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December 12, 2008

BY E-FILE

The Honorable Anne K. Quinlan  
Acting Secretary  
Surface Transportation Board  
395 E Street S.W.  
Washington, DC 20423-0001

Re: STB Finance Docket No. 35187, Grand Elk Railroad, LLC – Lease  
and Operation Exemption – Norfolk Southern Railway Company

Dear Acting Secretary Quinlan:

Attached for e-filing is Grand Elk Railroad's Reply To Stay Request and  
Response to Marquette Rail, LLC.

If you have any questions, please contact me.

Sincerely yours,



Karl Morell

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB FINANCE DOCKET NO. 35187**

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**GRAND ELK RAILROAD, L.L.C.  
--LEASE AND OPERATION EXEMPTION--  
NORFOLK SOUTHERN RAILWAY COMPANY**

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**REPLY TO STAY REQUEST AND  
RESPONSE TO MARQUETTE RAIL, I.LC**

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**Attorney for:  
GRAND ELK RAILROAD, L.L.C.**

**Dated: December 12, 2008**

**BEFORE THE**  
**SURFACE TRANSPORTATION BOARD**

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**STB FINANCE DOCKET NO. 35187**

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**GRAND ELK RAILROAD, L.L.C.**  
**-LEASE AND OPERATION EXEMPTION-**  
**NORFOLK SOUTHERN RAILWAY COMPANY**

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**REPLY TO STAY REQUEST AND**  
**RESPONSE TO MARQUETTE RAIL, LLC**

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Grand Elk Railroad, L.L.C. ("GER"), hereby: (1) replies in opposition to the Request For Stay ("Stay Request") filed by the Michigan Economic Development Corporation ("MEDC") on November 26, 2008; and (2) responds to the letter filed by Marquette Rail, LLC ("MQT") on November 26, 2008 ("MQT Letter").

**BACKGROUND**

On November 3, 2008, GER filed its Verified Notice of Exemption, pursuant to 49 C.F.R. Part 1150, Subpart D—Exempt Transactions, to permit GER to lease and operate approximately 122.9 miles of rail lines owned by Norfolk Southern Railway Company ("NS") in Michigan and Indiana ("Notice of Exemption"). In the Notice of Exemption, GER explained that its projected annual revenues may exceed \$5 million and that, consequently, GER was in the process of complying with the notice requirements of 49 C.F.R. § 1150.32(e). On November 25, 2008, GER certified its compliance with Section 1150.32(e). On December 1, 2008, GER revised its certification and, in so doing, expressly pointed out that the Notice of Exemption in

this proceeding would not become effective until January 31, 2009. Moreover, the labor notice attached to the certification points out that GER will not be consummating the transaction until March 1, 2009.

## REPLY

### I. Stay Request.

GER voluntarily filed its Notice of Exemption **88 days** before the Notice becomes effective and **117 days** before GER plans to consummate the transaction. MEDC apparently is of the mistaken view that the Notice of Exemption became effective on December 3, 2008. To the extent that MEDC filed the Stay Request on the basis of this mistaken view, the Board should deny or dismiss the Stay Request as moot. In any event, MEDC has failed to meet the stay criteria.

The standards governing disposition of a request for stay are: (1) that there is a strong likelihood that the movant will prevail on the merits; (2) that the movant will suffer irreparable harm in the absence of a stay; (3) that other interested parties will not be substantially harmed; and (4) that the public interest supports the granting of the stay. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (“*Petroleum Jobbers*”). It is the movant’s obligation to justify the exercise of such an extraordinary remedy, *Cuomo v. United States Nuclear Regulatory Comm.*, 772 F.2d 972, 978 (D.C. Cir. 1985), and the movant carries the burden of persuasion on each of the four elements required for the extraordinary relief. *Canal Authority of Fla V. Callaway*, 489 F.2d 567, 573 (5<sup>th</sup> Cir. 1974).

