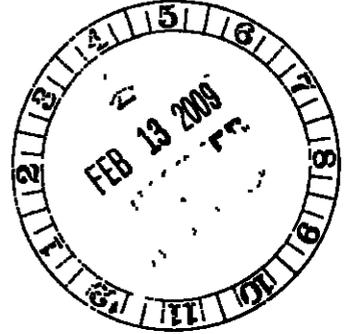


224529

LAW OFFICES  
**JOHN D. HEFFNER, PLLC**  
1750 K STREET, N.W.  
SUITE 200  
WASHINGTON, D.C. 20006  
PH: (202) 296-3333  
FAX: (202) 296-3939



February 13, 2009

VIA HAND DELIVERY

Hon. Anne K. Quinlan  
Acting Secretary  
Surface Transportation Board  
395 E Street, S.W.  
Washington, D.C. 20423

**RE: STB Docket No. AB-1020X      East Penn Railroad, LLC-  
Abandonment Exemption-In Berks and Montgomery Counties, PA**

Dear Ms. Quinlan:

On behalf of the Berks County Board of Commissioners, we are hand filing the original and 10 copies of a Petition for Stay this matter pending judicial review. A check representing the filing fee is enclosed. Please date stamp and return the extra copy of this letter and first page of the petition to our messenger.

**ENTERED**  
Office of Proceedings  
FEB 13 2009  
Part of  
Public Record

Respectfully submitted,  
John D. Heffner, PLLC

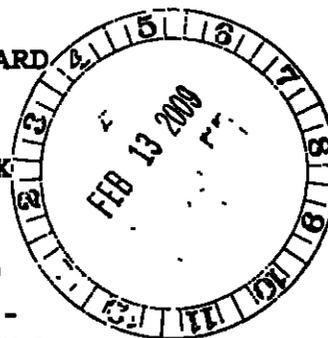
*James H. M. Savage*  
By: James H. M. Savage  
Of Counsel

Enc.  
cc: all counsel (w/enc.)

BEFORE THE  
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. AB-1020-X

EAST PENN RAILROAD, LLC  
--ABANDONMENT EXEMPTION--  
IN BERKS AND MONTGOMERY COUNTIES, PA



PETITION FOR STAY  
OF DECISION  
SERVED JANUARY 28, 2009

John D. Heffner  
John D. Heffner, PLLC  
1750 K Street, NW  
Suite 200  
Washington, DC 20006  
(202) 296-3334

Attorney for  
The Berks County Board  
of Commissioners

James H. M. Savage  
Of Counsel

**ENTERED**  
**Office of Proceedings**  
**FEB 13 2009**  
**Part of**  
**Public Record**

Dated: February 12, 2009

BEFORE THE  
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. AB-1020-X

EAST PENN RAILROAD, LLC  
--ABANDONMENT EXEMPTION--  
IN BERKS AND MONTGOMERY COUNTIES, PA

PETITION FOR STAY  
OF DECISION  
SERVED JANUARY 28, 2009

INTRODUCTION AND BACKGROUND

Pursuant to 49 CFR 1152.25(e)(7)(iii) the Berks County Board of Commissioners ("Berks" or "the County"), a political subdivision in the Commonwealth of Pennsylvania, petitions the Board to stay its decision served January 28, 2009 ("January 28<sup>th</sup> Decision") pending judicial review. That decision set the terms and conditions for the sale of an 8.6 mile line of railroad ("the Line") owned and operated by East Penn Railroad, LLC ("ESPN") extending from milepost 0.0 at Pottstown in Montgomery County, PA to milepost 8.6 at Boyertown in Berks County, PA.

On July 31, 2008, ESPN originally filed an individual petition for exemption with the Board seeking permission to abandon the Line. In support of its Petition, ESPN

represented that the Line has a net liquidation value (NLV) of \$2,077,556 consisting of a net salvage value for track, ties, and other track materials of \$1,082,000, and the underlying right of way of \$995,556. ESPN also represented, erroneously as it turns out, that one of the two remaining on-line shippers, Drug Plastic and Glass Co. Inc. ("Drug Plastic"), did not oppose the abandonment.

By decision served November 18, 2009, the Board granted ESPN's abandonment over the opposition of Berks and a potential customer, Martin Stone Quarries, Inc. ("Martin"). As relevant here, the Board accepted for the purpose of the opportunity cost calculation, ESPN's figure of \$1,082,000 representing the net liquidation value of the track, ties, and other track materials based upon a written offer from the Tie Yard of Omaha ("TYO"). However, the Board rejected ESPN's unsupported real estate valuation, accepting Berks' calculation of the real estate value (\$317,376), and concluded that the Line was worth \$1,399,376 for the purpose of the opportunity cost calculation.

Thereafter, Berks filed an offer of financial assistance ("OFA") on November 26, 2008, to acquire the Line for \$500,000. The Board successively issued orders finding Berks financially responsible and its offer bona

·  
·

·  
·

*fide* and reasonable for the purpose of initiating negotiations and setting December 29, 2008, as the due date for filing a request for the Board to set purchase terms and conditions. In filing its request to set terms, the County asked the Board to set NLV at \$596,804, based upon the net salvage value ("NSV") of \$377,804 for track materials<sup>1</sup> and \$219,000 for the Line's real estate. Berks' supported its request with a detailed right-of-way appraisal prepared by a Pennsylvania licensed real estate appraiser and an expert legal opinion by a Pennsylvania-licensed real estate attorney as to ESPN's quality of title. ESPN replied, asserting that the Line should be valued at \$2,162,018, based upon a \$1,082,000 NSV for track materials plus \$1,080,018 FMV for the Line's real estate. It also, and for the very first time, submitted a valuation of the land prepared by a Pennsylvania-licensed real estate appraiser.<sup>2</sup> However, ESPN relied on the lay opinion of a person who was neither a lawyer nor a licensed title agent on the quality of title issue.

---

<sup>1</sup> After deducting the cost of removing the many bridges and restoring the many grade crossings on the Line

<sup>2</sup> In discovery served on ESPN, Berks requested copies of appraisals of track materials and the right of way real estate. ESPN did not furnish any real estate appraisal. Its sole response was to provide a copy of a letter from the TYO offering to purchase the track materials. Berks renewed its request for track and real estate appraisals in the offer of financial assistance portion of these proceedings. Again, ESPN failed to comply.

In its January 28<sup>th</sup> Decision, the Board adopted ESPN's valuation in toto, setting the Line's purchase price at \$2,162,018, including ESPN's \$1,080,018 real estate valuation. The Board's decision gave Berks until February 9th to accept or reject the Board's terms.

Finding both appraisals to be of "equivalent weight as to methodology," the Board noted the great disparity in value was due to the parties' dispute as to the nature of the title held.<sup>3</sup> On this point, the Board found that both parties had made "colorable" cases concerning whether ESPN holds fee title to the land. But it avoided making any decision on the quality of title issue ruling that these questions and arguments are heavily grounded in Pennsylvania property law and a Pennsylvania court is better suited to answer them.<sup>4</sup> On February 3, 2009, Berks filed a Petition for Review of the Board' January 28<sup>th</sup> Decision with the U.S. Court of Appeals for the Third Circuit, case number 09-1308. See, Petition for Review, attached as Exhibit A.

During the interim period between the January 28<sup>th</sup> Decision and the February 9<sup>th</sup> deadline for notifying the Board of its acceptance or rejection of the Board's terms,

---

<sup>3</sup> January 28<sup>th</sup> Decision at 6

<sup>4</sup> Id at 7

Berks and ESPN engaged in negotiations for the County's purchase of the Line. When the parties failed to reach agreement by February 9<sup>th</sup>, the County filed a timely rejection letter. This stay request is being filed at this time and not earlier so as not to interfere with the negotiating process.

Consistent with its regulations,<sup>5</sup> Berks anticipates the Board will issue a decision on or about February 17, 2009, terminating the OFA and allowing abandonment to take place any time thereafter. The County is aware that ESPN has entered into a salvage agreement with the TYO. Should the salvage process begin, any possibility of retaining the Line for continued rail service will be irretrievably lost.

#### LEGAL ARGUMENT

##### POINT I

##### THE BOARD'S DECISION CONTAINS MATERIAL ERROR

The Board's Rules of Practice provide that a party may petition for a stay of the effectiveness of an abandonment decision pending a request for judicial review. 49 CFR 1152.25 (e) (7) (111). The County has sought judicial review of the Board's January 28<sup>th</sup> Decision. See, Exhibit

---

<sup>5</sup> 49 CFR 1152.27(h)(7)

A. The County maintains that the January 28<sup>th</sup> Decision involves material error in two major respects:

(a) **The Board erred in ascribing FMV to property in which ESPN holds no fee interest.**

As proof of its contention that ESPN does not have a fee interest in most of the Line's real property, the County introduced the affidavit of Edwin Stock, a Pennsylvania-licensed real estate attorney, who examined the instruments of conveyance, concluding that ESPN held fee simple title by Deed to a mere 12 acres of the Line.<sup>6</sup> The remainder was held by "release" which Pennsylvania law defines as a species of use and occupancy agreement covering private property, or by "charter", a species of use and occupancy agreement for public property. See, Stock affidavit. The County identified and produced for Board review 40 such "releases" and 18 such "charters". In reaching its untenable conclusion that ESPN owns all 80 acres in fee, the Board accorded sufficient weight to the lay opinion testimony of ESPN's title witness (Paul Catania) to neutralize the contrary expert opinion testimony of attorney Stock. This constitutes material

---

<sup>6</sup> ESPN originally represented that the Line consisted of 64 acres, later raising its claim to encompass nearly 80 acres. Regardless, ESPN produced no evidence that its Deeded parcels exceed 12 acres

error. In the first place, Mr. Catania admits his lack of familiarity with the type of instrument referred to herein as a "release". This, coupled with his lack of legal training, significantly calls into question the basis of his alleged "expertise".

