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June 29, 2009

By Federal Express

Surface Transportation Board
Attn: Secretary Ann Quinlan
395 E Street, SW
Washington, DC 20024

Re: Finance Docket No. 34943
Beaufort Railroad Company, Inc. – Modified Rail Certificate

Dear Ms. Quinlan:

I am enclosing herewith the original and eleven copies of the Petition for Stay of Diane D. Terni, Greedy Children Land, LLC and Prodigal Son, LLC. Please file it in the captioned matter and return our clocked-in copy in the envelope provided.

Yours very truly,

WARREN & SINKLER, LLP

Jo Davis
Assistant to G. Dana Sinkler

/jd
Enclosures

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Office of Proceedings

JUN 30 2009

Part of
Public Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



Finance Docket No. 34943

BEAUFORT RAILROAD COMPANY, INC. – MODIFIED RAIL CERTIFICATE

PETITION FOR STAY

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Dated: June 22, 2009

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JUN 30 2009

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 34943

BEAUFORT RAILROAD COMPANY, INC. – MODIFIED RAIL CERTIFICATE

PETITION FOR STAY

Pursuant to 49 C.F.R. § 1115.5, Petitioners Diane D. Terni, Greedy Children Land, LLC and Prodigal Son, LLC respectfully request a stay of the Board’s *Decision and Notice of Interim Trail Use or Abandonment* (“*Decision*”), served May 20, 2009, pending judicial review.

BACKGROUND

This case involves a dispute between landowners whose property came into possession of railroads (and their successors-in-interest) in the form of a right-of-way for use in expanding rail service. Petitioners, some of those landowners, have waited patiently for several years until all rail service over the right-of-way on their property was abandoned, and they now wish to reclaim that land. The right-of-way at issue here comprises a rail line between Yemassee and Port Royal, South Carolina (“Rail Line”) that was formerly owned by Seaboard System Railroad, Inc. (“Seaboard”). In 1984, the Interstate Commerce Commission approved this Rail Line for abandonment by Seaboard, but the Rail Line was subsequently acquired by Tangent Transportation Company, an instrumentality of the State of South Carolina, which instituted rail operations over the Rail Line in 1985. By 2003, those operations had ended, and Tangent filed a Notice of Intent to Terminate Service over the Rail Line. Petitioners believe that, upon

expiration of the 60-day period following the filing of that notice, the Board's jurisdiction over the Rail Line expired and they were entitled to seek to reclaim their land.

Despite the lack of rail service over the Rail Line since 2003, Beaufort Railroad Company, Inc. ("Beaufort"), a subsidiary of the South Carolina Division of Public Railways (collectively, and with all other relevant entities of South Carolina, "State Parties"), filed a notice requesting the issuance of a Modified Certificate of Public Convenience and Necessity ("Modified Certificate") to reinstate rail operations over the Rail Line ("December 1 Request") in December of 2006. On December 28, 2006, the Board published a notice of the December 1 Request in the Federal Register, thereby approving it ("Notice"). The Board issued its Notice in reliance upon the facts asserted in the December 1 Request – namely, that the State Parties had supposedly formed a fully functioning railroad company and intended to reinstate rail service over the Rail Line.

In its December 1 Request, Beaufort represented to the Board that the State Parties' only intention was to permit Beaufort to reinstate rail service over the Rail Line, and that their business plan to do so was reasonable and achievable, even though they could not identify any shipper which would be attracted to their proposed service. Nowhere in Beaufort's request did the State Parties mention their true intention – to use the Board's processes to maintain federal jurisdiction over the Rail Line, thereby preventing Petitioners from seeking to reclaim the right-of-way, and then to sell the right-of-way to the Beaufort-Jasper Water and Sewer Authority ("BJWSA") for \$3 million. Instead, Beaufort represented to the Board that it had been incorporated by the State of South Carolina (through its instrumentalities) to restore rail service over the Rail Line, and that the State had maintained the Rail Line in operating condition since Tangent terminated service in 2003. Beaufort also represented that it planned to improve the

Rail Line and re-establish freight rail service over it. None of those representations turned out to be true.

Petitioners long suspected that the State Parties planned to sell the Rail Line right-of-way to the BJWSA, which could be done only if the Board retained federal jurisdiction over the right-of-way, thereby preventing Petitioners from instituting a state court action to reclaim their property. Because the Board only has jurisdiction over active or contemplated rail service that affects interstate commerce, the State Parties devised a plan to create Beaufort and request a Modified Certificate to reinstate rail service over the Rail Line, even though they had no intention of doing so.

In response to the Notice, Petitioners (together with other affected landowners) filed a Petition for Reconsideration and also requested that the Board initiate an investigation to determine the true facts underlying Beaufort's December 1 Request ("2007 Petition"). Petitioners presented evidence showing that portions of the Rail Line were in poor condition and had not been maintained as represented, and that Beaufort did not seek a Modified Certificate in good faith, but did so only to re-establish the Board's jurisdiction over the Rail Line so that the land could be sold to BJWSA. Despite that evidence, in March of 2008 the Board refused to initiate an investigation and denied the 2007 Petition ("*March 2008 Decision*").

