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March 29, 2007

## **VIA ELECTRONIC FILING**

The Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
395 E Street, S.W.  
Washington, D.C. 20423-0001

RE: STB Docket No. AB-878  
City of Peoria and the Village of Peoria Heights, IL – Adverse Discontinuance –  
Pioneer Industrial Railway Company

Dear Secretary Williams:

I am filing herewith on behalf of Pioneer Industrial Railway Company (“KJRY”) a Motion to Strike the Letter of Friends of the Rock Island Trail, Inc., filed March 22, 2007. Copies of the Motion are being served on all parties of record in accordance with the Board’s regulations. If there are any questions about this matter, please contact me directly, either by telephone: (202) 663-7823 or by e-mail: [wmullins@bakerandmiller.com](mailto:wmullins@bakerandmiller.com).

Respectfully submitted,



William A. Mullins  
Attorney for Pioneer Industrial Railway Company

Enclosures

cc: All Parties of Record

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB DOCKET NO. AB-878**

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**CITY OF PEORIA AND THE VILLAGE OF PEORIA HEIGHTS, IL—ADVERSE  
DISCONTINUANCE—PIONEER INDUSTRIAL RAILWAY COMPANY**

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**MOTION TO STRIKE**

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**March 29, 2007**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB DOCKET NO. AB-878**

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**CITY OF PEORIA AND THE VILLAGE OF PEORIA HEIGHTS, IL—ADVERSE  
DISCONTINUANCE—PIONEER INDUSTRIAL RAILWAY COMPANY**

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**MOTION TO STRIKE**

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Pioneer Industrial Railway Company (“PIRY”) hereby moves the Surface Transportation Board to strike the letter filed March 28 on behalf of the Friends of the Rock Island Trail, Inc. (“FRITI”).<sup>1</sup> FRITI is not party to the proceeding and did not seek leave to intervene nor was the letter timely filed. Further, the letter is factually misleading and redundant of arguments and evidence already produced in a timely and appropriate fashion by advocates for the subject adverse discontinuance. As such, the letter is not authorized by the Board’s regulations or its orders in this case and should be stricken.

**BACKGROUND**

As is relevant here, the Board issued a decision on January 12, 2007 (“January 12 Decision”), reopening this proceeding in order to reassess the merits of the subject adverse discontinuance application under the applicable public convenience and necessity (“PC&N”) standard due to new evidence concerning inadequate rail service to Carver Lumber Company (“Carver”). The City of Peoria (“Peoria”) and the Village of Peoria Heights (“Peoria Heights”),<sup>2</sup>

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<sup>1</sup> The letter was dated March 21<sup>st</sup> but the Certificate of Service notes that it was served on all parties of record on March 22<sup>nd</sup>. On the Board’s website the letter is docketed as being filed on March 28.

<sup>2</sup> Collectively, Peoria and Peoria Heights will be referred to as “the Cities.”

the applicants in this adverse discontinuance proceeding, and Central Illinois Railway Company (“CIRY”) were directed to provide further evidence regarding the balancing of the relative benefits and burdens under the PC&N standard by February 12, 2007. PIRY and Carver were given until March 5, 2007, to reply to such new evidence. Subsequently, the Cities requested, and the Board granted, an extension of time, so that supplemental evidence was due by February 22, and replies by March 15. As instructed by the Board, the parties dutifully and timely filed their respective supplemental evidence and argument.

On March 22, 2007, Mr. George M. Burrier, Jr., acting as President of the Friends of the Rock Island Trail, Inc., and the Recreational Trail Advocates submitted a letter (“FRITI’s Letter”) filing which is clearly intended at this late date to address the merits of the reopened adverse discontinuance application and to introduce additional evidence.

### **ARGUMENT**

FRITI’s Letter is an unauthorized filing under the Board’s regulations and its orders in this proceeding; furthermore, the letter is redundant and immaterial. FRITI’s Letter was not accompanied by any motion for its admission, nor was it permitted by any order of the Board. Accordingly, it should be stricken.<sup>3</sup> FRITI is not a party to this proceeding, was not invited by the Board to offer evidence and argument on the matter, and has not sought leave to file its

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<sup>3</sup> See 49 CFR 1104.8 (the Board may strike any redundant, irrelevant, immaterial, impertinent, or scandalous material), 1104.13(c) (replies to replies are not permitted), and Northeast Interchange Railway, LLC – Lease And Operation Exemption – Line In Croton-On-Hudson, NY, STB Finance Docket No. 34734, and Gordon Reger – Continuance In Control Exemption – Northeast Interchange Railway, LLC, STB Finance Docket No. 34735 (served Nov. 18, 2005), slip op. at 3; CSX Transportation, Inc. — Abandonment Exemption — In Franklin County, PA, STB Docket No. AB-55 (Sub-No. 568X) (served July 27, 2005), slip op. at 4 (reply to a reply which is not accompanied by a motion for admission will be stricken); North San Diego County Transit Development Board – Acquisition Exemption – The Atchison, Topeka And Santa Fe Railway Company, 10 I.C.C. 2d 78; 1994 MCC LEXIS 31 at Finance Docket No. 32173 at \*8 (striking a

comments and evidence. FRITI has merely decided to offer its opinions at this late date without the slightest regard for the Board's processes.