MEDC has not addressed, much less satisfied, the four criteria governing a stay.

### **MEDC Is Unlikely To Prevail On The Merits**

MEDC claims that the transaction GER seeks to undertake will eliminate one of MQT's Class I rail connections at Grand Rapids, MI. But MQT has no direct physical connection to NS at Grand Rapids today. MQT-NS interchange traffic must be handled by CSX Transportation, Inc. ("CSXT") as an intermediate switch, and even then the interchange is subject to an interchange commitment fee. Moreover, historically, very little traffic moving to or from MQT's leased lines was interchanged with NS. In any event, GER will simply replace NS in any potential routings via Grand Rapids.

### **Denial Of The Stay Will Not Cause MEDC Irreparable Harm**

An administrative decision is not ordinarily stayed without an appropriate showing of irreparable harm. *Permian Basin Area Rate Case*, 390 U.S. 747, 777 (1968). MEDC has failed to demonstrate that anyone will suffer irreparable harm in the absence of a stay. It would hardly be persuasive for MEDC or MQT to argue that a shipper on the MQT lines would be irreparably harmed by the addition of a short line into a route that is already burdened by an interchange switch and an interchange commitment fee.

### **A Stay Would Harm Shippers And GER**

GER intends to upgrade the tracks and, as a short line operator, improve service to the shippers located on the leased lines. Thus, delaying the implementation of the involved transaction will have a material, adverse effect on the shippers located on the leased lines by delaying the benefits they will realize once GER commences operations. Any delay in GER's operations will cause GER to incur significant expenses, result in a loss of business that will be

unrecoverable and cause uncertainty among its employees and the shippers located on the leased rail lines.

GER plans to spend \$2.7 million on track rehabilitation once it leases the lines from NS, including the replacement of 20,000 ties and the rehabilitation of two yards. GER's planned rehabilitation program will create new jobs and infuse money into the ailing Michigan economy. Any significant delay in the effective date of the Notice of Exemption will jeopardize GER's ability to complete the rehabilitation program during the construction season. Also, GER will be hiring more employees than are currently working on the lines. Consequently, GER's lease of the lines will not only improve service to the shippers on the leased lines but will also infuse capital into the Michigan economy and increase jobs at this critical time.

#### **A Stay Is Not In The Public Interest**

MEDC has failed to demonstrate how issuance of a stay would further the public interest. On the other hand, the proposed change in operations is intended to increase the efficiency of rail operations in the area, improve service to the shippers and increase jobs on the leased rail lines. For more than two decades, the Board and its predecessor have consistently stated that the public interest is served by encouraging the formation of short line and regional carriers. Consequently, granting the stay is contrary to the public interest.

When MQT leased its lines from CSXT, MQT informed the Board that the transaction would "allow CSXT to reduce its capital needs, to rationalize its rail system and to restructure its business, while giving MQT the ability to preserve rail service to existing customers and to try to increase business on the Rail Lines." Verified Notice of Exemption filed by MQT with the Board on September 26, 2005, in STB Finance Docket No. 34728, at 2. The situation is no different here.

## **II. MQT Letter.**

The MQT Letter is a puzzling filing. MQT acknowledges that the Notice of Exemption in this proceeding will not become effective until sixty (60) days after the certification required by Section 1150.32(e) is filed with the Board. MQT also notes that, under the Board's rules, a petition for stay is due no later than seven days before the Notice of Exemption becomes effective. In this proceeding, the Notice will become effective on January 31, 2009 and a petition for stay is due no later than January 24, 2009. MQT claims that it will file a petition for stay and a petition to partially or totally revoke the notice of exemption, but has failed to do so. Given the extraordinary amount of time MQT has been provided in this proceeding, it would be unreasonable for MQT to wait until the last minute to file a stay request, particularly given the harm that a stay would inflict on others.

