

BEFORE THE  
SURFACE TRANSPORTATION BOARD

207233

FINANCE DOCKET NO. 30186 (SUB-NO. 3)



TONGUE RIVER RAILROAD COMPANY -- CONSTRUCTION AND  
OPERATION -- IN ROSEBUD AND  
BIG HORN COUNTIES, MONTANA<sup>1</sup>

RESPONSE OF TONGUE RIVER RAILROAD COMPANY TO  
OPPOSITIONS TO  
PETITION FOR LEAVE TO FILE SUPPLEMENTAL EVIDENCE

ENTERED  
Office of Proceedings

FEB 13 2003

Part of  
Public Record

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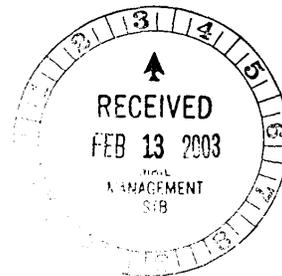
Attorneys for Applicant  
Tongue River Railroad Company

February 13, 2003

<sup>1</sup> In its Petition, TRRC used the slightly different caption that had been used in its application (and as also used by the Board's Section of Environmental Analysis for this proceeding.) The above caption is identical to that which the Board and the parties have previously used in this proceeding.

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Tongue River Railroad Company ("TRRC") hereby tenders this response to the oppositions filed by Northern Plains Resource Council, Inc. ("NPRC") and United Transportation Union, General Committee of Adjustment on The Burlington Northern and Santa Fe Railway Company, Montana State Legislative Board ("UTU") to the January 17, 2003 Petition of TRRC for Leave to File Supplemental Evidence ("Petition").<sup>1</sup> By that Petition, TRRC seeks permission to do no more than update the record in this rail construction proceeding. Opponents do not want the railroad built. Thus, they have opposed TRRC's efforts at every stage. Now they oppose TRRC's effort to provide the Board with up-to-date information for a variety of reasons that the Board should find unpersuasive.

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<sup>1</sup> TRRC has simultaneously moved for leave to file this response.

In contrast, the newly-elected Governor of the State of Montana, Judy Martz, has filed a letter with the Board supporting TRRC's petition. Governor Martz expressed her view that "the submittal of current information by the TRRC will bring the record current and ensure the Surface Transportation Board's decision in Finance Docket No. 30186 (Sub-No. 3) is based on current information and fact." The Governor also reiterated "Montana's support of the Tongue River Railroad project" and the Western Alignment application, and urged the Board's "timely action" on that application "to ensure Montana's ability to move forward with its plans for developing the coal resources in southeastern Montana and recognize the economic benefits for its education system." See Letter from Judy Martz, Governor of Montana, to Roger Nober, dated January 31, 2003.

**A. Reply to UTU**

UTU argues that the Petition should be denied because the supplemental evidence sought to be submitted for the record was not attached to the Petition. (No doubt, if the evidence had been attached, UTU would be arguing that the evidence should not have been attached on the grounds that doing so would violate Board rules.) TRRC described the nature of the supplemental evidence in its Petition. The evidence would consist, quite simply, of (1) the current status of the transfer of certain federal mineral rights; (2) updates, if necessary, to tonnage forecasts, financial forecasts and estimated costs of construction; (3) updates, if necessary, to descriptions of TRRC's business structure, proposed financial structure and plan for raising the funds required for construction; (4) updates to supporting statements from key Montana public officials and (5) the effect (if any) of the Board's recent authorization of the DM&E Railroad's proposed construction of a rail line to serve the Southern Powder River Basin of Wyoming. None of this evidence will be voluminous and all of it will merely supplement

elements of the application that TRRC has already filed in this proceeding. The purpose in submitting this supplemental evidence is merely to ensure that the Board has the most recent evidence when it decides this case.

There is no Board rule that requires that supplemental evidence be tendered with a petition for leave to file such evidence, and UTU points to no such rule or principle. TRRC was of the view that it should ask for permission to submit the evidence, and ask the Board to establish a procedure for its submission, and for the submission of responses, before preparing and tendering the evidence itself. By this means, TRRC sought to insure that the update was received at the time and in the manner deemed by the Board to be most appropriate, with a schedule allowing adequate time for responses before issuance by the Board of its final decision in the case.