Petitioners subsequently petitioned the Board to reconsider its *March 2008 Decision* ("2008 Petition") and presented further evidence of the State Parties' true intentions regarding the Rail Line right-of-way, including news articles confirming that the State Parties intended to sell the right-of-way to BJWSA for \$3 million. Petitioners asserted that the Board's blanket acceptance of the State Parties' erroneous representations of plans to reinstate rail service over the Rail Line, which were clearly disputed by Petitioners, was a material error. Petitioners also

stated that it was erroneous for the Board to find that the termination of service by Tangent in 2003 did not constitute abandonment of the Rail Line by the State. Because of these disputed facts, and the growing evidence of the State Parties' true plans for the Rail Line right-of-way, Petitioners asserted that the Board's refusal to initiate an investigation also was a material error.

The State Parties never disputed the evidence and allegations presented by Petitioners. Faced with the 2008 Petition and clear evidence of their intent to sell the right-of-way to BJWSA, the State Parties jointly filed a Notice of Intent to Terminate Service by Beaufort and a request for issuance of a Notice of Interim Trail Use ("NITU"). The State Parties claimed that Beaufort would only terminate service over the Rail Line and effect a new abandonment if, contemporaneously, their request for a NITU were granted, thereby permitting the State Parties to sell the right-of-way to BJWSA without removing the Board's jurisdiction and exposing the right-of-way to any challenges by Clarendon to reclaim its land. In making that joint filing, the State Parties sought to further manipulate the Board's processes so that the Notice of Intent to Terminate Service, which, under the Board's regulations should automatically become effective 60 days after it is filed, would become contingent on the Board's approval of a NITU. This would foreclose all post-abandonment alternatives to the planned sale of the right-of-way to BJWSA, including the possibility that Petitioners could seek to reclaim their property.

Despite evidence of the State Parties' true intentions and the material errors in the *March 2008 Decision*, in May of 2009, the Board refused to reconsider its *March 2008 Decision*, again refused to initiate an investigation into the underlying facts, and issued the *NITU* ("*Decision*").

ARGUMENT

The Board's Rules of Practice provide that any party may petition for a stay of agency action pending judicial review. *See* 49 C.F.R. § 1115.5(a). Petitioners expect to seek judicial review of the Board's decision.

Petitioners maintain that the *Decision* is the product of material error and inflicts irreparable injury upon them. Under the Board's precedent, a stay is warranted when: (1) there is a substantial likelihood that the party seeking the stay will prevail on the merits; (2) the party seeking the stay will be irreparably harmed if the stay is not granted; (3) other interested parties will not be substantially harmed; and (4) the public interest supports the granting of the stay. *See Grand Elk Railroad, LLC – Lease and Operation Exemption – Norfolk Southern Railway Company*, STB Finance Docket No. 35187 (STB served Dec. 22, 2008); *see also Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958). As described below, Petitioners meet these criteria, and therefore a stay should be granted without delay.

I. There Is A Substantial Likelihood That Petitioners Will Prevail On The Merits.

Petitioners regard as material error the Board's continued refusal to reconsider its December 28, 2006 issuance of a Notice of Modified Certificate of Public Convenience and Necessity ("Notice of Modified Certificate") to Beaufort for reinstatement of rail service over the Rail Line. First, the Board erroneously determined that the Rail Line had not been abandoned and that it retained jurisdiction over the Rail Line despite clear evidence to the contrary. Tangent, an instrumentality of the State, terminated service in 2003, and there has been no subsequent rail service over the line. The State Parties also have not maintained the Rail Line in

fully operational condition since Tangent's termination of service. Moreover, the State Parties' actions in this proceeding show that Beaufort's December 1 Request was made solely to allow the State Parties to effectuate their plans of selling the Rail Line's right-of-way over Petitioners' property to BJWSA without allowing Petitioners the opportunity to seek to reclaim that land. Although the Board found that an operator's notice of intent to terminate service, standing alone, is insufficient to show an intent to abandon, an appeals court considering the totality of the circumstances likely would conclude that the State abandoned the Rail Line and therefore the Board's *Decision* was in error.

Second, an appeals court also likely would find that, given the vigorously disputed factual contentions in this proceeding, the Board's wholesale adoption of the State Parties' factual assertions in its *Decision* was a material error. Petitioners repeatedly presented evidence that contradicted the State Parties' representation that they intended to reinstate rail service over the Rail Line and undermined the factual assertions in the December 1 Request. The Board did not weigh or credit Petitioners' evidence and did not address the State Parties' serious credibility issues. At a minimum, these issues warrant an investigation into the true facts surrounding Beaufort's December 1 Request and the State Parties' asserted intent to reinstate rail service made in their subsequent filings. The Board's refusal to initiate an investigation was a material error.