Contrast this to Delta Southern Railroad, Inc.-- Abandonment Exemption--Between Lake Village, AR, and Shelburn, LA, AB-384 (Sub-1X), decided January 28, 2005 ("Delta Southern"), where the Board accepted the railroad's real estate valuation over that submitted by the offeror because, *inter alia*, the railroad presented evidence on all the parcels, whereas the offeror "cherry picked" which parcels to address. The converse of the Delta Southern situation exists where, as here, the offeror presented the more comprehensive analysis, and the railroad engaged in parcel "cherry picking".

Delta Southern also refutes ESPN's claim that use of the phraseology such as "right of way" or "for railroad purposes" is automatically determinative of the nature of the deed. Instead, Delta Southern instructs that, under state case law, the language of the entire instrument must be examined to determine whether a fee simple or reversionary interest has been granted. See Coleman v. Missouri Pac. R.R. Co., 745 S.W.2d 622 (Ark. 1988);

Arkansas Improvement Co. v. Kansas City So. Ry. Co., 181 So. 445 (La. 1938).

In this proceeding, after discussing and accepting the testimony of both parties as "colorable," the Board side stepped the issue of which party made the better case by stating the "quality of title" decision should be made by a court of competent jurisdiction in Pennsylvania. This ruling is inconsistent with other agency decisions such as Burlington Northern Railroad Company—Abandonment Exemption—In Snohomish County, WA, STB Docket No. AB-6 (Sub-No. 375X), slip op. at 6, served March 11, 1996, where the Board did opine on the title issue under state law.

Berks' expert cited the Board to a Pennsylvania ruling that holds that a "release" conveys no marketable title. The Board noted the citation but failed to address the issue in its ruling and provided no explanation for its departure from precedent.

**(b) The indemnification provision constitutes material error.**

The Board further erred by setting the real estate FMV at full price subject to ESPN indemnifying the County for actual losses resulting from defects in title. The Board wrongly decided this issue by failing to follow or else explain its departure from agency precedent holding that

the Board will accept the railroad's valuation subject to indemnification or, absent indemnification, it will accept the offeror's figure. See, San Pedro Railroad Operating Company, LLC - Abandonment Exemption - In Cochise County, AZ, STB Docket No. AB-1081X, slip op. served April 13, 2006, where the Board accepted the abandoning carrier's valuation on property for which it did not present evidence of marketability, provided the railroad indemnify the purchaser. While the financial assistance offeror did not challenge the railroad's figure, the Board took it upon itself to reduce the real estate value absent a willingness of the railroad to provide title indemnification to the offeror. In the Southern Pacific case, cited in the January 28th Decision, the former Interstate Commerce Commission announced that the agency would value the right of way at the railroad's figure providing it indemnified the purchaser. But it went one step further stating that "if SPT does not provide an indemnity, the parcels will be valued at zero." Slip op. at 10. As a minimum, the Board should have said the same thing here.

Moreover, the Board's indemnification condition provides scant comfort where, as here, the indemnitor is not required to post bond or otherwise guarantee its contingent future liability to the indemnitee. The Board

could have required the selling railroad to place a portion of the purchase proceeds in an escrow account as it has done in other proceedings but it did not do so here. Railroad Ventures, Inc. - Abandonment Exemption Et Al, STB Docket No. 556 Sub-No. 2X, slip op. served April 28, 2008.

## POINT II

### THE COUNTY SATISFIES THE BOARD'S CRITERIA FOR GRANTING A STAY

The Board will grant a stay in a proceeding where (a) there is a substantial likelihood that the movant will prevail on the merits, (b) the petitioner will be irreparably harmed absent the stay, (c) the stay would not harm other parties, and (d) issuance of a stay is in the public interest. 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). Moreover, the Board has the power to stay its own decision without such showings on the merits where it needs additional time to consider difficult issues presented in a case. City of Alameda - Acquisition Exemption - Alameda Belt Line, STB Finance Docket No. 34798 (served Dec. 15, 2005) (stay granted); New York City Economic Development Corporation--Adverse Abandonment--New

York Cross Harbor Railroad in Brooklyn, NY, STB Docket No. AB-596 (served June 10, 2003) (stay imposed).

**(a) There exists substantial likelihood that Petitioner will prevail on the merits.**

The County avers that the Board's January 28<sup>th</sup> Decision is (i) constitutes material error, (ii) contrary to law, and (iii) unsupported by substantial evidence.

Proceedings to set conditions and compensation are governed by the provisions of 49 U.S.C. 10904(d)-(f). The Board may not set a price below the FMV of the Line. 49 U.S.C. 10904(f)(1)(B). FMV equals constitutional minimum value. 49 CFR 1152.27(h)(6). In the proven absence of a higher going-concern value for continued rail use, the constitutional minimum value is the NLV of the rail properties for their highest and best non-rail use. Chi. & N. W. Transp. Co.—Abandonment, 363 I.C.C. 956, 958 (1981) (Lake Geneva Line), aff'd sub nom. Chi. & N. W. Transp. Co. v. United States, 678 F.2d 665 (7th Cir. 1982). NLV includes the FMV of the underlying real estate held in fee plus the NSV of track materials.

The burden of proof is on the offeror. Lake Geneva Line, 363 I.C.C. at 961. Absent probative evidence supporting the offeror's estimates, the rail carrier's evidence is accepted. In areas of disagreement, the

offeror must present more specific evidence or analysis or provide more reliable and verifiable documentation than that submitted by the carrier. Where the offeror presents superior evidence, the Board accepts the offeror's estimates. Burlington Northern Railroad Company--Abandonment Exemption--In Sedgwick, Harvey and Reno Counties, KS, Docket No. AB-6 (Sub-No. 358X) (ICC served June 30, 1994).

(i) The Board's rejection of the County's more specific, more reliable and superior title evidence was material error. The County went to great lengths to assure that its title evidence was thoroughly and properly documented. First, the County's consultant Gary Landrio traveled to the National Archives in Bethesda, MD to review the former Reading Railroad's valuation maps for the Colebrookdale Branch to identify each and every parcel of real estate comprising the Line. Next, the County obtained from the Berks and Montgomery County Recorders of Deeds a true copy of each and every title instrument corresponding with the information obtained from the railroad valuation maps. The County thereupon retained Edwin Stock, a Pennsylvania licensed attorney, to personally review each and every title instrument to determine whether it represented a fee or non-fee interest in the underlying real estate as per Pennsylvania law. The County provided

the Board with attorney Stock's expert legal opinion, with citations to controlling Pennsylvania case law, together with the underlying instruments. For those parcels in which attorney Stock concluded ESPN held a fee interest, the County retained Matthew Cremers an ASA certified licensed real estate appraiser, to perform an appraisal of the real estate included in the Line's right-of-way. Mr. Cremers divided the right-of-way into 10 distinct parcels, grouping property with similar attributes, including adjoining land uses. Mr. Cremers discovered historical sales of five rural land sales, two large building lot sales, and 10 commercial/industrial land sales for use in his appraisal. Mr. Cremers used all five rural land sales occurring from October 2007 to July 2008, neither of the large building lot sales, and seven of the commercial/industrial sales occurring from December 2001 to December 2008 in his analysis. He assigned the historical sales to one or more of the County's 10 distinct parcels for which the historical sale has attributes, location, or usage similar to that anticipated for the parcel. He then adjusted the unit prices of the historical sales assigned to each parcel to account for factors of date of sale, frontage, topography, flood plain, shape, and water and sewer access. He then averaged the unit prices and multiplied those

averages by the acreage in the parcel to determine the value of the parcel. He then calculated a net present value of the land using a 3 or 5-year selloff period depending on the location of the property and included a 10% per year deduction for holding costs. Based on these computations, Mr. Cremers concluded that the land to which the railroad holds marketable title (12 acres) has an FMV of \$219,000 (\$18,250 per acre).<sup>7</sup>

The railroad's appraiser concluded that the Line's 80 acres had a FMV of \$1,080,018 (\$13,500 per acre).

(ii) Ascribing FMV to non-fee parcels is contrary to law. The wide divergence between the parties' valuations arises from the County's proof that the railroad does not hold marketable title to most of the Line's right-of-way. According to the County, of the 70 identified instruments, 12 are "Deeds" vesting fee simple title in the railroad, 40 are "Releases" vesting non-fee occupancy certain rights short of fee simple title in the railroad, and 18 are "Charters" vesting non-fee occupancy rights to certain parcels of public property in the railroad.<sup>8</sup> The County contends that, of these documents, only the deeds convey marketable title and should be factored into an NLV

---

<sup>7</sup> The County's appraisal is consistent with ESPN's representation in its July 2008 petition for abandonment authority that its real estate was worth \$18,000 per acre

<sup>8</sup> See Section (iii) *infra* for a discussion of the charters

determination. The County determines that these deeds provide that the railroad only owns approximately 12 acres in fee. Mr. Stock contends that the releases convey only a right-of-way. Mr. Stock supports this by pointing to the language of these instruments and a Pennsylvania court case, Bevan v. The Reading Company, 1969 Pa. Dist. & Cnty. Dec. LEXIS 349, 47 Pa. D. & C.2d 683 (Chester County CCP 1969), which examined similar instruments. He further asserts that the other releases and one agreement found in his searches do not convey a fee simple interest based on the documents' language. Additionally, Mr. Stock claims that the charters convey only a grant to construct a rail line in a public place.