UTU points to a Board decision served March 24, 1998 denying TRRC's request that the Board establish a specific procedural schedule for handling its then-forthcoming application in this proceeding. UTU claims that that decision, wherein the Board held that it would not establish a schedule until after the application was filed and the scope of public interest in the application determined, dictates the denial of the pending TRRC Petition. However, in contrast to the matter at hand in the 1998 decision, the application has long since been filed, and TRRC here merely seeks leave to supplement a record that has already been developed in a pending case. Moreover, unlike the 1998 request, TRRC here has not proposed a specific schedule for the submission of responsive evidence or replies. Indeed, TRRC would not oppose deferring any Board consideration of the specifics of such a schedule until after it has submitted its supplemental evidence and the Board has had the opportunity to review the scope of the evidence and, on the basis of that information, set an appropriate schedule for responsive filings.

UTU argues that TRRC's Petition should be governed by the rules and standards that would apply to a petition to reopen a proceeding that has already been the subject of a Board decision. See 49 CFR §§ 1115.3; 1115.4. That argument is patently wrong. TRRC is not seeking to reopen a Board decision at all, but merely to update the record in a pending case. In any event, the supplemental evidence that it would submit -- consisting solely of updates to evidence already in the record -- obviously was not available at the time of TRRC's initial submission and will undoubtedly assist the Board in reaching a decision in this proceeding.

In other proceedings, the Board has authorized parties to supplement the record of a pending proceeding in order to bring to the Board's attention updated evidence or information that may inform the Board's decision. The Board has so acted in the interest of building a complete record.<sup>2</sup> The Board should act no differently here.

**B. Reply to NPRC**

NPRC claims that TRRC's Petition "is an attempt to amend its application to submit extensive new documentation about issues which affect the merits of the Board's determination." This is simply not true. TRRC is *not* proposing to amend its application, but merely to update the evidentiary record. Nor is TRRC proposing to submit anything that could reasonably be labeled "all manner of new evidence about the economic and social value of the railroad." The

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<sup>2</sup> See, e.g., *Central Kansas Railway Limited Liability Company -- Abandonment Exemption -- In Marion and McPherson Counties, KS*, STB Docket No. AB-406 (Sub No. 6X) (served Dec. 18, 1998) (permitting petitioners to supplement their petition with more recent developments); *Idaho Northern & Pacific Railroad Company -- Abandonment Exemption -- in Wallowa and Union Counties, OR*, STB Docket No. AB-433X (served July 25, 1996) (allowing the filing of supplemental evidence bearing on more recent developments "in the interest of a more complete record").

fact is that little of relevance has changed during the pendency of this case. TRRC's supplemental evidence will be very modest in scope and confined to those few matters where, e.g., economic indices require updating or some new developments merit note.<sup>3</sup>

NPRC -- in an obvious effort to obtain a new platform to relitigate this proceeding -- claims that TRRC instead should submit a new application. NPRC's notion that any time a party seeks to supplement its evidence in support of an application it must do so by filing a new application is simply not credible, or consistent with Board practice. TRRC submits that preparation of an entirely new application would be a pointless and wasteful exercise which would produce only the goals that NPRC really wants: more burden for TRRC and more delay for the agency process. The essential elements of the Western Alignment application and evidence remain unchanged and do not need supplementation. Thus, a new application would essentially constitute a repeat of the pending application, except to the very limited extent that TRRC intends to update its evidence.

A new application would be particularly pointless given the extremely limited nature of this application. The Board and its predecessor have already approved the construction of

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<sup>3</sup> Both UTU and NPRC argue that the Board's approval of the Dakota, Minnesota & Eastern Railroad Corporation's proposal to construct an extension into the Powder River Basin of Wyoming may have a significant impact on the TRRC project. Of course, the only issue in the pending TRRC proceeding is the narrow one of whether TRRC should be able to use an alternative routing for the southernmost 17 miles of its proposed line. It is hard to see how the DM&E project would bear on that issue. Moreover, the proposed DM&E line, which is designed to serve an area in a different state, is almost one hundred miles south of the southernmost terminus of the proposed TRRC line. It could not possibly have any major impact on TRRC's project -- a point underscored by the absence of any reference whatsoever to the TRRC project in the Board's *DM&E* decision and related environmental documents. In addition, TRRC's project is focused primarily on the transportation of coal originating at mines to be developed in southeast Montana, an entirely different market than that proposed to be served by DM&E. This is among the points that TRRC proposes to address in its supplemental submission.

