excepted from the Board's authority. For example, one Board decision stated that if track—even track that is used for purposes such as switching—"(1) will constitute the entire operation of the new carrier; (2) permits the using carrier to extend operations into, or invade, new territory, and

thereby alter the competitive balance between railroads; and/or (3) is essential to the through movement of traffic from shipper to consignee, then it is deemed to be a railroad line subject to Board licensing requirements, rather than excepted spur or auxiliary track.” *Riverview Trenton Railroad Company—Petition for an Exemption from 49 U.S.C. 10901 to Acquire and Operate a Rail Line in Wayne County, MI*, 2003 WL 21108179 (STB served on May 15, 2003) (citing *Texas & Pacific, Effingham* (1997 WL 564155), *United Transp. Union v. STB, Great Salt Lake & Southern Railroad LLC* (2000 WL 1844695), *New Orleans Terminal Co. v. Spencer, Nicholson*, 366 F.2d 160)). Another Board decision stated that the construction of a line that “substantially alters the competitive status quo among...railroads is an extension requiring Commission approval.” *Chicago & North Western Transp. Company—Construction and Operation Exemption—City of Superior, Douglas County, WI*, 1994 WL 178841 (STB April 26, 1994).

To suggest, as UPR does, that any and all classification yards are excepted from Board jurisdiction ignores the guiding test articulated by the Supreme Court and a number of more factually nuanced decisions made by the STB and reviewing courts. Producing documents responsive to BRBA’s discovery requests will help ensure that the decision is made on a full record. The STB cannot rely simply on litigation-generated graphics provided in UPR’s Reply, or a footnote citing a press release, to determine what the purpose and effect of the Robertson County project is, particularly in light of the project’s massive size and scope, and in light of the allegations made in BRBA’s Petition.

Moreover, Union Pacific makes self-serving proclamations that it is already penetrating the four markets identified in BRBA’s Petition for Declaratory Order (*i.e.*, fracking, coal, Panama Canal expansion, Mexico traffic). It is equally disingenuous for UPR to assert that they

have already penetrated these markets, particularly when, for example, the fracking market is currently expanding, and the Panama Canal expansion has not yet been built. UPR is likely trying to penetrate these markets at the current time, and market penetration is an ongoing process.

There is as much a factual question about which markets UPR will penetrate with its project in Robertson County, and how, as there is about the broader purpose of the project. BRBA requested documents pertaining to the “business needs to expand the rail lines near Mumford in Robertson County, Texas.” Such a request aims to discover whether and how the new lines in Robertson County will effect UPR’s market expansion.

D. Recent information suggests that UPR’s project footprint is growing, which raises questions regarding the character and purpose of the project.

In BRBA’s Petition for Declaratory Order, BRBA represented its belief that the Union Pacific project in Robertson County will be approximately 1,200 acres. At this time, however, BRBA understands that the UPR project’s footprint is now projected to be around 1,800 acres. This is recent information that BRBA members have learned (and can be verified in discovery). Of course, without discovery, BRBA cannot confirm the exact proposed acreage.

Even so, what this expanded footprint demonstrates is that much more is going on with UPR’s project in Robertson County than UPR wishes for the public to know. UPR quotes from the decision in *Nicholson v. Missouri Pacific R.R.*, 366 I.C.C. 69, 69-70 (1982). In that case, the classification yard was approximately 500 acres. UPR’s project in Robertson County may be as much as, or more than, *four times* that size. As stated above, the rail’s size is a factor that the STB investigates, among other factors, when determining the purpose and effect of new trackage.