ESPN takes issue with the claim that the releases fail to convey a fee simple interest. To this end, the railroad provides a lay witness, Mr. Paul Catania, a non-attorney who claims to have experience examining title to property interests of the former Reading Company and Consolidated Rail Corporation. Mr. Catania's "expertise" is questionable. For one thing, referring to the releases in question, Mr. Catania admits, "It should be noted that I have not previously encountered this type of language in any of the previous releases made to the Reading Company or its predecessors I have reviewed." See, Catania VS at 3.

His admission is made all the more disturbing by the fact that Mr. Stock, with whose affidavit he was presumably provided, states, "My conclusion is also supported by a 1969 Chester County case that examined a document with language very similar to that found in the Releases[.]"<sup>9</sup>FN This statement, which Mr. Catania fails to refute, strongly suggests that use of 'language of this type' is hardly unprecedented in railroad land matters generally, and Reading Company matters specifically.<sup>10</sup> For another, Mr. Catania is apparently neither a licensed attorney, nor a licensed title agent, nor even a certified title examiner.

Based on its expert, ESPN argues that easement deeds generally contain language calling for the extinguishment of the railroad's easement or other such rights upon discontinuance of rail operations. This is a straw argument, as the instruments in question are neither easements *per se* nor are they deeds. They are releases of liability granting use and occupancy rights to the railroad. The releases contain no language whatsoever conveying ownership of the property to the railroad. See, e.g. January 19, 1869 Release of Reuben R. Engel to

---

<sup>9</sup> See, Stock affidavit at 10

<sup>10</sup> The subject rail line, like the rail line in Bevan, was formerly part of the Reading system

Colebrookdale Railroad Co , attached hereto as Exhibit B ("Engel Release").

ESPN also claims that many of the releases involve "significant" consideration, a factor which, if true, would weigh in favor of its contention that fee ownership was conveyed. The reality is otherwise. The releases pertain to parcels ranging from a miniscule six hundredths of an acre (John Deysher) to 10.17 acres (George R. Yorgey). The consideration paid by the Colebrookdale Railroad Company to the various landholders ranged from one dollar (See, Engel Release) to \$2,000. The Board would not be straining the bounds of credulity to take official notice that one dollar was not a substantial amount of consideration for industrial real estate even in the late 1860's. As to the larger amount, the railroad's witness seems to have "pulled the wool" over the STB by inducing the Board to approvingly cite the Yorgey transaction as proof of substantial consideration changing hands. The Yorgey property, comprising 10.17 acres, was significantly larger than any other. The consideration paid by the railroad for this release was \$1,300 (not the \$1,800 figure Mr. Catania erroneously cites), reducing the per acre consideration to a more modest \$127.83, well in line with the other

Releases, and entirely consistent with the County's position that the Releases do not convey fee interest.

(iii) Ascribing FMV to parcels of publicly chartered real estate is unsupported by substantial evidence. Neither ESPN's appraiser (Yetke) nor its title examiner (Catania) addresses the 18 public charters in their submissions. ESPN provides no evidence that its occupancy of this public property rises to the level of an ownership interest, nor any indication that it excludes this land from the 79.8 acres comprising its gross real estate valuation. The contrary is thus to be presumed.

A charter is a grant of non-fee occupancy for use of public space for railroad purposes. It does not convey fee title. See, Stock affidavit at 17. The County's evidence as to ESPN's non-fee interest in the chartered parcels is thus uncontroverted. Consequently, the Board's failure to reduce the FMV of ESPN's holdings by the chartered acreage is material error.

Because the Board overlooked or disregarded the County's uncontroverted evidence regarding ESPN's non-fee interest in the chartered parcels, the County has a substantial likelihood of prevailing on the merits of its Petition for Review, and a stay of the January 28<sup>th</sup> Decision is warranted.

(b) Petitioner will suffer irreparable harm absent a stay.

Petitioner submits the verified statement of Berks County Commission Chairman Mark Scott detailing the irreparable harm the County will suffer should the Board fail to stay its January 28<sup>th</sup> Decision. See, September 2, 2008 Verified Statement of Mark Scott attached hereto as Exhibit C ("Scott VS").

Particularly significant to the County's stay petition are Commissioner Scott's references to the irreparable harm which the County would suffer from the scrapping of the Line during the pendency of the petition for review including loss of potential industrial growth due to insufficient suitable rail freight transportation alternatives, consequent over-reliance upon the local roadway system, increased highway congestion, reduced highway safety, an increase in the unemployment rate among blue collar workers, loss of industrial capacity, and ultimately lost tax revenues.

In Commissioner Scott's view, the public interest would be far better served by replacing the present operator with an entrepreneurial railroad operator who would seek to maximize return on investment by developing the Branch to its full potential rather than seeking to

recoup its investment by liquidating the Line. See, Scott VS at 12.

Once the existing infrastructure is removed, the County is foreclosed by fiscal constraints from expending the vast financial resources which would be necessary to reconstruct the Line from scratch. It would certainly be uneconomical for the Board to permit the premature scrapping of the Line under the present circumstances.

**(c) A stay will harm no other party.**

ESPN previously terminated service on the Line. It is incurring little or no avoidable costs while continuing ownership of the Line during the pendency of this proceeding. ESPN's agreement with the TYO remains in full force and effect pending final disposition of this proceeding. To the extent ESPN can document financial losses resulting from any delay in abandoning the Line; those losses are strictly financial and thus would not satisfy the burden of proving irreparable harm under agency precedent.

**(d) A stay is in the public interest.**

There should be no question that the public interest requires the issuance of a stay. Consumers have only two means of transporting inbound products they need: highway

or rail. Highway transportation to and from southeastern Pennsylvania inevitably entails the use of the Pennsylvania Turnpike as well as badly congested local highways including Routes 100 and 202. This leaves the alternative of rail transportation, provided by the Norfolk Southern Railroad ("NS") in cooperation with local and regional rail freight carriers such as ESPN.

Furthermore, in determining the appropriate course of action here, the Board should not lose sight of the fact that this country has both a well documented shortage of fossil fuel and a global warming problem. The issue that cases like this present is whether the public should be able to utilize rail as an energy efficient, environmentally friendly form of transportation or should it continue its wasteful polluting ways of moving goods while engaging in painstakingly slow studies on the environment.

Petitioner submits the verified statements of Drug Plastic and Glass Co., Inc. ("Drug Plastic") and Martin Stone Quarries, Inc. ("Martin") in support of its petition for a stay as being in the public interest.

Drug Plastic is a long time rail user located in Boyertown, PA. See, February 11, 2009 Verified Statement of Rick Hoffmann, attached hereto as Exhibit D.

Drug Plastic annually requires about 7,500 plus tons of inbound raw materials consisting of plastic pellets obtained from suppliers in Texas.

Prior to ESPN announcing it intended to abandon the Line, ESPN and the Line's prior operators had provided rail freight service to Drug Plastic since 1973. Up to and including 2004, service was provided to a transloading facility located on railroad property in Boyertown. In 2004 a railroad bridge in Pine Forge, PA, about 2 miles south of Boyertown, was damaged. The railroad operator thereupon provided temporary service to a transload site located near Pine Forge. The bridge was subsequently repaired and service restored to the former transload site in Boyertown. At no time did the rail operator provide transload service for Drug Plastic at Pottstown, as ESPN erroneously sets forth at page 5 of its July 31, 2005 exemption petition. Service continued until July 2008, at which time ESPN embargoed the Line due to alleged damage to a railroad bridge near the Line's point of origin in Pottstown, PA. Drug Plastic received 84 carloads in 2005, 93 carloads in 2006, and 82 carloads in 2007. In lieu of repairing the bridge, ESPN brought this abandonment petition.

Due to the service embargo imposed by ESPN on the Line, Drug Plastic was required to make alternate

arrangements to receive inbound raw material. Drug Plastic declined ESPN's offer of delivery to an alternate rail line some 10 miles away. On September 18, 2008, ESPN materially misrepresented to the Board's SEA that Drug Plastic informed ESPN that it was no longer interested in using the Colebrookdale Line.

Inbound traffic formerly transported by rail currently moves by truck, generating 400 to 500 extra trips annually each way. In Drug Plastic's view, trucking is not a satisfactory alternative to rail service.

Inbound truck traffic to Drug Plastic moves primarily over Route 100, an arterial roadway which serves as a feeder to the Pottstown Expressway (Route 422), which in turn feeds into the Schuylkill Expressway (I-76) at the Valley Forge Interchange, which PennDOT reports is the third busiest in the State, with a daily traffic volume of 55,000 vehicles. A recent study estimates the current traffic volume at this interchange is expected to increase 1.5 times by 2028.<sup>11</sup>

Rising motor transport costs, particularly fuel costs present challenges which Drug Plastic seeks to offset by exploring the resumption of fuel efficient, environmentally

---

<sup>11</sup> See, [www.paturnpike.com/newletters/december00\\_page07.htm](http://www.paturnpike.com/newletters/december00_page07.htm), and [www.sixlanewidening.com/FAQ.asp](http://www.sixlanewidening.com/FAQ.asp)

friendly rail service as an alternative to truck transportation.

Mr. Hoffman affirms Drug Plastic's interest in exploring the option of accepting delivery of rail freight at the Boyertown Foundry location where the County is considering establishing a transloading facility, or at some other location in the Boyertown area.