TRRC's proposed 89-mile line between Ashland and Miles City, MT and its proposed 41-mile line between Ashland and Decker. See Tongue River Railroad Company -- Rail Construction and Operation -- in Custer, Powder River and Rosebud Counties, MT, F.D. No. 30186 (not printed) (served Sept. 4, 1985) modified (not printed) (served May 9, 1986); and Tongue River Railroad Company -- Rail Construction and Operation -- Ashland to Decker, MT, F.D. 30186 (Sub-No. 2) (not printed) (served Nov. 8, 1996.) The only issue raised by the present application is whether TRRC should be authorized to construct the southernmost portion of the Ashland to Decker line -- a distance of 17 miles -- over a different routing (the Western Alignment) than that previously authorized by the Board in its 1996 decision. Any update needed to the evidence supporting this extremely narrow application can readily -- and expeditiously -- be accomplished simply by the filing of supplemental evidence. A new application would simply add to the burden and increase the drain on the resources of both TRRC and the Board, with no public interest benefits whatsoever.

Indeed, the filing of a new application would be extremely confusing for the public -- both the supporters and the opponents of the Tongue River project. The natural assumption of anyone receiving a new application would be that it seeks something different than the prior application. But, of course, that would not be the case -- any new application would seek exactly the same thing as the application now on file, and indeed would be supported by virtually identical evidence. This would both confuse the public and require them to engage in substantial additional effort to understand what it is all about. In contrast, the filing of supplemental evidence will indicate immediately the few matters that have been updated, thus greatly simplifying the proceeding for all interested parties.

Further, were such a new application required, NPRC and other opponents would effectively receive a second bite at the apple in submitting their responsive evidence. TRRC submits that its opponents should be entitled to address the supplemental evidence that it proposes to submit, but there is no reason why they should have a renewed opportunity to attack TRRC on the vast bulk of the remaining evidence that has already been addressed. Yet that is precisely the result that would follow were a new application required -- to the significant prejudice of TRRC. By contrast, neither NPRC nor other opponents will be prejudiced by TRRC's proposal to submit updated evidence since they will have, if the Board agrees with TRRC, ample opportunity to prepare and submit reply evidence.

NPRC argues that it should be given at least 4 months to prepare its response to the TRRC supplementary evidence. Contrary to NPRC's apparent expectations, TRRC will be making a very modest supplemental filing. As noted above, TRRC would not oppose the postponement of a Board order fixing a schedule for responsive filings until after the supplemental evidence is submitted. TRRC will, however, oppose as entirely unnecessary anything close to a four month delay in the submission of such responsive data.<sup>4</sup>

NPRC correctly observes that the evidence that TRRC proposes to submit has "nothing to do with the on-going environmental review and everything to do with the need for, and viability of the proposed railroad." This is precisely the point. Updating of the environmental issues, which is the responsibility of SEA, will be addressed in the ongoing environmental review

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<sup>4</sup> NPRC's concern that TRRC has been devoting months or years to developing its supplemental evidence is far afield. The TRRC project has been on hold until recently, and TRRC has only recently begun to address these matters.

process.<sup>5</sup> TRRC simply proposes that the evidence relevant to the transportation issues raised by the application also be updated, so that the Board will have an up-to-date record on both environmental and transportation issues when it renders its decision.

### CONCLUSION

The issue here is really very simple: Should TRRC be able to supplement the record -- with full opportunity for reply by opposing parties -- so that the Board has the most complete and updated information before making a decision? The answer, TRRC submits, is obvious. The objections from UTU and NRPR should be seen for what they are -- efforts to delay this proceeding.

Respectfully submitted,

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<sup>5</sup> Thus the Department of Interior's EIS with respect to coal bed methane development, cited by NPRC, is more appropriately addressed (to the extent that SEA determines it is relevant at all) in the environmental review process. It has no conceivable relevance to the transportation issues relating to the proposed alternative routing that is the subject of TRRC's Petition.

Certificate of Service

I hereby certify that on this 13th day of February 2003, a true and correct copy of the foregoing Response to Oppositions to Petition for Leave to File Supplemental Evidence was served by first-class mail, postage prepaid, on all parties of record to this proceeding.



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David H. Coburn