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

**Docket No. AB-290 (Sub-No. 210X)**

**NORFOLK SOUTHERN RAILWAY COMPANY  
- ABANDONMENT -  
IN ATLANTA, FULTON COUNTY, GEORGIA  
- NOTICE OF EXEMPTION -**

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**PETITION FOR EXEMPTION FROM CONDITIONS GOVERNING  
OFFERS OF FINANCIAL ASSISTANCE AND  
PUBLIC USE**

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Norfolk Southern Railway Company (“NSR”) hereby submits this Petition for Exemption from Conditions Governing Offers of Financial Assistance and Public Use (“**Petition for Exemption**”) simultaneously and in connection with its Verified Notice of Exemption pursuant to 49 C.F.R. §1152, Subpart F – Exempt Abandonments and Discontinuances of Service and Trackage Rights in the above-captioned proceeding (the “**NOE**”). NSR is submitting the NOE to effect the abandonment of its common carrier obligation on a 4.30 mile line of railroad in Atlanta, Fulton County, Georgia, from Milepost DF 633.10 to Milepost DF 637.40 (the “**Line**”).<sup>1</sup> This petition requests an exemption from the application of the provisions of 49 U.S.C. §10904 (Offer of Financial Assistance or “**OFA**” procedures) and 49 U.S.C. §10905 (public use conditions) with respect to the abandonment of the Line. NSR has performed no rail service and no shipper has demanded rail service over the subject Line segment for at least eight years. In

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<sup>1</sup> The Line is a segment of a line of railroad from Charlotte, North Carolina to Atlanta, Georgia, that was originally constructed in 1873. NSR acquired the Line as the result of a series of transfers of corporate control

2004, NSR conveyed the real property underlying a portion of the Line's right-of-way between Milepost DF 633.10 and Milepost DF 636.56 to a local developer. NSR retained an easement and complete operating authority to provide freight service over that segment of the Line until such time as NSR receives and exercises STB authority, or an exemption, to abandon it. In 2007, the developer conveyed the real property underlying this Line segment to NE Corridor Partners, LLC, an entity formed by the City of Atlanta to develop the corridor for public purposes as part of the Atlanta BeltLine project. NSR retains both its interest in the real property and its right to operate over the remaining 0.84 mile portion of the Line between Milepost DF 636.56 and Milepost DF 637.40.

Under the NOE in the subject abandonment proceeding, which is being filed with the Board simultaneously with this petition, NSR will effect the complete abandonment of any freight common carrier obligation on the Line. For the reasons set forth in detail below, NSR respectfully requests that the Board also exempt the abandonment of the subject Line from the provisions of 49 U.S.C. §10904 (Offer of Financial Assistance or "OFA" procedures) and 49 U.S.C. §10905 (public use conditions).

### **Background**

NSR seeks exemption from the OFA procedures and public use conditions along with exemption authority to abandon the Line under the NOE in order to remove an unused and unneeded line from its system and to facilitate NE Corridor Partners, LLC's (the City's) development of the Atlanta BeltLine, a comprehensive economic development effort that combines transit, green space, trails and new commercial, residential and public facility development along a 22-mile ring of current or former rail segments encircling Atlanta's urban core. The BeltLine master plan anticipates that the Line's right-of-way will be used in part to

develop a transit corridor to accommodate light rail or buses in a fixed guideway along with a trail and adjacent uses designed to support and be supported by the variety of available transportation modes. The Atlanta BeltLine is one of the most wide-ranging urban redevelopment projects underway in the U.S. and will provide a network of linked uses and opportunities for living, employment, entertainment and recreation. Although the subject segment is no longer economically viable as a freight rail line, the existing corridor can be expeditiously put to use to create substantial future public benefits in accordance with the BeltLine master plan if the freight rail use of the right-of-way is formally abandoned and the abandonment is exempt from offers of financial assistance and the imposition of public use conditions.

## **I. ARGUMENT**

Under 49 U.S.C. 10502, the Board must exempt a transaction or service from regulation when the Board finds that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power. The requested exemptions meet these criteria because (1) there has been no freight service over the Line for several years, the land uses in the neighborhood in which the Line is located have been changing to residential and light commercial uses rather than industrial use and there is no prospect that railroad customers would locate along the Line or request renewed rail freight service over the Line due to this redevelopment; (2)(a) the Line is only 4.30 miles in length in a major urban area with several alternate freight railroad lines and transportation alternatives (b) and no shippers will lose railroad freight service due to the permanent abandonment of the Line.