Drug Plastic foresees a high probability that in the event rail service were to be restored on the Line, it would generate at least as many carloads of traffic as previously generated on the Line (82 to 93 carloads per year) for at least the next two calendar years (2009 and 2010).

Martin Stone Quarries, Inc. is located in Bechtelsville, PA, approximately one mile above the present northern terminus of the Line. Since 1953, Martin has been providing quality aggregate and infield mix material to southeastern Pennsylvania and surrounding states. Martin has over 60 employees capable of producing in excess of 1.5 million tons of finished product every year. The aggregate mined from Martin Stone Quarries is a particularly hard form of granite called granite gneiss. See, September 5, 2008 Verified Statement of Rod Martin, attached hereto as Exhibit E.

Martin Stone Quarries annually generates about 500 thousand tons of outbound product destined for customers in Southern New Jersey. This traffic currently moves entirely by truck, generating 25 thousand trips annually.

Certain local concrete plants (Rahn's Concrete, a tenant of Martin Stone Quarries and Berks Products of Gilbertsville) annually import 80 to 100 thousand tons of sand from New Jersey. This traffic also currently moves entirely by truck, generating 12 to 15 thousand trips annually.

Both inbound and outbound truck traffic moves primarily over Route 100, an arterial roadway which serves as a feeder to the Pottstown Expressway (Route 422), which in turn feeds into the Schuylkill Expressway (I-76) at the Valley Forge Interchange, the third busiest in the State, with a daily traffic volume of 55,000 vehicles. A recent study estimates the current traffic volume at this interchange is expected to increase 1.5 times by 2028.<sup>12</sup> These trucks then travel down the heavily congested Schuylkill Expressway, through Philadelphia, and across the Delaware River via the Walt Whitman Bridge to reach South Jersey.

---

<sup>12</sup> See. [www.patumpike.com/newsletters/december00/page07.htm](http://www.patumpike.com/newsletters/december00/page07.htm), and [www.sixlanewidening.com/FAQ.asp](http://www.sixlanewidening.com/FAQ.asp)

Rising motor transport costs, particularly fuel costs present challenges which Martin Stone Quarries seeks to overcome by exploring fuel efficient, environmentally friendly rail service as an alternative to truck transportation.

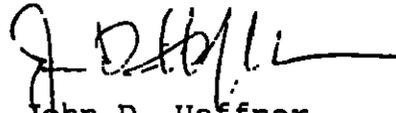
The abandonment of the Colebrookdale Branch would deprive Martin and other potential local customers of the rail alternative before that alternative has ever been explored. Martin Stone Quarries has never been approached by ESPN with any proposal to provide railroad service.

With suitable financial terms, Martin has committed to shifting 50% of its outbound product, primarily aggregate material destined for South Jersey from truck to ESPN or another short line railroad operator, generating approximately 2,500 annual outbound carloads of product (a volume of 12.5 cars a day for 200 days or 40 weeks per year). Coupled with a potential back haul of 800-1,000 carloads of sand, this would eliminate 37 to 40 thousand annual truck trips from local roads, regional highways and the interstate highway system. See, Martin VS at 10.

CONCLUSION

For the above stated reasons and based upon the above cited authority the County requests that the Board stay its January 28<sup>th</sup> Decision pending judicial review.

Respectfully submitted,



John D. Heffner  
John D. Heffner, PLLC  
1750 K Street, NW  
Suite 200  
Washington, DC 20006  
(202) 296-3334

Attorney for  
The Berks County  
Board of Commissioners

James H. M. Savage  
Of Counsel

Dated: February 12, 2009

**EXHIBIT A**

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THIRD CIRCUIT

BERKS COUNTY BOARD OF  
COMMISSIONERS

Petitioner,

v.

SURFACE TRANSPORTATION BOARD  
and  
UNITED STATES OF AMERICA,

Respondents

No. 09 - 1308

PETITION FOR REVIEW

Pursuant to 28 U.S.C. Sections 2321(a), 2322, 2342(5), and 2344 and Rule 15 of the Federal Rules of Appellate Procedure, the Berks County Board of Commissioners ("Berks"), a political subdivision of the Commonwealth of Pennsylvania, hereby Petitions the Court for review of a decision of the Surface Transportation Board ("Board") in Docket No. AB-1020X, East Penn Railroad, LLC-Abandonment Exemption-In Berks and Montgomery Counties, PA (served January 28, 2009). A copy of the Decision is appended to this Petition.

Pursuant to 28 U.S.C. 2344, Berks submits the following information in support of its petition for review:

1. By Petition filed July 31, 2008 the East Penn Railroad, LLC ("ESPN") sought Board authority to abandon an 8.6 mile Line of rail ("the Colebrookdale Branch"). Berks protested the abandonment. On November 18, 2008 the Board granted ESPN's request for abandonment authority. Berks thereupon filed an Offer of Financial Assistance and then a Request to Set Financial Terms and Conditions for the sale of the Line. In its Decision served January 28, 2009, setting the sale price at ESPN's higher requested value, the Board relied upon the unqualified testimony of a layperson. The Board, sitting in an adjudicatory capacity, has a duty to reject the legal opinion of an unqualified witness. Berks contends that the Board's failure to do so in this instance was plainly erroneous and entitles Berks to relief.

2. Venue is proper under 28 U.S.C. 2343, as the Petitioner is a political subdivision of the Commonwealth of Pennsylvania.

3. The Board's Decision that is the subject of the petition for review is contrary to law, arbitrary and capricious, and not supported by substantial evidence.

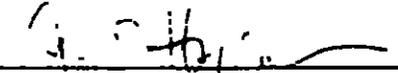
Berks was a party to the proceedings below and is aggrieved.

Berks requests the Court to hold unlawful, vacate, suspend,

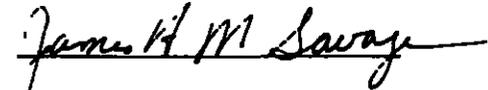
enjoin, and set aside the Board's Decision and grant it such other relief as may be just and proper

Respectfully submitted,

BERRY COUNTY BOARD OF COMMISSIONERS

By. 

John D. Heffner, PLLC  
John D. Heffner  
1750 K Street, N.W.  
Suite 200  
Washington, D.C. 20006  
(202) 296-3333

By. 

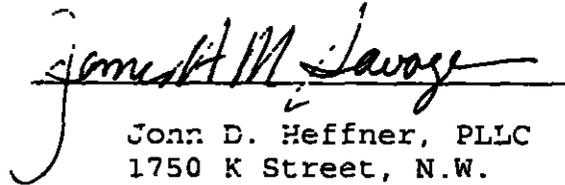
James H.M. Savage  
Of Counsel

Dated: February 2, 2009

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Petition for Review by first-class mail upon the Office of the General Counsel, Surface Transportation Board, 395 E Street, S.W., Washington, D.C. 20423-0001, and the Office of the Attorney General, U.S. Department of Justice, Room 5111, 10<sup>th</sup> Street and Constitution Avenue, N.W., Washington, D.C. and by first-class mail upon all other parties to this proceeding.

Dated at Washington, D.C., this 2nd day of February, 2009.

A handwritten signature in black ink, reading "James H. M. Savage", written over a horizontal line.

John D. Heffner, PLLC  
1750 K Street, N.W.  
Suite 200  
Washington, D.C. 20006  
(202) 296-3333

James H. M. Savage  
Of Counsel

39637  
EB

SERVICE DATE - LATE RELEASE JANUARY 28, 2009

**SURFACE TRANSPORTATION BOARD**

**DECISION**

STB Docket No. AB-1020X

**EAST PENN RAILROAD, LLC—ABANDONMENT EXEMPTION—IN BERKS AND  
MONTGOMERY COUNTIES, PA**

**IN THE MATTER OF A REQUEST TO SET TERMS AND CONDITIONS**

Decided: January 28, 2009

By decision served on November 18, 2008, the Board, under 49 U.S.C. 10502, exempted from the prior approval requirements of 49 U.S.C. 10903 the abandonment by East Penn Railroad, LLC (ESPN) of an 8.6-mile line of railroad extending from milepost 0.0 at Pottstown to milepost 8.6 at Boyertown, in Berks and Montgomery Counties, PA. This grant of authority was made subject to public use, trail use, environmental, and standard employee protective conditions. The exemption was scheduled to become effective on December 18, 2008, unless stayed by the Board or unless a formal offer of financial assistance (OFA) under 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1) was filed by November 28, 2008.

On November 26, 2008, the Board of Commissioners of the County of Berks, acting on behalf of the County of Berks, PA (the County), timely filed an OFA under 49 U.S.C. 10904 and 49 CFR 1152.27 to purchase the entire 8.6-mile line. The County noted in a clarification filed on November 28, 2008, that it proposed to purchase the line for the total amount of \$500,000.

In a decision served on December 2, 2008, the Board, by the Director of the Office of Proceedings, found the County to be financially responsible and postponed the effective date of the exemption to permit the OFA process to proceed.

On December 24, 2008, the County filed a request asking that the Board set the terms and conditions of the line sale. The County completed its filing by submitting a supplement on December 29, 2008. The offeror asserts that the line's track structure is worth \$767,804, and after adjustment for \$390,000 in bridge removal costs, the line's Net Salvage Value (NSV) is \$377,804. To the \$377,804 NSV, the County adds \$219,000 for the fair market value of the real property to derive \$596,804 as the Net Liquidation Value (NLV) for the line.