E. UPR’s objections are unwarranted and overstated.

The rules governing discovery in Board proceedings are modeled on the discovery rules contained in the Federal Rules of Civil Procedure. *Potomac Electric Power Company v. CSX*

Transportation, Inc., STB Docket No. 41989, slip op. at 1 (n.5) (served May 14, 1997). As such, an objecting party “must make a particular and specific demonstration of fact and cannot rely on simple conclusory assertions about the difficulty of complying with a discovery request.” *Coker v. Duke & Company*, 177 F.R.D. 682, 686 (M.D. Ala. 1998); *see also Arizona Electric Power Cooperative, Inc. v. Burlington Northern and Santa Fe R. Co. and Union Pacific R. Co.*, STB Docket No. 42058, slip op. at 4 (served Sept. 11, 2002). Also, “boilerplate, generalized responses are not sufficient to satisfy a party’s discovery obligations.” *Trailer Bridge, Inc. v. Sea Star Lines, LLC*, STB Docket No. WCC-104, slip op. at 8 (served Oct. 27, 2000); *McLeod, Alexander, Powel, and Appfel v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990) (same).

In their Reply, Union Pacific lodges various objections to BRBA’s discovery requests. Their objections—that the discovery is not necessary and that BRBA’s requests are burdensome and overbroad—are conclusory and incorrect.

1. The record cannot be sufficient because no record exists.

Union Pacific asserts that the record is sufficient to resolve this dispute; however, no record exists. In their Reply, UPR cites *Maryland Transit Administration--Petition for Declaratory Order*, Finance Docket No. 34975, 2008 WL 4281987 (STB served September 19, 2008), but that case is not on point because, in that case, the STB had various transaction documents before it, which enabled the STB to render a decision. The present case cannot be analogous to that one because, as discussed herein, no documents exist for Petitioner or the STB to review.

2. BRBA’s discovery requests are not unduly burdensome.

BRBA limited its discovery requests with both a time limitation and a distance limitation. For the time limitation, documents were limited to those with dates after January 2007. For the distance limitation, documents were limited to those that are responsive within a limit of seven (7)

miles of Robertson County. Moreover, at this time, BRBA has made a request for only ten (10) different categories of documents. All of the discovery requests were directly pertinent and tailored to the legal standard that the STB must address.

In their Reply, UPR objected that BRBA's discovery requests are "unduly burdensome and overbroad" and have no bearing on the legal issue. UPR Reply at 28. In actuality, any allegations of a discovery burden should be balanced by the needs of the STB to adduce facts to resolve this dispute. Whatever the burden imposed on UPR to produce documents, this burden is outweighed by the need for such documents to resolve the dispute at issue in this case.

3. BRBA's discovery requests are tailored to the legal dispute at issue and not overbroad.

As stated, all of BRBA's discovery requests are focused on the legal standards, and relevant factors, articulated by the STB. They do not go outside the scope of the information that the STB needs to resolve this dispute. Moreover, they contained time and distance limitations so that they could not be deemed overbroad.

F. A party is entitled to develop a full record.

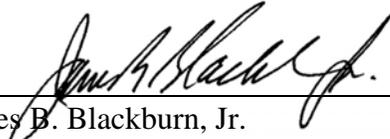
Finally, the purpose of BRBA's discovery requests is the basic need for a factual record in this case. A party "is entitled to discovery necessary to develop a full record for this proceeding." *Reasonableness of BNSF Railway Co. Coal Dust Mitigation Tariff Provisions*, Finance Docket No. 35557, 2012 WL 735637, *2 (March 5, 2012). BRBA is entitled to a record, and the STB needs one for its decision. For all the reasons stated above, BRBA urges that discovery is necessary to put forth information and facts before the STB to render a decision in this case.

IV. CONCLUSION

Petitioners respectfully request that their Motion to Compel is GRANTED. Petitioners respectfully request that the Surface Transportation Board require discovery for Union Pacific in order to answer the critical factual questions that underlie the legal dispute.

Respectfully submitted,

BLACKBURN CARTER, P.C.

by:  _____

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Counsel for Petitioners

CERTIFICATE OF SERVICE

On this 25th day of November, 2013, a true and correct copy of BRAZOS RIVER BOTTOM ALLIANCE’S MOTION TO COMPEL DISCOVERY FROM UNION PACIFIC RAILROAD COMPANY was served on all parties/attorneys of record by the undersigned via the method designated below.



James B. Blackburn, Jr.

Via Email and U. S. First Class Mail

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