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THOMAS F. MCFARLAND

January 16, 2007

By UPS overnight mail

Vernon A. Williams, Secretary
Surface Transportation Board
Case Control Unit, Suite 713
1925 K Street, N.W.
Washington, DC 20423-0001

ENTERED
Office of Proceedings
JAN 16 2007
Part of
Public Record

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

Dear Mr. Williams:

Enclosed please find an original and 10 copies of Petition To Reopen And/Or For Reconsideration Of Decision Served December 28, 2006, in behalf of Delores Coberly, et al., for filing with the Board in the above referenced matter. Also enclosed is a check for \$200 to cover the filing fee.

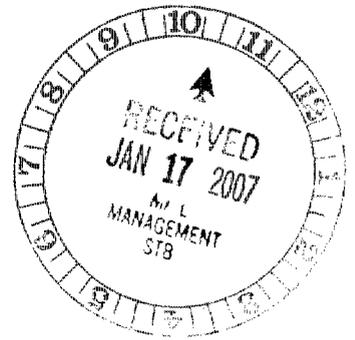
Very truly yours,

Tom McFarland

Thomas F. McFarland
Attorney for Petitioners

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BEFORE THE
SURFACE TRANSPORTATION BOARD



BEAUFORT RAILROAD COMPANY,) FINANCE DOCKET
INC. - MODIFIED RAIL CERTIFICATE) NO. 34943

**PETITION TO REOPEN AND/OR FOR RECONSIDERATION
OF DECISION SERVED DECEMBER 28, 2006**

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DATE FILED: January 17, 2007



BEFORE THE
SURFACE TRANSPORTATION BOARD

BEAUFORT RAILROAD COMPANY,) FINANCE DOCKET
INC. - MODIFIED RAIL CERTIFICATE) NO. 34943

**PETITION TO REOPEN AND/OR FOR RECONSIDERATION
OF DECISION SERVED DECEMBER 28, 2006**

Pursuant to 49 C.F. R. § 1115.3 and 1115.4, DELORES COBERLY, DON EDGERLY, JOHN KEITH, DARTHA P. PIERCE, PENDER BROTHERS, INC. and JOHN SCHERER hereby petition to reopen and/or for reconsideration of the Board's decision/notice (decision) served December 28, 2006 of a Modified Certificate of Public Convenience and Necessity (Modified Certificate) issued to Beaufort Railroad Company, Inc. (BRC), a subsidiary of the South Carolina Division of Public Railways (SCDPR).

On reopening/reconsideration, the Board is urged to vacate the finding at page 2 of the decision that the rail segment qualifies for a modified certificate of public convenience and necessity. The Board is urged to find instead that it lacks jurisdiction to issue a Modified Certificate because: (1) the rail segment under consideration was fully abandoned over three years ago; and (2) BRC does not propose to provide transportation of freight to or from the rail segment in interstate commerce. Based on those findings, the Board is urged to vacate the decision served December 28, 2006 for lack of jurisdiction to have issued a Modified Certificate as to the involved rail segment.

BACKGROUND

The persons filing this Petition own the fee interest in parcels of right-of-way land that, together with other such parcels, comprise a rail line that extends from point of connection with CSX Transportation, Inc. (CS) at Yemassee, SC to the Port of Port Royal, SC, a distance of approximately 25 miles.^{1/} For convenience, Petitioners will sometimes be referred to as the Landowners.

Until three years ago, the Landowners' fee interest was subject to an easement for operation of rail freight service over the rail line. That easement was initially held by predecessors of CSX. Abandonment of that rail line by a CSX predecessor was authorized by the Board's predecessor in 1984. *See Seaboard System Railroad, Inc. -- Abandonment -- in Beaufort County, SC*, Docket No. AB-55 (Sub-No. 110), decision served Aug. 23, 1984.