Also on December 29, 2008, the railroad filed a preliminary reply to the County's request to set terms and conditions. ESPN filed a final reply on December 31, 2008. The railroad argues that the line's NLV is actually \$2,162,018. The railroad explains that it and Tie Yard of Omaha (Tie Yard) signed a July 2008 agreement for the sale of the track structure for a net amount of

\$1,082,000, and that that agreed amount should determine the line's NSV. ESPN further claims that the land value should be set at \$1,080,018.

#### PRELIMINARY MATTER

On January 7, 2009, ESPN filed a motion asking that the Board reject the County's request to set terms and conditions. ESPN argues that the County failed to comply with the service requirement of 49 CFR 1152.27(g)(1) (service by overnight mail) which specifically governs requests to set terms in OFA proceedings. The railroad also claims that the County failed to comply with 49 CFR 1104.12(a) (service on the parties should be by the same method and class of service used in serving the Board). ESPN argues that these shortcomings prejudiced it by not allowing ample time for it to verify the information in the December 24, 2008 filing or to expose misstatements and omissions in that filing. To illustrate its perceived harm, the railroad attaches additional evidence to its January 7, 2009 filing. The County replied on January 9, 2009, arguing that no prejudice has occurred here, and that the Board should strike the evidence submitted by the railroad. The County explains that, should the Board accept this evidence into the record, the offeror would be prejudiced because it would not be able to respond.

Although we are sympathetic with ESPN's concerns, we will not reject the County's request to set terms and conditions. In light of our findings below, the railroad's interests have not been prejudiced. We will also not accept ESPN's late-filed evidence.

#### DISCUSSION AND CONCLUSIONS

Valuation and Evidentiary Standards Proceedings to set conditions and compensation are governed by the provisions of 49 U.S.C. 10904(d)-(f). Under section 10904(f)(1)(B), the Board may not set a price that is below the fair market value of the line. In the absence of a higher going-concern value for continued rail use, the proper valuation standard in proceedings for offers to purchase under section 10904 is the NLV of the rail properties for their highest and best nonrail use. Chi & N.W. Transp. Co. — Abandonment, 363 I.C.C. 956, 958 (1981) (Lake Geneva Line), aff'd sub nom. Chi & N.W. Transp. Co. v. United States, 678 F.2d 665 (7th Cir. 1982). NLV includes the value of the underlying real estate plus the NSV of the track and track materials.

The burden of proof is on the offeror, as the proponent of the requested relief. See Lake Geneva Line, 363 I.C.C. at 961. Placing the burden of proof on the offeror is particularly appropriate in forced sale proceedings under 49 U.S.C. 10904 because the offeror may withdraw its offer at any time prior to its acceptance of the terms and conditions that the Board establishes pursuant to a party's request. The rail carrier, on the other hand, is required to sell its line to the offeror at the price the Board sets, even if the railroad views the price as too low.

Because the burden of proof is on the offeror, absent probative evidence supporting the offeror's estimates, the rail carrier's evidence is accepted. In areas of disagreement, the offeror must present more specific evidence or analysis or provide more reliable and verifiable documentation than that which is submitted by the carrier. If the offeror does not present such

superior evidence and/or documentation, the Board accepts the carrier's estimates in these forced sale proceedings. See Burlington Northern Railroad Company—Abandonment Exemption—In Sedgwick, Harvey and Reno Counties, KS, Docket No. AB-6 (Sub-No. 358X) (ICC served June 30, 1994), and cases cited therein

### Track Materials

The railroad claims that the line's NSV should be determined by a salvage agreement it signed with Tie Yard in July 2008. The salvage agreement, which the railroad includes in its December 29, 2008 and December 31, 2008 filings, contractually obligates Tie Yard to pay ESPN \$1,082,000 for the rail, other track materials, and ties on the line.<sup>1</sup> This agreement includes the cost of removing these assets and restoring road crossings, but it does not include the salvage or removal of bridges, culverts, and ballast. ESPN also attaches to its December 31 filing a verified statement from Terry Peterson, President of Tie Yard, reaffirming the salvage agreement.

The offeror argues that this agreement should not serve as the measure of NSV. The County claims that the inclusion in the agreement of a condition subsequent, i.e., consummation of a forced sale by the Board pursuant to the OFA process unilaterally excusing Tie Yard's obligation to perform, renders the agreement potentially non-binding upon it, and thus invalid on its face as lacking consideration.<sup>2</sup> The County claims that the agreement is flawed just as were offers submitted in Oregon International Port of Coos Bay—Feeder Line Application—Coos Bay Line of the Central Oregon & Pacific Railroad, Inc., STB Finance Docket No. 35160 (STB served Oct 31, 2008) (Coos Bay). In that case, the Board found that two offers to purchase track materials, which allowed the respective salvage companies to unilaterally withdraw their offers based on substantial market change, should not serve as measures of NSV.<sup>3</sup> The Board found that, based on those escape clauses, those offers were not "firm."

The County claims that the Board should, just as the agency did in Coos Bay, measure the NSV of the line using current steel prices. The County notes that such a valuation is especially necessary here where the price of steel is so radically different now from when the railroad and the salvage company signed their contract last July. To this end, the County has provided a valuation prepared by its expert, Gary E. Landrio, an Assistant Vice President of the engineering consulting firm of TranSystems. According to the County, Mr. Landrio inspected the line and computed the NSV of the various grades of steel and ties comprising it. With regard to steel, the County states that Mr. Landrio relied upon the December 22, 2008 AMM Price Index Report to calculate the wholesale gross rail salvage value as \$714,704. With regard to ties, the County notes that Mr. Landrio's inspection revealed that virtually all of these ties are suitable only for landscape use. Mr. Landrio previously found that the average price for used ties suitable for landscape use is \$3 per tie, for a total of \$53,100. Mr. Landrio adds these sums together to reach a gross salvage value (GSV) of \$767,804.

<sup>1</sup> See the railroad's December 31, 2008 Reply at 35.

<sup>2</sup> See the County's December 24, 2008 filing at 8.

<sup>3</sup> See Coos Bay, slip op. at 11.

The County further claims that the Board should reduce this GSV to account for the cost of removing the bridges and crossings on the line.<sup>4</sup> The County claims, generally, that Board precedent dictates that bridge removal costs should be assessed against the line's owners and subtracted from the line's value, and that the removals would be in harmony with Pennsylvania state law.<sup>5</sup> The County provides costs for removing six of the bridges that Mr. Landrio claims are non-compliant with the current Pennsylvania Utility Commission's (PUC) standards. According to the County, these non-compliant bridges would have to be removed at an average cost of \$65,000 per bridge, totaling \$390,000. The County subtracts this amount from \$767,804 to reach an NSV for the line of \$377,804.

After considering the parties' evidentiary submissions on the fair market value of the track structure, we find that the Tie Yard salvage agreement is the best evidence of record of what these assets are worth in the marketplace. This is a binding contract made at arm's length between a willing seller and a willing buyer, both very knowledgeable as to the value of such assets. We have found such a contract to be a reliable indicator of a line's value in the past, and we find the same here.<sup>6</sup>

Moreover, the County's valuation is not well supported. The County's assertions concerning 90-pound relay rail are particularly weak. The County claims that 90-pound relay rail is worth \$250 a ton based on AMM, but, as ESPN points out, AMM does not publish prices concerning relay rail.<sup>7</sup> On the other hand, Tie Yard values this item at \$830 a ton, and the Tie Yard relay price has been verified by a quotation received by the railroad from Unitrac Railroad Materials, Inc.<sup>8</sup> There are similar concerns regarding the County's valuation of 100-pound relay rail. Furthermore, the County's price for ties is not backed by any supporting evidence.

It is true that at the time ESPN and Tie Yard signed the contract, scrap steel prices were much higher than they are now. But ESPN verified that Tie Yard remains committed to purchase the assets at the agreed-to price despite the price fluctuations.<sup>9</sup> Tie Yard's president explains that, while the price of scrap steel has declined since July, the price of relay rail has

---

<sup>4</sup> Although the County references grade crossing restoration, it does not provide costs for this work. Rather, it accepts ESPN's representation that the Tie Yard net salvage bid includes these costs.

<sup>5</sup> See the County's December 24, 2008 filing at 15.

<sup>6</sup> See Portland Traction Company—Abandonment Exemption—in Multnomah and Clackamas Counties, OR, Docket No. AB-225 (Sub-No 2X), slip op at 5 (ICC served Jan 10, 1990) (Portland Traction), 1411 Corporation—Abandonment Exemption—in Lancaster County, PA, STB Docket No. AB-581X, et al., slip op at 4 (STB served Oct. 18, 2001); San Joaquin Valley Railroad Company—Abandonment Exemption—in Tulare County, CA, STB Docket No. AB-398 (Sub-No 7X), slip op at 4, 5 (STB served Aug. 26, 2008) (SJVR).

<sup>7</sup> See ESPN's December 31, 2008 reply at 27-28.

<sup>8</sup> Id. at 28.

<sup>9</sup> Id., VS Peterson at 1.

increased, and he points out that the relay tonnage on the line is much higher than the scrap tonnage<sup>10</sup> Regardless, the contract continues to represent what an independent party would pay for the assets in the marketplace, and therefore, for our purposes, constitutes the constitutional minimum value for those assets. Thus, we properly rely on it as the best evidence of the line's NSV.