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., K & E R Co. – Abandonment Exemption – In Alfalfa, Garfield, and Grant Cos., OK, and Barber Cos., KS*, STB Docket No. AB-480X (Service Date December 31, 1996), *slip op.* at 4-5. In Docket No. AB-33 (Sub-No. 141X), *Union Pacific R. Co. – Abandonment Exemption – In Pima Co., AZ*, *slip op.* (Service Date Feb. 16, 2000), the Board stated the following:

Exemptions from 49 U.S.C. 10904-10905 have been granted from time to time, provided the right-of-way is needed for a valid public purpose and there is no overriding public need for continued rail service. [Footnote, citing earlier cases supporting this conclusion, omitted] Here, UP has transferred the right-of-way to the City for a valid public purpose and the sole shipper on the line will be relocated and will have access to rail service from UP. Imposition of OFA procedures would delay the City's land use plans and policies and development of the area. Likewise, there is no need for a public use condition because a public use for the right-of-way has already been established between UP and the City.

*Id.* at 3-4. *Accord*, Docket No. AB-33 (Sub-No. 105X), *Union Pacific R. Co. – Abandonment Exemption – In Kane Co., IL* (*slip op.*, Service Date April 29, 1997), at 3 (“Exemptions from 49 U.S.C. 10904 have been granted from time to time, but only when the right-of-way is needed for a valid public purpose and there is no overriding need for continued rail service.”). The Board noted further that in those circumstances, the requirements of 49 U.S.C. §10502 are satisfied because “applying the OFA or public use requirements in this instance is not necessary to carry out the rail transportation policy” and “[a]llowing the abandonment exemption to become effective expeditiously, without first being subject to these requirements, would minimize the need for Federal regulatory control over the rail transportation system, expedite the regulatory decision and reduce regulatory barriers to exit [49 U.S.C. 10101(2) and (7)]” *Id.*

As set forth in detail below, the circumstances here fully warrant an exemption from OFA and public use requirements of 49 U.S.C. Sections 10904 and 10905.

**A. Exemption from the Public Use and Offer of Financial Assistance Requirements is Consistent with 49 U.S.C. §10502**

**1. The Application of Sections 10904 and 10905 is not Necessary to Carry out the Transportation Policy of Section 10101.**

In view of the absence of rail traffic on the Line that is the subject of the NOE and of this Petition for the past several years, there is no reason to require the application of the OFA provisions in the absence of the prospect of a legitimate OFA. These provisions are designed to preserve rail service on a corridor. No such rail freight service has been demanded or provided for at least eight years and no realistic prospect for such service in the future exists.<sup>2</sup> There is also no reason to require the application of the “public use” provisions. The Line’s right-of-way has already been acquired by a public agency that is proposing to use the corridor as part of a network of trails and transit for the benefit of the residents of Atlanta and thus, NSR has no transferable interest that could be made available to another public entity. Granting the OFA and public use condition exemptions will serve the goals of the National Transportation Policy. “to minimize the need for Federal regulatory control over the rail transportation system” and “to

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<sup>2</sup> The Board need not require the sale of a line under the OFA provisions if it determines that the offeror is not genuinely interested in, or capable of, providing rail service or that there is no likelihood of future traffic. *Roaring Fork--Exem --in Garfield, Eagle & Pitkin Counties, CO*, 4 S.T.B. 116, 119-20 (1999), *Burlington N/Santa Fe--Aban.--in King County, WA*, 3 S.T.B. 634, 63 8-39 (1998) In *Los Angeles County Metropolitan Transportation Authority--Abandonment Exemption--in Los Angeles County, CA*, STB Docket No. AB-409 (Sub-No. 5X), slip op. at 3 (STB served June 16, 2008) the Board provided that any person “who intends to file an OFA should address one or more of the following whether there is a demonstrable commercial need for rail service, as manifested by support from shippers or receivers on the line being abandoned or as manifested by other evidence of immediate and significant commercial need, whether there is community support for continued rail service, whether acquisition of freight operating rights would interfere with current and planned transit services, and whether continued rail service is operationally feasible, especially where, as here, the line to be abandoned is physically constrained.” These criteria would be valid for an evaluation of feasibility of an OFA request in this case. As the facts demonstrate, there is no prospect that any potential offeror could meet these criteria for an OFA with respect to the subject Line

reduce regulatory barriers to entry into and exit from the industry.” 49 U.S.C. §10101 (2) and (7). After the abandonment becomes effective, and the exemption from Sections 10904 and 10905 is approved, the Board will have removed the regulatory barriers to taking this unused and unceded rail line out of the national freight rail system and will have allowed alternate public uses and urban redevelopment of the right-of-way to proceed expeditiously. The Board should accordingly exempt the abandonment of the subject Line from the requirements of Sections 10904 and 10905.