That rail easement was subsequently acquired by the State of South Carolina through the South Carolina State Ports Authority (Ports Authority). The Ports Authority leased that interest to the South Carolina Public Railways Commission, which is now SCDPR. The Railways Commission created a subsidiary, Tangent Transportation Company (Tangent), to operate the rail line. In a decision served June 13, 1985 in ICC Finance Docket No. 30655, *Tangent Transportation Company -- Modified Rail Certificate*, the Board's predecessor provided notice

^{1/} Petitioners' claim of fee ownership of the right-of-way land is based on review of the deeds by which a CSX predecessor originally acquired its interest in those parcels, and on application of South Carolina real property law to the terms of those deeds. Petitioners recognize that the Board does not have jurisdiction to determine the nature of Petitioners' real property interest. That interest is subject to the jurisdiction of South Carolina Courts. However, the Board does have jurisdiction to determine whether the rail line has been fully abandoned (i.e., whether an authorized abandonment has been consummated), so as to trigger application of South Carolina real property law to the parcels of land under consideration.

of issuance of a Modified Certificate to Tangent. That decision stated that the rail line would be known as the Port Royal Railroad (PRR), and that the rail line would connect with a CSX predecessor at Yemassee, SC. A copy of that decision is attached to this Petition as Appendix 1.

Tangent operated the PRR for the next 18 years, until 2003. In that year, the State of South Carolina decided to close the Port of Port Royal and abandon the PRR. Attached to this Petition as Appendix 2 is a copy of a public statement by Mr. Bernard S. Groseclose, Jr., President and CEO of the Ports Authority, issued on August 1, 2003. In that statement, Mr. Groseclose referred to his suggestion to the Governor of South Carolina, with which the Governor concurred, that the Ports Authority “look at redeveloping or re-using portions of our property in Port Royal.” Mr. Groseclose stated that “(i)f or when the Port of Port Royal discontinues cargo operations, rail access to Beaufort County will likely disappear.”

Exactly two months later, on October 1, 2003, SCDPR and Tangent filed a Notice with the Board under 49 C.F.R. § 1150.24 of termination of Tangent’s Modified Certificate, effective 60 days later. A copy of that Notice is attached to this Petition as Appendix 3.

Rail service over the PRR ceased on November 30, 2003. Thereafter, the Ports Authority made a number of public statements to the effect that rail freight service over the PRR would not be restored. A group of investors known as the Port Royal Railroad Preservation Authority (Preservation Authority) made several proposals to the Ports Authority to lease or purchase the PRR for continued rail freight service and tourist passenger service. All of those proposals were denied or ignored. On several occasions, the Ports Authority stated publicly that it intended to sell all or part of the PRR to Beaufort County, SC for use as a recreational trail. The Landowners let it be known that they oppose any such use, and that they would attack any such sale on the

ground that the Ports Authority's easement cannot lawfully be sold to Beaufort County because that easement was extinguished by operation of law when abandonment of the PRR was consummated as a result of termination of Tangent's Modified Certificate and the Port Authority's refusal to lease or sell the PRR for continued rail freight transportation.

The PRR has sat idle for over three years following termination of rail freight service at the end of November, 2003. The right-of-way is grown over with weeds, brush and trees. A massive expensive effort would be required to restore rail freight service over the line. There is absolutely no prospect that such freight service will be restored.

Nevertheless, in a Notice for Modified Certificate of Public Convenience and Necessity in this proceeding filed on December 1, 2006, the Ports Authority, SCDPR and the latter's new subsidiary, BRC, provided notice of a Modified Certificate for BRC to provide rail freight service over the former PRR. A copy of that Notice is in this record. The following very meaningful acknowledgment appears at page 4 of the Notice:

. . . The Operator (BRC) does not expect to make any interchange or interline connections with any connecting railroads . . .

The plain meaning of that statement is that BRC does not expect nor intend to transport rail freight traffic for interchange with CSX to or from points beyond Yemassee, SC.

The Board's decision providing notice of the filing of BRC's Notice was served on December 28, 2006. As here pertinent, the Board there stated that the PRR qualifies for a Modified Certificate (at 2). However, the Board also noted BRC's acknowledgment that it does not expect to make interchange or interline connections with any connecting railroads (*id*).