We are not persuaded by the County's attempt to discredit the contract by portraying it as suffering the same flaw as the offers submitted in Coos Bay. In Coos Bay, the offerors retained the right to revise their offers if there was a substantial change in the market and there was no deadline for the railroad to accept. Accordingly, we found that those offers could not be considered as truly firm. Here, Tie Yard has entered into an agreement without such a clause. Tie Yard's contract therefore had credibility when it was signed, and it continues to have credibility because the company still stands by its commitment.

The fact that Tie Yard's obligation might be superseded by operation of the statutory OFA process does not render the contract nonbinding or fatally undermine its credibility for our valuation purposes. This prospect does not allow for Tie Yard to unilaterally withdraw from the salvage agreement.

The Tie Yard contract does not cover the removal of the line's bridges. As discussed above, the County asks that we deduct \$390,000 from the NSV for the removal of six bridges. But ESPN contends that bridge removal costs are unwarranted because it does not plan on removing any bridges. ESPN states that it already has agreed to negotiate a trail use/rail banking agreement with Montgomery County for the portion of the line in that County and indicates that it would negotiate for trail use/rail banking for the remainder of the line in Berks County consistent with the Berks County Planning Commission's plan to incorporate the line into a planned trail system. ESPN also states that it has contacted the PUC regarding the proposed abandonment and that the PUC has not told ESPN it would have to remove any bridges. And ESPN argues that the County has failed to show that the removal costs of those bridges would exceed their salvage value. Moreover, our rules provide that, in determining the NLV of rail properties subject to the OFA process, we include any asset with a negative salvage value at a value of zero. 49 CFR 1152.34(c)(1)(iii)(A)(2).<sup>11</sup> We will therefore not adjust the line's NSV for bridge removal. Accordingly, we set the line's NSV at the \$1,082,000 agreed to between Tie Yard and the railroad.

#### Land

The County retained a certified general appraiser, Matthew Cremers, to perform an appraisal of the real estate included in the line's right-of-way that the County claims is held in fee by ESPN. Mr. Cremers broke the right-of-way into 10 distinct parcels, grouping property with similar attributes, including adjoining land uses. Mr. Cremers discovered historical sales of five rural land sales, two large building lot sales, and 10 commercial/industrial land sales for use in his appraisal. Mr. Cremers used all five rural land sales occurring from October 2007 to

<sup>10</sup> See id.

<sup>11</sup> See, e.g., Coos Bay, slip op. at 14.

July 2008, none of the large building lot sales, and seven of the commercial/industrial sales occurring from December 2001 to December 2008 in his analysis. He assigned the historical sales to one or more of the County's 10 distinct parcels for which the historical sale has attributes, location, or usage similar to that anticipated for the parcel. He then adjusted the unit prices of the historical sales assigned to each parcel to account for factors of date of sale, frontage, topography, flood plain, shape, and water and sewer access. He then averaged the unit prices and multiplied those averages by the acreage in the parcel to determine the value of the parcel. He then calculated a net present value of the land using a 3 or 5-year selloff period depending on the location of the property and included a 10% per year deduction for holding costs. Based on these computations, Mr. Cremers concludes that the land to which the railroad holds marketable title has a fair market value of \$219,000.

The railroad hired Mr. William Yetke, a certified general appraiser, to conduct its appraisal. Mr. Yetke broke the right-of-way into 13 distinct parcels. Mr. Yetke used the same methodology as the County, but used 10 historical sales, assigning them to one or more of their 13 distinct parcels with similar attributes. Their historical sales occurred from August 2005 through August 2008. Mr. Yetke made similar adjustments to the sales unit prices as the County and specified an estimated unit value for the various parcels. He treated that estimated parcel unit value as an approximate average as opposed to a mathematical average of the adjusted sales unit values. He then multiplied the parcel unit values by the area units of the corresponding parcels and added those results to calculate the total value of the right-of-way. Mr. Yetke then adjusted the total value to account for selling costs, holding costs or gains, and a discount factor by reducing the total value by 13%. Mr. Yetke concludes that the real estate comprising the line's right-of-way has a fair market value of \$1,080,018.

The wide divergence between the parties' valuations arises from the County's claim that the railroad does not hold marketable title to much of the land in question. The County retained Edwin L. Stock, a Pennsylvania-licensed real estate attorney, to review the conveyances recorded for the property along the line. According to the County, of the 70 instruments, 12 are "Deeds," 40 are "Releases," and 18 are "Charters." The County claims that, of these documents, only the deeds convey marketable title and should be factored into an NLV determination. The County determines that these deeds provide that the railroad only owns approximately 12 acres in fee.

Mr. Stock contends that many of the releases only conveyed a right-of-way. Mr. Stock supports his claim by pointing to the language of these instruments and a Pennsylvania court case, Bevan v. The Reading Company, 1969 Pa. Dist. & Cnty. Dec. LEXIS 349, 47 Pa. D. & C.2d 683 (Chester County CCP 1969), which examined similar instruments. He further asserts that the other releases and one agreement found in his searches do not convey a fee simple interest based on the documents' language. Additionally, Mr. Stock claims that the charters convey only a grant to construct a rail line in a public place.

ESPN takes issue with the claim that not all the instruments conveyed a fee simple interest. To this end, the railroad provides its own expert, Mr. Paul Catania, who has experience with the property interests of the former Reading Company and Consolidated Rail Corporation. Based on its expert, ESPN argues that easement deeds generally contain language calling for the

extinguishment of the railroad's easement or other such rights upon discontinuance of rail operations. The releases in question contain the opposite language and warrant or guarantee the continued ownership of the property by the railroad even if the railroad ceases to use the property for railroad purposes. The railroad also notes that many of the releases involve significant consideration. Accordingly, the railroad claims that it owns the land in fee, and that it has marketable title to 79.928 acres.<sup>12</sup>

Both parties have made colorable cases concerning whether ESPN has marketable title to the land. The questions and arguments are heavily grounded in Pennsylvania property law, and a court in that jurisdiction is better suited to answer them. While the releases do not appear to lapse upon the cessation of rail use, the question remains as to which party should bear the risk of loss. Should the County be able to acquire the disputed property for nothing and thereby impose on ESPN a loss from a forced transfer of valuable real estate for no compensation if the title that the County receives goes unchallenged? Or should the County pay full fee value and then face the risk that someone will demonstrate a reversionary interest or otherwise challenge the title? To resolve this situation, we find that the circumstances particular to this proceeding call for assigning full fee value for the property in dispute upon a condition that ESPN indemnify the County for any losses arising out of any defect to the title. This result is supported by agency precedent,<sup>13</sup> allows a Pennsylvania court to resolve any title dispute, provides ESPN constitutional minimum value for its land, and protects the County in case the railroad does not have marketable title to all of the involved parcels.

As for the appraisals, both employed the across-the-fence method in determining the value of the land using past, comparable sales. Both parties made adjustments to the comparable sales unit sales price based on substantial differences between the attributes of the comparable sales and those of the right-of-way. Under our burden of proof analysis, the offeror must provide superior evidence or documentation in areas of disagreement. Because these appraisals are of equivalent weight as to methodology, the offeror has failed to meet its burden. Additionally, the County's appraisal only values the approximately 12 acres of property that it contends ESPN owns in fee. Thus, we use the appraisal submitted by the railroad when valuing the land. Accordingly, because we adopt the railroad's appraisal and its claim that it possesses marketable title to the land as conditioned above, we value the land at \$1,080,018.

#### Net Liquidation Value

Accordingly, relying on the best evidence of record, which the railroad has submitted, we set the purchase price for the line at \$2,162,018.

---

<sup>12</sup> See the railroad's December 31, 2008 reply at 14-23 and Exhibits 3 and 5.

<sup>13</sup> Southern Pacific Transportation Company—Abandonment Exemption—Sacramento and El Dorado Counties, CA, Docket No. AB-12 (Sub-No. 159X), slip op. at 9 (ICC served Oct 20, 1994).

**Terms of Sale**

In addition to the compensation for this line specified herein, we will impose our typical OFA terms. (1) payment is to be made by cash or certified check; (2) closing is to occur within 90 days of the service date of this decision, (3) ESPN shall convey all property by quitclaim deed, except that, as noted above, ESPN shall indemnify the County for any losses arising out of any defect to title, and (4) ESPN shall deliver all releases from any mortgage within 90 days of closing. The parties may alter any of these terms by mutual agreement.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

**It is ordered.**

1. ESPN motion to reject the County's request to set terms and conditions is denied, and the evidence contained in that motion is not accepted into the record.

2. The purchase price for the line is set at \$2,162,018, and the parties must comply with the other terms of sale discussed above.

3. This decision will become binding on the parties unless the County notifies the Board and ESPN in writing, on or before February 9, 2009, that it is withdrawing its offer to purchase the line.

4. If the County withdraws its offer or does not accept the terms and conditions with a timely written notification, we will serve a decision by February 17, 2009, vacating the prior decision that postponed the effective date of the decision authorizing the abandonment.