**2. The Transaction is of Limited Scope**

This Petition ultimately concerns post-abandonment use of a right-of-way that is only approximately 4.3 miles long and has seen no rail traffic in many years. The Line’s removal from the freight rail network will have no discernable impact, and the application of Sections 10904 and 10905 would impose requirements that have no connection with the realities of this Line’s current lack of participation in the nation’s freight network since there is no realistic prospect that rail freight shippers will locate on the Line or that the Line can be used for future freight operations. Any overhead traffic that may have moved over the Line in the past was rerouted several years ago. Upon consummation of the abandonment of the subject Line, no existing rail operations will be affected. Because the proposed action affects a limited geographic area and will not have any impact on the existing national freight rail network, the transaction is limited in scope and the Board should exempt it from the requirements of Sections 10904 and 10905.

**3. The Application of Section 10901 is not Needed to Protect Shippers from the Abuse of Market Power.**

There are no shippers to protect on this Line segment, since no freight traffic has moved over the Line for many years. NSR knows of no prospective shippers along the Line segment

and in view of the changing character of the area, NSR believes there is no realistic possibility that any such shippers would locate along the Line in the future. As a result, exempting the abandonment from the OFA provisions would not adversely affect shippers because there is no rail traffic moving over the Line to preserve and no realistic prospect of any future rail traffic developing in the future. With respect to the exemption from the public use conditions, the right-of-way is already under control of a public entity. The Board should therefore exempt the abandonment of the subject Line from the requirements of Sections 10904 and 10905.

**B. Exemption from OFA Requirements Would Be Consistent with Board Precedent**

In circumstances like those presented here, where there are no shippers on the Line and none have sought to ship or receive traffic over the Line for many years, and where a public agency proposes a public use of the Line's right-of-way, Board precedent supports the exemption NSR requests. The OFA provisions are intended to permit a party genuinely interested in providing continued rail service on a Line that would otherwise be abandoned to acquire that Line for continued rail service to current or actual prospective customers located along the Line. Exemptions from 49 U.S.C. §10904 have been granted when the record shows that a right-of-way is needed for a valid public purpose and there is no overriding public need for continued rail service. *See, e.g., Georgia Southwestern Railroad, Inc – Abandonment Exemption – In Barbour County, AL*, STB Docket No. AB-1000X (Service Date April 25, 2007) (no shippers in over seven years, right-of-way to be used for public trail); *CSX Transportation, Inc – Abandonment Exemption—in Pike County, KY*, STB Docket No. AB-55 (Sub-No 653X) (Service Date September 13, 2004) (no existing shippers, right-of-way to be used for highway expansion); *Norfolk Southern Ry Co – Abandonment Exemption – In Washington County, NC*, STB Docket

No. AB-290 (Sub-No. 248X) (“*Washington County*”) (single remaining shipper had moved shipments to other facility; right-of-way needed for improvements to electric distribution facilities owned by power company).

Where abandonments are necessary to support urban redevelopment projects, the Board has granted exemptions from the OFA requirements even over the protests of putative shippers. *See, e.g., Norfolk and Western Railway Company—Abandonment Exemption—in Cincinnati, Hamilton County, OH*, STB Docket No. AB-290 (Sub-No. 184X) (Service Date May 13, 1998) (petition for exemption from the OFA process granted in the face of arguments by two potential shippers that there was an overriding public need for transportation service because no traffic had moved on the line for the prior 11 years, shippers had viable transportation alternatives available, and the right-of-way was needed for multi-purpose municipal improvements, including a new professional football stadium); *The Kansas City Southern Ry Co – Abandonment Exemption – In Jackson County, MO*, STB Docket No. AB-103 (Sub-No. 17X) (Service Date July 27, 2004) (shippers along line had ceased operation and right-of-way was needed to facilitate municipal economic development and urban revitalization projects). Additionally, a mass transit operation on its own is not only a valid public purpose, but an important one, as the Board and its predecessor, the ICC, have recognized. In the absence of any public use, demand or need for freight transportation over the Line, the City should be permitted to use the Line’s right-of-way for public purposes, including mass transit passenger service. *Los Angeles County Metropolitan Trans. Auth. – Abandonment Exemption – In Los Angeles County, CA*, AB-409 (Sub-No. 5X) (Service Date July 17, 2008), *slip op.* at 5. The Board has also recognized that permitting an OFA to proceed may preclude the planned use of a rail line by a transit agency, thus frustrating “the very purpose of the abandonment and discontinuance.” *See Missouri Pacific Railroad Co. –*