The Landowners are filing this Petition because they are convinced that the Modified Certificate has not been sought by BRC in a good faith effort to provide rail freight service over the PRR, but instead is designed to re-establish the Board's jurisdiction over the PRR, after which the Modified Certificate would be terminated and the PRR would be converted to recreational trail use. That is certainly not an idle concern. The Modified Certificate-Recreational Trail Use scenario has been used on at least two recent occasions of which the Landowners are aware, i.e., (1) STB Finance Docket No. 29910 (Sub-No. 1), *D&I Railroad Company -- Notice of Interim Trail Use and Termination of Modified Rail Certificate*, decision served Oct. 6, 2004; and (2) STB Finance Docket No. 32609, *Chesapeake Railroad Company -- Certificate of Interim Trail Use and Termination of Modified Certificate*, decision served Jan. 7, 2007.

The Landowners do not contend that it is inherently unlawful to use modified certificate procedure and recreational trail use procedure consecutively where the involved rail line has not been fully abandoned and the modified certificate was obtained in a good faith effort to provide rail freight service on the line. That was not the case here. The Landowners are forced to challenge the Modified Certificate at this time because if they were to fail to do so, they could be precluded from challenging issuance of a trail use certificate at a later time because the modified certificate would have re-established the Board's jurisdiction to issue a trail use certificate. In that circumstance, Landowner opposition to issuance of a trail use certificate could be seen as an untimely collateral attack against BRC's Modified Certificate.

ARGUMENT

THE BOARD SHOULD VACATE ITS FINDING THAT THE RAIL LINE QUALIFIES FOR A MODIFIED CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY AND DISMISS THE NOTICE FOR MODIFIED CERTIFICATE FOR LACK OF JURISDICTION

I. The Board Lacks Jurisdiction To Issue A Modified Certificate Because The Rail Line Has Been Fully Abandoned

The Board's regulations providing for Modified Certificates apply to rail lines that have been approved for abandonment, but not yet fully abandoned, at the time when the lines are acquired by States or political subdivisions thereof. 49 C.F.R. § 1150.23. The regulations do not apply to rail lines that have been fully abandoned at that time because the Board has lost jurisdiction over such lines. Thus, it is provided in 49 C.F.R. § 1150.23 that the acquisition by a State of a fully abandoned line is not subject to the jurisdiction of the Board.

Accordingly, the PRR qualifies for a Modified Certificate only if it was not fully abandoned prior to issuance of the Modified Certificate. The PRR does not qualify for a Modified Certificate because the PRR was fully abandoned in 2003 when a prior holder of a Modified Certificate terminated the Certificate and the State declined attempts by the Preservation Association to lease or purchase the PRR for continued rail operation.

Whether a rail line has been fully abandoned (that is, whether an approved abandonment has been consummated) is a mixed question of fact and law. In the case of PRR, the facts and law are convincing that it has been fully abandoned. That is shown by the following:

- (1) a prior Modified Certificate was terminated by Tangent in 2003 when the Port of Port Royal was closed. Termination of that Modified Certificate signaled an end to the State's intent to provide rail freight service over the PRR;

- (2) Shortly prior to termination of that Modified Certificate, the State Ports Authority publicly stated that it intended to redevelop its rail property in Port Royal, and that if the Port of Port Royal discontinued cargo operations, “rail access to Beaufort County will likely disappear.”;
- (3) thereafter, the State Ports Authority rejected and/or ignored attempts by the Preservation Authority and others to lease or purchase the PRR for continued rail operation; and
- (4) for a period of more than three years after termination of rail freight service, the State Ports Authority did not perform even minimal maintenance of the PRR, with the result that its right-of-way and trackage have substantially deteriorated.

The Landowners respectfully submit that those facts demonstrate conclusively that in 2003 and thereafter, the State Ports Authority manifested an unmistakable intent to cease rail freight service over the PRR on a permanent basis. That being the case, it follows that the PRR has been fully abandoned (i.e., the abandonment that was approved in 1984 was consummated in 2003 or soon thereafter). Inasmuch as the PRR has been fully abandoned, it does not qualify for a Modified Certificate. The Board’s contrary finding in the decision served December 28, 2006 should thus be vacated. And since the PRR does not qualify for a Modified Certificate, the Board did not have jurisdiction to issue a Modified Certificate to BRC to operate the PRR. Accordingly, BRC’s Notice for Modified Certificate should be dismissed for lack of jurisdiction. *See Becker v. STB*, 132 F.3d 60, 63 (D.C. Cir. 1997) (“Given T&P’s intent to abandon before that time and its expressed opposition to extension of the negotiation period, we must conclude that

when the May 1993 NITU expired on November 27, 1993 abandonment was consummated and the Board lost jurisdiction over the line.”).