5. This decision is effective on its service date.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey

Anne K. Quinlan  
Acting Secretary

**EXHIBIT B**

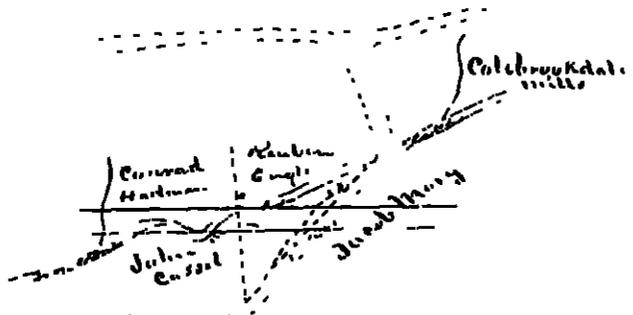


Signed and sealed in presence of us  
Wm. H. Stauffer  
R. H. Hubert  
Berks County

Richard K. Engel Seal

225  
225  
225

Before me the undersigned a justice of the Peace sworn for said County personally appeared the above named Richard K. Engel and in due form of law acknowledged the above and foregoing return to his act and deed and declared that the same might be returned as such. Witness my hand and seal this 19<sup>th</sup> day of January A.D. 1869  
Wm. H. Stauffer Seal



Length: 219 ft Total area 0 40 000  
Scale: 1 inch to 10 rods

Recorded in presence of me and the above named Richard K. Engel on the 11<sup>th</sup> day of February A.D. 1869  
Henry Reider  
Recorder

Whereas the title to the Rail Road Company's line ascertained by said map and return... the roads for these roads through said lands of Jacob Henry and Catsbrookdale township Berks County State of Pennsylvania... have occupied and intended to occupy for the purposes of the said road... strip of five feet on each side of the following described line... Beginning at stake in the hundred and ninety five and twenty five... of intersection of the road on line between lands of said Jacob Henry... of Richard K. Engel with the center line of said road and thence with... hundred and eleven and one quarter... to station three hundred and ninety five feet and one quarter... by a few degrees more left to hundred and thirty three and one... with feet to station three hundred and ninety five feet and one quarter... hundred of Samuel Schaner containing nearly eight hundred three of an acre... map of the same which is described as above. The above mentioned strip of five feet... of the said Jacob Henry as well as the same and the advantages... be derived there by reason of the convenient construction of said road... of the same as well as the same and the advantages... of the Rail Road Company at said place the ordinary and delivery house of the... except whereof is hereby acknowledged here renounced released quiet claimed... and forever discharged and by those presents do release release quiet claim... and forever discharged with the said title to the Rail Road Company their... cessors and assigns in and from all such claims and demands and... and charges and costs for all or any reason of their being a forward but they... at occupying the above described piece or strip of land and the location

**EXHIBIT C**

VERIFIED STATEMENT OF MARK SCOTT

I, MARK C. SCOTT, ESQ., of full age, make the following

Verified Statement:

1. I am Chairman of the Berks County Commission, the governing body of Berks County, PA (hereinafter "Berks" or "the County"). I have been a County Commissioner since first being elected in 1995, taking office in 1996.
2. I make this verified statement based upon personal knowledge in support of the County's protest of the proposed abandonment of the Colebrookdale Branch by the East Penn Railroad, currently pending before the Board under Docket No. AB-1020X.
3. Situated in southeastern Pennsylvania, Berks has a population of slightly more than 400,000 people. The County seat, the City of Reading, is 56 miles northwest of Philadelphia and the heart of the Delaware Valley region, one of the leading industrial and trade centers in the nation. Berks is bordered by Schuylkill County on the north, Lebanon and Lancaster Counties on the west, Lehigh County on the east, and by Chester and Montgomery Counties on the south. Despite its close proximity to

the Philadelphia metropolitan area, Berks is considered part of Pennsylvania Dutch Country. (SOURCE: Berks County Pennsylvania, Economic Resource Profile). Through numerous federal and state highways and turnpikes, the County is linked to other major cities such as New York (125 miles) and Baltimore (97 miles). The County is a diamond-shaped area of 864 square miles. Sections of the Blue and South Mountains, two ridges of the Appalachian Mountain chain, form its northern and southern boundaries with elevations averaging about 640 feet above sea level. The Schuylkill River and several of its main tributaries drain almost the entire county.

4. Berks County possesses a long and storied railroad tradition. Berks County was the home of the Reading Railroad. Chartered in 1833, what became known as the Reading Railroad flourished for more than 100 years as a major anthracite coal transporter from the mining regions of southeastern Pennsylvania to terminals in Jersey City, Philadelphia and elsewhere. Following a long post-World War II decline, Reading Railroad declared bankruptcy in 1971. Most of Reading's rail assets were conveyed to Conrail in 1976. Conrail, in turn, was acquired by Norfolk Southern and CSX in 1999. The former Reading lines fell primarily within what became designated as NS territory.

5. The Colebrookdale Branch of the former Reading Railroad runs north and south, connecting with the Norfolk Southern Railway's Philadelphia-Harrisburg Main Line at Pottstown. The existing Branch is a spur totaling 8.6 miles in length, terminating in Boyertown. See, Map A, annexed hereto as Exhibit Scott-1. The Branch once extended an additional 4.4 miles to the north, providing service to stations at New Berlinville (MP 9.7), Bechtelsville (MP 11.4), Eshbach (MP 12.3) and Barto (MP 13.0). See, Berks County 1895 Railroad Map annexed hereto as Exhibit Scott-2.

6. The Branch today terminates at a bridge crossing North Reading Ave. near 7<sup>th</sup> Street in Boyertown. The bridge, if and when rehabilitated, would provide direct rail access to Boyertown Foundry, an existing industrial property immediately to the north. One mile further to the north is Martin Stone Quarries, Inc. which is a potential source of significant freight traffic for a short line railroad interested in profitably operating the line. See, Verified Statement of Rod Martin.

7. The Branch possesses considerable historic significance and should be preserved. The Colebrookdale Railroad was initially chartered by the Pennsylvania Legislature in 1865 and completed in 1869. The line served to link up-country iron forges to the

Main Line of the Reading Railroad at Pottstown. See, Report of Nathaniel Guest, annexed hereto as Exhibit Scott-3 at pages 6-7 (hereinafter "Guest Report"). The 11 bridges on the existing Branch are all of historic significance. Two of the bridges represent perhaps the last in-service timber trestles in the region. A stone arch bridge and steel viaduct crosses the Manatawny Creek at Pine Forge. The Branch traverses undeveloped terrain and represents an outstanding working example of 19<sup>th</sup> Century railroad engineering. See, Guest Report at pages 10-11.

8. The County is seeking a short line railroad operator to replace ESPN, preserve the existing rail right-of-way for current and potential customers, as well as to extend the right of way to accommodate new customers including the Martin Quarry. While the search for a replacement rail operator is ongoing, at least one potential replacement rail operator has expressed interest in the Branch to date.

9. In addition to current Branch customer Drug Plastics, Martin Stone Quarries and Boyertown Foundry, other nearby potential railroad customers include the following businesses: Cabot Supermetals Corporation (Boyertown), Haines & Kibblehouse (Douglasville, PA), Trap Rock Quarry (Douglas Twp., PA), Rahn's Concrete (Bechtelsville), Bechtelsville Asphalt, and Berks Products (Wyomissing). The Colebrookdale vicinity is rich in

mineral, served as a regional center of iron mining activity throughout the 19<sup>th</sup> and early 20<sup>th</sup> Centuries, and continues to be a center of quarry activity today.

10. On December 31, 1998 the Pennsylvania Department of Transportation ("PennDOT") received an independent Valuation Study of the Branch from Man Line Management Services, Inc. valuing the Branch at \$416,000, including net track material liquidation value of \$133,000. See, 1998 Valuation Study, annexed hereto as Exhibit Scott-4.<sup>1</sup> The County subsequently acquired the Branch from PennDOT on June 8, 2001 for \$148,000. See, Agreement of Sale, annexed hereto as Exhibit Scott-6. In October 2002, PERL commissioned Leon G. Perkins, P.E. to inspect all bridges on its system. See, Perkins October 2002 inspection report for the Colebrookdale Branch, annexed hereto as Exhibit Scott-7. On July 3, 2003, with knowledge of the condition of all 11 bridges on the Branch, PERL purchased the Branch from the County for \$177,000. See, Deed, annexed hereto as Exhibit Scott-8.

11. The sale of the Branch was consummated with the County's understanding that purchaser would make an attempt to market the Branch to potential customers. To the best of my knowledge,

---

<sup>1</sup> The assessed value of the Branch was \$334,000 See, Realty Transfer Tax Statement of Value at D (4), annexed hereto as Exhibit Scott-5

information and belief, neither ESPN, nor Regional Rail, LLC ever discussed the Branch's viability with County officials before filing for abandonment authority.

12. While the County is aware that the liquidation of the Branch might be the most attractive short term option to the present operator, the long term public interest would be far better served by replacing the present operator with an entrepreneurial railroad operator who would seek to maximize its return on investment by developing the Branch to its full potential rather than seeking to recoup their investment by liquidating the Branch.

13. ESPN has postulated an unrealistic and thus unreasonably high net real estate value for its property, especially in light of the declining commercial real estate market over the past two years. Even assuming ESPN holds 95% of the real estate comprising the Branch in fee simple, as alleged in their petition for abandonment authority; there exist multiple significant impediments to a prompt sale of the right of way including historic preservation issues, bridge and crossing removal, environmental remediation and the like. South of Boyertown, the existing right of way traverses terrain which is thickly wooded, largely inaccessible by motor vehicle, characterized by steep slopes and crisscrossed by streams. See,

Map A. The foregoing characteristics of the surrounding terrain, coupled with the absence of level terrain adjacent to the right of way, render the land unsuited for development or alternative use as anything other than a trail.

14. Citizens have expressed concern to the Commissioners about the potential unlawful misuse of the railroad right of way by off-road vehicle operators and other trespassers were abandonment to be approved.