Finally, it was a material error for the Board to grant the State Parties' request for a *NITU* given the disputed facts and the misleading positions taken by the State Parties in this proceeding. The State Parties' Notice of Intent to Terminate Service, when considering that it was made contingent upon the Board's grant of their request for a *NITU*, shows that the State Parties never intended to reinstate rail service over the Rail Line. Without that intent, Beaufort's

request for a Modified Certificate should never have been granted. In particular, the Board's finding that "the NITU request shows an intent to preserve the right-of-way for potential future rail service" is inconsistent with the factual record in this proceeding which shows that the real intent was to sell the right to install water and sewer pipes, not to provide rail service. Because the Board's issuance of a *NITU* is based on that finding, that portion of the *Decision* was a material error.

As a result, Petitioners have a substantial likelihood of success on the merits on appeal.

II. Petitioners Will Be Irreparably Harmed Absent A Stay.

If a stay is not granted here, the State Parties will move forward with their plans to sell the Rail Line's right-of-way to BJWSA for the installation of water and sewer pipes on that land. The State Parties also represented to the Board that the land would be converted to public recreational trails. To make these substantial changes to the land, it likely will be necessary for the State Parties to enter Petitioners' property. By the time that Petitioners' request for judicial review is decided and any appeal is heard, substantial construction likely will have been undertaken by the State Parties, and it will be extremely difficult to undo the installation of water and sewer pipes and recreational trails on the land. The Rail Line right-of-way and Petitioners' adjoining property comprise pristine, beautiful land that is largely undeveloped and natural. Installation of water and sewer pipes and construction of recreational trails will destroy this pristine land, and it will be impossible to return that land to its prior condition if Petitioners are successful on appeal and in reclaiming that property. By issuing a stay, the Board will ensure that this land is left unchanged while Petitioners appeal the *Decision*.

Moreover, conversion of the Rail Line property for recreational trail use likely will be accompanied by public announcements regarding the creation of those trails, and if there is no

stay of the *Decision* while Petitioners seek judicial review, the public likely will acquire an expectation of access to and use of the Rail Line property that will be difficult to reverse if the *Decision* is overturned. A stay will maintain the status quo while the *Decision* is reviewed and will prevent the creation of public expectations that may be unwarranted.

III. Issuance Of A Stay Will Not Harm Any Other Parties.

Here, issuance of a stay will not harm any other interested parties because the stay will merely continue the status quo that has existed for the past several years. A stay will not impede the State Parties' efforts to reach an agreement regarding the sale of the Rail Line property to BJWSA or its development for interim trail use; it will only prevent the parties to any such agreement from making changes to the Rail Line property. In addition, the State Parties have not expressed any urgency with respect to the timing of the development of the Rail Line property in their filings in this proceeding, and therefore a stay will not adversely impact their plans.

IV. Issuance Of A Stay Is In The Public Interest.

Issuance of a stay of the Board's *Decision* pending judicial review is in the public interest because it will allow Petitioners to be fully heard on its challenges to the State Parties' plans for the Rail Line property. Judicial review of the *Decision* and its underlying facts by a United States Court of Appeals will ensure an impartial analysis that considers Petitioners' property rights, and will provide a check on the Board's acceptance of the State Parties' actions, guaranteeing that the most appropriate result is reached. By subjecting the *Decision* to judicial scrutiny, the Board will benefit from a determination of the validity of its reasoning.

Here, the State Parties are attempting to use the Board's processes to transfer control of the Rail Line property without providing Petitioners with any opportunity to seek to reclaim that property. Although the Board has determined that the State Parties' actions are proper under its

own rules and regulations, the *Decision* will have impacts far beyond the scope of the Board's jurisdiction, including Petitioners' property rights and limits on the Board's jurisdiction over rail lines not affecting interstate commerce. The potential effects of the *Decision* are far-reaching, and judicial review of the *Decision* will allow an impartial appeals court to consider all relevant issues in determining whether the proper conclusion was reached. In addition, the manner in which the State Parties have used the Board's processes likely will be attempted by others if the *Decision* is upheld, and therefore judicial review of the *Decision* before others follow the same approach in proceedings before the Board is appropriate.

Finally, issuance of a stay will serve the public interest because it will prevent, or at least delay, the creation of any public expectation of access to or use of the Rail Line property for recreational trail use, which would be difficult (if not impossible) to reverse once developed. Indeed, if no stay is issued and the State Parties complete construction of recreational trails on the Rail Line property, the public may even begin to access and use that property. If Petitioners subsequently are successful on appeal and in reclaiming that land, they likely will face trespassing and damage to its property. A temporary stay of the *Decision* pending judicial review will prevent this.

CONCLUSION

For the reasons stated above, Petitioners respectfully requests that the Board issue a stay of the effectiveness of its *Decision* pending judicial review, and grant such other and further relief as the Board deems just and proper.

Dated: June 22, 2009

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that, on June 22, 2009, I caused a copy of the Petition for Stay to be served upon the following persons by first-class mail, postage prepaid:

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