II. The Board Lacks Jurisdiction To Issue A Modified Certificate Because BRC Does Not Propose To Provide Transportation Of Freight To Or From The PRR In Interstate Commerce _____

Even if the PRR had not been fully abandoned, the Board lacks jurisdiction to issue a Modified Certificate because BRC does not propose to provide transportation of freight to or from the PRR in interstate commerce. That is evident from BRC’s acknowledgment at page 2 of the Notice for Modified Certificate that “the Operator (BRC) does not expect to make any interchange or interline connections with any connecting railroads.”

The plain meaning of that Statement is that any rail freight transportation that would be provided by BRC would be performed wholly on the rail line between Yemassee, SC and Port Royal, SC. Any such transportation would be wholly in South Carolina intrastate commerce. The Board does not have jurisdiction over transportation that is performed in South Carolina intrastate commerce. *See Napa Valley Wine Train, Inc. -- Declaratory Order*, 7 I.C.C. 2d 954 (1991); 49 U.S.C. § 10501(a)(2). Accordingly, the Board does not have jurisdiction to issue a Modified Certificate to BRC to perform transportation that is conceded to be solely in South Carolina intrastate commerce. That being the case, BRC’s Notice for Modified Certificate should be dismissed for lack of jurisdiction. *See RLTD Railway Corp. v. STB*, 166 F.3d 808, 814 (6th Cir. 1999) (“... (W)e cannot say that the STB erred in its judgment that it loses jurisdiction over a line once it becomes severed from the interstate rail system so that it (the STB) may not issue a trail condition.”).

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, premises considered, the Board should: (1) vacate the finding in its decision served December 28, 2006 that the PRR qualifies for a Modified Certificate; and (2) dismiss the Notice for Modified Certificate filed by BRC for lack of jurisdiction.

Respectfully submitted,

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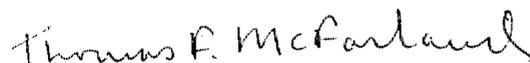
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Attorney for Petitioners

DATE FILED: January 17, 2007

APPENDIX 1

PR-7015-01
DO

INTERSTATE COMMERCE COMMISSION
Finance Docket No. 30655
TANGENT TRANSPORTATION COMPANY
Modified Rail Certificate

SERVICE DATE

JUN 13 1985

June 7, 1985

NOTICE:

On April 16, 1985 as amended June 4, 1985, a notice was filed by Tangent Transportation Company (Tangent), for a modified rail certificate of public convenience and necessity under 49 C.P.R. 1150, Subpart C to operate a line of trackage from Yamassee (MP 443.26) to Port Royal (MP 468.31) in Beaufort County, SC. This line of railroad had formerly been owned and operated by Seaboard System Railroad, Inc. (SBD). In Docket No. AB-55 (Sub-No. 110), served August 23, 1984, the Commission authorized SBD to abandon this line.

The South Carolina State Ports Authority, a political subdivision of the State of South Carolina, has acquired the line and has leased the line to the South Carolina Public Railways Commission (Commission). Tangent, a wholly-owned subsidiary of the Commission, will operate the line, beginning May 1, 1985. The railroad will be known as the Port Royal Railroad and will connect with SBD at Yamassee.

This notice will be served upon the Association of American Railroads (Car Service Division) as agent of all railroads subscribing to the car-service and car-hire agreements, and upon the American Short Line Railroad Association.

By the Commission, Haber P. Hardy, Director, Office of Proceedings.

(SEAL)

James H. Bayne
James H. Bayne
Secretary

APPENDIX 2

Port of **PORT ROYAL**

**SOUTH CAROLINA STATE
PORTS AUTHORITY**

601 PARIS AVENUE

PORT ROYAL, SC 29935-2431 USA

(843) 524-9311

FAX: (843) 524-5397

**STATEMENT FROM THE S.C. STATE PORTS AUTHORITY
REGARDING THE PORT OF PORT ROYAL**

Bernard S. Groseclose, Jr. – President & Chief Executive Officer

August 1, 2003

On July 17, at a public meeting with Gov. Mark Sanford and his staff, I suggested that the Ports Authority look at redeveloping or re-using portions of our property in Port Royal. Gov. Sanford concurred and encouraged an expedited approach.