*Abandonment – in Harris County, TX*, STB Docket No. AB-3 (Sub-No. 105X) (Service Date December 22, 1992), *slip op.* at 3.

Here, NE Corridor Partners, LLC, the entity formed by the City of Atlanta, intends to use the Line for the development of a public transit corridor as part of the larger Atlanta BeltLine project targeted at spurring economic development. The facts and circumstances supporting NSR's requested exemption from OFA provisions are consistent with those the Board has previously accepted as the basis for such an exemption. There is no freight service to be preserved, no prospect for future freight service on the Line and the abandonment will clear the path for planned public uses to be established. There are no shippers on the Line, NSR has received no requests for service over the Line and no freight has moved over the Line for over eight (8) years.

Because the facts and circumstances in this case are consistent with those in other cases in which the Board has granted exemptions from the OFA provisions, the Board should exempt NSR's abandonment request from the application of the OFA provisions and requirements of 49 U.S.C. 10904.

**C. In View of the Public Interest and Intended Use of the Line, Exemption from Public Use Requirements Would Be Consistent with Board Precedent**

Where there is no overriding public need for continued rail service, a right-of-way is needed for a valid public purpose and is already owned by a public entity, the Board will grant exemptions from the requirements governing the imposition of public use conditions. *See, e.g., Washington County, slip op.* at 2, 4. The Board should exempt NSR from the imposition of public use conditions because NSR seeks abandonment of the Line, in large part, in order to devote the corridor to a valid and compelling public purpose. Much of the Line's right-of-way is

owned by NE Corridor Partners, LLC, the quasi-public entity that will be developing the corridor for transit and other legitimate public purposes.

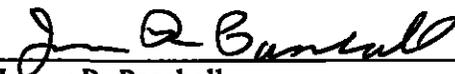
Here, the subject Line segment is only 4.30 miles long and has seen no traffic for over eight years, well beyond the 2-year period of dormancy required for use of the Board's class exemption for abandonment of a line of railroad. Once NSR receives and exercises authority to abandon the Line, NE Corridor Partners, LLC will use the right-of-way of the abandoned Line segment for uses directly related to, and in support of, the development of public transit, a trail, parkland and economic development projects, amounting to a host of compelling public uses. Accordingly, the facts in this proceeding clearly justify exemptions from OFA and public use requirements and demonstrate that the criteria for these exemptions are met in this case.

For the reasons set forth above, the Board should find that NSR has met the criteria for an exemption under 49 U.S.C. 10502 and exempt the abandonment of the Line under the NOE in this proceeding from the OFA process and the public use conditions.

## II. CONCLUSION

WHEREFORE, in light of the foregoing, NSR respectfully requests that the Board exempt the abandonment transaction contemplated by the NOE in this proceeding from the provisions of 49 U.S.C. §10904 (OFA procedures) and 49 U.S.C. §10905 (public use conditions).

Respectfully submitted,

  
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**Certificate of Service**

I hereby certify that on this 2nd day of December, 2008, I caused to be served a copy of the foregoing PETITION FOR EXEMPTION FROM CONDITIONS GOVERNING OFFERS OF FINANCIAL ASSISTANCE AND PUBLIC USE to be served by first class mail, postage prepaid, upon:

Mr. Chuck Eaton, Chairman  
Georgia Public Service Commission  
244 Washington Street, S.W.  
Atlanta, GA 30334

Ms. Jan Matthews, Associate Director  
U.S. Department of the Interior  
National Park Service  
Cultural Resources, Room 3126  
1849 C Street, N.W.  
Washington, DC 20240

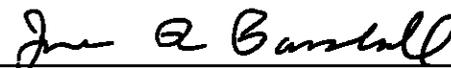
Mr. Harvey Kepler, Administrator  
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