As in the Michigan Central Transaction, MQT will likely seek to improve its own financial situation at the expense of GER by taking advantage of this proceeding. The thrust of MQT's arguments in the Michigan Central Transaction were that MQT and the shippers on its lines would be harmed because MQT was losing a direct connection to NS and there would be an extra interchange for shippers on its lines. As noted above, MQT has no direct interchange with NS today. MQT's shippers cannot lose what they do not have.

The proposed transaction may result in the addition of an extra carrier for MQT's customers shipping to NS destinations.<sup>1</sup> But that is precisely what happens in all short line transactions: an extra carrier and an extra interchange are inserted in the through movement. Indeed, this transaction is no different than MQT's lease of the CSXT lines in 2005. All of the

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<sup>1</sup> If GER and MQT are able to settle on a reasonable cost-sharing arrangement for a direct connector between MQT's lines and the NS lines GER seeks to lease, there will be no extra carrier or interchanges since GER will simply replace CSXT in any movements from the MQT lines to NS destinations.

customers on the MQT leased lines where subjected to an extra carrier and an extra interchange. The hypocrisy of MQT's position appears lost on MQT. To be logically consistent and add credibility to its argument, MQT should lead by example and return its lines to CSXT thereby sparing its customers the extra carrier and the extra interchange.

The rail lines GER seeks to lease are in need of significant and costly repair. Also, these rail lines have seen a dramatic decline in traffic in recent years. Most recently, the largest customer on the lines (the General Motors stamping plant in Grand Rapids) announced the closure of its plant. In these circumstances, GER more than welcomes and will actively solicit any additional traffic that can be moved over the leased lines, including any traffic GER can interchange with MQT. However, GER cannot afford to handle the MQT traffic at a loss. The Board need only ask itself why a profit-motivated company such as GER would deliberately turn away MQT traffic if that traffic were profitable!

In the Michigan Central Transaction, MQT asked the Board for a host of conditions,<sup>2</sup> one of which was to force Michigan Central to bear 90 percent of the construction cost for a connector between the MQT's lines and those of Michigan Central, all without benefit of any guarantees from anyone that there would be sufficient traffic to justify the cost of construction. MQT also sought to have the Board impose haulage fees that would have forced Michigan Central to handle the MQT traffic at a loss. Essentially, what MQT sought in the Michigan Central Transaction and will undoubtedly seek in this proceeding is for the Board to impose conditions that will force GER to cross-subsidize MQT and for GER's customers to cross-subsidize MQT's customers.

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<sup>2</sup> In the Michigan Central Transaction, MQT wanted the Board to examine the level of haulage rates over the lines, impose new haulage and trackage rights, impose service standards, and order the construction of a direct connection between the Michigan Central lines and those of MQT in order to permit MQT to bypass CSXT.

No MQT customer will see a reduction in competition or service as a result of this transaction. Consequently, the Board need not interject itself between GER and MQT. GER and MQT are negotiating multiple scenarios that involve the construction of a direct connection. MQT is attempting to use this proceeding and the threat of filing a stay request to gain leverage in the negotiations. Once the Notice of Exemption is effective and the playing field is leveled, the parties will have adequate incentives to achieve a mutually satisfactory agreement that will be profitable to both carriers and beneficial to the shippers located on the MQT lines.

### CONCLUSION

GER respectfully urges the Board to deny MEDC's Stay Request. The Request falls woefully short of meeting the criteria for a stay. If any party, such as MQT, waits until the last moment to file for a stay, the Board should view such a request with considerable skepticism. In addition, the Board should deny any request for revocation of the Notice of Exemption.

Respectfully submitted,



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GRAND ELK RAILROAD, LLC

Dated. December 12, 2008

**CERTIFICATE OF SERVICE**

I hereby certify that on this 12<sup>th</sup> day of December, 2008, I have caused a copy of the foregoing Reply to be served on counsel for Marquette Rail and on Mr. James C. Epolito, President of Michigan Economic Development Corporation.

  
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**Karl Morell**