While certainly not a new concept, I brought the idea forward because there are probably some higher and better uses for the Ports Authority's land in this historic seaport.

Additionally, the cost of providing rail access to the terminal is rising. The Ports Authority owns the rail, and trains are operated by the S.C. Public Railways. If or when the Port of Port Royal discontinues cargo operations, rail access to Beaufort County will likely disappear. This has obvious impacts on the future development of Beaufort County, as well as on the private and federal users of the railroad.

Any future redevelopment of the Authority's land in Port Royal must generate the highest possible financial return for the State's ports, while meshing with the community's long-term desires.

But redevelopment will not be like flipping a switch. We have several long-term customers in the Port of Port Royal – customers that have invested in facilities and signed contracts. We value their business and respect our business relationships.

Part of our legislated mandate is to operate port facilities in Port Royal, and over the years the Ports Authority has attempted to be a good corporate citizen. We are committed to moving this project forward to the benefit of the state and her citizens and we look forward to working with the Mayor, Town officials and the community.

Media Contact: *Byron Miller, S.C. State Ports Authority, (843)577-8197*

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APPENDIX 3

LAW OFFICES OF

SIMONS & KEAVENY

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TELEPHONE: (843) 762-9132 • FACSIMILE: (843) 406-9913

KEATING L. SIMONS, III THOMAS J. KEAVENY, II DEREK FARRELL DEAN BOB J. CONLEY
ksimons@charlestonattorneys.net tjkeaveny@charlestonattorneys.net dfdean@charlestonattorneys.net bjconley@charlestonattorneys.net

October 1, 2003

FD-30655

Surface Transportation Board
1925 K Street, NW
Washington, D.C. 20423

The Honorable Mark Sanford
Governor's Office
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Columbia, SC 29211

Secretary of Commerce Bob Faith
S.C. Department of Commerce
1201 Main Street, Suite 1600
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S.C. Public Service Commission
101 Executive Ctr. Dr., Suite 100
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Page 2

Mr. Fred Dennin
Regional Administrator
Federal Railroad Administration
Sam Nunn Atlanta Federal Center
Suite 16T20
61 Forsyth Street, S.W.
Atlanta, GA 30303-3104



RE: **Port Royal Railroad**

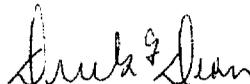
To Whom It May Concern:

Please be advised that this firm represents the South Carolina Division of Public Railways and its subsidiary Tangent Transportation Company, Inc. ("Tangent"). Tangent operates the Port Royal Railroad in Beaufort County, South Carolina pursuant to a Modified Rail Certificate issued by the Interstate Commerce Commission (Finance Docket No. 30655) on June 7, 1985. A copy of Finance Docket No. 30655 is attached hereto and incorporated by reference herein. This line is owned by the South Carolina State Ports Authority.

In accordance with 49 CFR Section 1150.24, this correspondence is intended to serve as Tangent's Notice of Intent to terminate service over the line known as the Port Royal Railroad sixty (60) days from the date noted above. Based thereon, service over the Port Royal Railroad line will cease on November 30, 2003.

With best regards, I am

Yours very truly,


Derek F. Dean

DFD/
Enclosure

cc: Mr. Dan Green (via facsimile only w/enc.)

Mr. Carlos Gonzalez (w/enc.)
Operations Manager
Port Royal Cement Company, LLC
601-A Paris Avenue
Port Royal, SC 29935

Mr. Kent Hollonbeck (w/enc.)
Transportation Manager
Hydro Agri North America Inc.
100 North Tampa Street
Suite 3200
Tampa, FL 33611

CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2007, I served the foregoing document, Petition To Reopen And/Or For Reconsideration Of Decision Served December 28, 2006, on Derek F. Dean, Esq., Simons & Keaveny, 147 Wappoo Creek Drive, Suite 604, Charleston, SC 29412, by UPS overnight mail.

Thomas F. McFarland

Thomas F. McFarland