15. Adverse impacts upon the County likely to result from the authorization of the proposed abandonment include loss of potential industrial growth due to insufficient suitable freight transportation alternatives, consequent over-reliance upon the local roadway system, increased highway congestion, reduced highway safety, an increase in the unemployment rate among blue collar workers, loss of industrial capacity, and ultimately lost tax revenues. To forestall such an unfavorable situation, the County is willing to work with a responsible short line rail operator to develop new sources of rail freight traffic, as well as to explore additional avenues for revenue including developing a scenic/tourist seasonal rail operation in Eastern Berks and western Montgomery Counties.

16. The County is further willing to work with the interchanging Class I railroad (NS) to facilitate a smooth and efficient partnership with the short line operator.

17. The County is further willing to assist an entrepreneurial short line railroad operator willing to invest in the Branch in working with origin and destination rail operators and shippers to develop sufficient two-way traffic flow on the Branch. The County has already received a letter expression of interest from one such operator. See, Exhibit Scott-9.

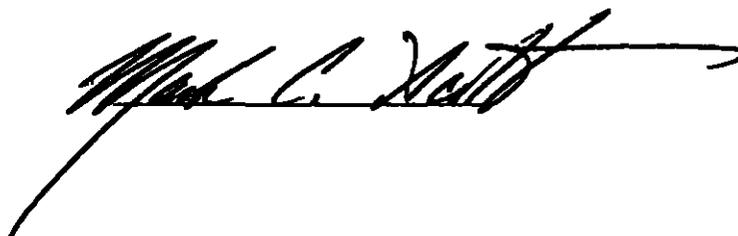
18. As part of the County's effort to identify potential rail customers, the Berks County Mapping Office has compiled a spreadsheet identifying commercial and industrial properties adjoining the existing Branch. See, Exhibit Scott-10.

19. For the foregoing reasons, Berks County respectfully requests the Board deny ESPN's request for abandonment authority of the Colebrookdale Branch.

VERIFICATION

Pursuant to 28 U.S.C. 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: September 2, 2008.

A handwritten signature in black ink, appearing to read "Mark C. Smith", written over a horizontal line.

[signature]

**EXHIBIT D**

**VERIFIED STATEMENT OF RICHARD HOFFMANN**

**I, RICHARD HOFFMANN, of full age, make the following Verified**

**Statement:**

- 1. I am the Director of Purchasing and Distribution for Drug Plastics and Glass Co., Inc. ("Drug Plastics"), located at One Bottle Drive, Boyertown, PA 19512.**
- 2. I make this verified statement based upon personal knowledge in support of Berks County's Petition for a Stay Pending Judicial Review of the Board's January 28, 2009 Decision in AB-1020X and in support of Drug Plastics desire for the resumption of rail service on the Colebrookdale Branch ("the Line") of the East Penn Railroad ("ESPN").**
- 3. Since 1963, Drug Plastics has been a leading supplier of quality plastic bottles to the pharmaceutical, healthcare, health and beauty aids, chemical, and food industries. Drug Plastics has over 250 employees capable of producing in excess of 7500 tons of finished product every year.**
- 4. Drug Plastics annually requires about 7500 plus tons of inbound raw material consisting of plastic pellets obtained from suppliers located in Texas.**

5. Prior to ESPN announcing it intended to abandon the Line, ESPN and the Line's prior operators had provided rail freight service to Drug Plastics since 1973. Up to and including 2004, service was provided to a transloading facility located on railroad property in Boyertown. In 2004 a railroad bridge in Pine Forge, PA, about 2 miles south of Boyertown, was damaged. The railroad operator thereupon provided temporary service to a transload site located near Pine Forge. The bridge was subsequently repaired and service restored to the former transload site in Boyertown. At no time did the rail operator provide transload service for Drug Plastics at Pottstown, as ESPN erroneously sets forth at page 5 of its July 31, 2005 exemption petition. Service continued until July 2008, at which time ESPN embargoed the Line due to alleged damage to a railroad bridge near the Line's point of origin in Pottstown, PA. Drug Plastics received 84 carloads in 2005, 93 carloads in 2006, and 82 carloads in 2007. In lieu of repairing the bridge, ESPN brought this abandonment petition.

6. Due to the service embargo imposed by ESPN on the Line, Drug Plastics was required to make alternate arrangements to receive inbound raw material. Drug Plastics declined ESPN's offer of delivery to an alternate rail Line some 10 miles away. Contrary to ESPN counsel's September 18, 2008 e-mail to Troy Brady

at the SEA, at no time did Drug Plastics inform ESPN that it was no longer interested in using the *Colebrookdale* Line.

7. Inbound traffic formerly transported by rail currently moves by truck, generating 400 to 500 extra trips annually each way. In Drug Plastics view, trucking is not a satisfactory alternative to rail service.

8. Inbound truck traffic moves primarily over Route 100, an arterial roadway which serves as a feeder to the Pottstown Expressway (Route 422), which in turn feeds into the Schuylkill Expressway (I-76) at the Valley Forge Interchange, which PennDOT reports is the third busiest in the State, with a daily traffic volume of 55,000 vehicles. A recent study estimates the current traffic volume at this interchange is expected to increase 1.5 times by 2028.<sup>1</sup>

9. Rising motor transport costs, particularly fuel costs present challenges which Drug Plastics seeks to offset by exploring the resumption of fuel efficient, environmentally friendly rail service as an alternative to truck transportation.

---

<sup>1</sup> See [www.paturnpike.com/newsletters/december00/page07.htm](http://www.paturnpike.com/newsletters/december00/page07.htm), and [www.sixlanewidening.com/FAQ.asp](http://www.sixlanewidening.com/FAQ.asp).

10. Drug Plastics is interested in exploring the option of accepting delivery of rail freight at the Boyertown Foundry location where the County is considering establishing a transloading facility, or at some other location in the Boyertown area.

11. Drug Plastics foresees a high probability that in the event rail were service to be restored on the Line, it would generate at least as many carloads of traffic as previously generated on the Line for at least the next two calendar years (2009 and 2010).

**VERIFICATION**

**Pursuant to 28 U.S.C. 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.**

A handwritten signature in cursive script, reading "Richard Hoffmann", written over a horizontal line.

**Richard Hoffmann**

**Executed on: February 11, 2009.**

**EXHIBIT E**

VERIFIED STATEMENT OF ROD MARTIN

I, ROD MARTIN, of full age, make the following Verified Statement:

1. I am the Vice President of Martin Stone Quarries, Inc., located at 1355 North Reading Avenue, Bechtelsville, PA 19505.
2. I make this verified statement based upon personal knowledge in support of the County's protest of the proposed abandonment of the Colebrookdale Branch by the East Penn Railroad ("ESPN").
3. Since 1953, Martin Stone Quarries has been providing quality aggregate and infield mix material to southeastern PA and surrounding states. Martin Stone Quarries has over 60 employees capable of producing in excess of 1.5 million tons of finished product every year. The aggregate mined from Martin Stone Quarries is a particularly hard form of granite called granite gneiss.
4. Martin Stone Quarries annually generates about 500 thousand tons of outbound product destined for customers in Southern New Jersey. This traffic currently moves entirely by truck, generating 25 thousand trips annually.

5. Certain local concrete plants (Rahn's Concrete, a tenant of Martin Stone Quarries and Berks Products of Gilbertsville) annually import 80 to 100 thousand tons of sand from New Jersey. This traffic also currently moves entirely by truck, generating 12 to 15 thousand trips annually.

6. Both inbound and outbound truck traffic moves primarily over Route 100, an arterial roadway which serves as a feeder to the Pottstown Expressway (Route 422), which in turn feeds into the Schuylkill Expressway (I-76) at the Valley Forge Interchange, the third busiest in the State, with a daily traffic volume of 55,000 vehicles. A recent study estimates the current traffic volume at this interchange is expected to increase 1.5 times by 2028.<sup>1</sup> These trucks then travel down the heavily congested Schuylkill Expressway, through Philadelphia, and across the Delaware River via the Walt Whitman Bridge to reach South Jersey.

7. Rising motor transport costs, particularly fuel costs present challenges which Martin Stone Quarries seeks to overcome by exploring fuel efficient, environmentally friendly rail service as an alternative to truck transportation.

---

<sup>1</sup> See [www.naturals.com/newsletters/december00/page07.htm](http://www.naturals.com/newsletters/december00/page07.htm) and [www.slatewidening.com/FAQ.asp](http://www.slatewidening.com/FAQ.asp)

8. The proposed abandonment of the Colebrookdale Branch would deprive Martin Stone Quarry and other potential local customers of the rail alternative before that alternative has ever been explored.

9. To the best of my knowledge, information and belief, Martin Stone Quarries has never been approached by ESPN with any proposal to provide railroad service.

10. With suitable financial incentives, Martin Stone Quarries would be willing to commit to shifting 50% of its outbound product, primarily aggregate material destined for South Jersey from truck to rail, generating approximately 2,500 annual outbound carloads of product (a volume of 12.5 cars a day for 200 days or 40 weeks per year). Coupled with a potential back haul of 800-1,000 carloads of sand, this would eliminate 37 to 40 thousand annual truck trips from local roads, regional highways and the interstate highway system.

VERIFICATION

Pursuant to 28 U.S.C. 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: September 9, 2008.

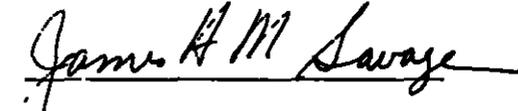


---

[signature]

CERTIFICATION OF PROOF OF SERVICE

I certify that I served this day by hand delivery and by electronic mail upon counsel for East Penn Railroad, LLC, and by first class mail upon counsel for Montgomery County a true copy of the within pleading.

  
James H. M. Savage

Dated: February 13, 2009