The Board's January 12 Decision, as modified by its decision served February 1, 2007, specifically directed the Cities and CIRY to supply supplemental evidence and argument in support of the Cities' reopened adverse discontinuance application. That decision neither solicited nor invited comments from the public. Even if the Board's order were intended to allow non-parties to submit comments in support of the adverse discontinuance as FRITI has done, it is abundantly clear that such supporting material should have been filed no later than February 22, 2007, along with the Cities' and CIRY's respective filings. FRITI's letter is more than a month late, assuming it had any right at all as a non-party to submit comments.

FRITI's Letter flaunts the Board's processes. It rehashes arguments raised by Peoria<sup>4</sup> and CIRY, and contains an astonishing array of inaccuracies, misstatements, mistakes, and untruths. FRITI attempts to masquerade its letter as a service to the Board to address "facts [that] were omitted [by PIRY] and other statements made [that] were false," and to "clarify some of the statements made" (presumably by PIRY). In fact, FRITI's Letter is nothing more than an untimely exposition of FRITI's take on the PC&N standard coupled with an unseemly effort to scandalize PIRY and an individual who previously served as president and CEO of PIRY. Clearly, the Board should have no stomach for such procedural abuses.

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reply to a reply which was not permitted under the Board's regulations and which "merely revisits old arguments").

<sup>4</sup> Peoria Heights did not concur in Peoria's supplemental evidence and argument. If Peoria Heights had continued to support the adverse discontinuance against PIRY, it would have so stated. But Peoria Heights did not do so, suggesting, at the very minimum, that Peoria Heights is re-evaluating its position and that it currently does not support displacing PIRY and severing the Kellar Branch as a critical route for Carver traffic.

It would be a violation of the Board's regulations and of PIRY's and other interested parties' procedural and due process rights to change the rules in the middle of this proceeding to admit FRITI's Letter into the record unless the Board were specifically to grant PIRY and Carver a full and fair opportunity to reply to it. See SWKR Operating Co.--Abandonment Exemption--In Cochise County, AZ, In The Matter Of A Request To Set Terms And Conditions, STB Docket No. AB-441 (Sub-No. 2X), 1997 STB LEXIS 286 (served Nov. 12, 1997) at \*4-\*5 (striking untimely evidence which was not a proper response in light of the procedural posture of the case).

As indicated above, 49 CFR 1104.13(c) specifically forbids the filing of replies to replies. In feeble acknowledgement of that rule, FRITI lamely suggests that its purpose here is to "clarify" a few matters for the Board and to address purported false statements contained in PIRY's supplemental evidence and argument. There is no need for "clarification" of the record, and PIRY will show immediately below that it has made no false or misleading statements warranting a departure from the Board's long-standing rule against replies to replies.

FRITI claims that PIRY is incorrect to state that Peoria Heights no longer agrees with Peoria concerning conversion of the middle portion of the Kellar Branch to a recreational trail. While Peoria Heights, which happens to own a portion of the Kellar Branch, is certainly re-assessing its options for the future disposition of the line, it is equally true that Peoria Heights does not endorse Peoria's trail plan as it once had. It is therefore *correct* to state that Peoria and Peoria Heights do not agree on the subject. Nothing could have made this clearer than Peoria Heights' notification to the Board on February 23, 2007, that it did not join in Peoria's supplemental evidence and argument filed on February 22. Finally, FRITI is not authorized to speak on behalf of Peoria Heights or any other party. Peoria Heights has its own counsel, who

has been actively involved in this proceeding. Accordingly, if PIRY had mischaracterized the facts, which it has not, then Peoria Heights is certainly capable of speaking up for itself.

FRITI's other allegation that PIRY has misled the Board relates to the possible coexistence of a trail and rail line on the Kellar Branch right-of-way. PIRY has asserted that it would be possible to accommodate both uses on the Kellar Branch right-of-way based on its extensive understanding of the property and surrounding land, a point that FRITI's Letter disputes. No one, however, including FRITI has offered evidence proving that a dual use right-of-way is impracticable or can't be done.<sup>5</sup> Even if a trail and rail line could not coexist along the Kellar Branch right-of-way, and that is not the case, this consideration would not tip the scales in favor of the interests espousing the removal of the Kellar Branch tracks at the expense of Carver and other potential shippers on the north/west end of the Kellar Branch.

FRITI's so-called "clarification" of the record, which constitutes the vast majority of FRITI's Letter, is to varying degrees a careless, malicious, and egregious jumble of mistakes and misstatements. The following are a few of the examples of FRITI's poor showing here:

- FRITI incorrectly claims that "CIRY has already agreed to allow Peoria to remove [the center portion of the Kellar Branch] not needed to service customers." FRITI Letter at 2. Not so. As CIRY has withdrawn its petition to discontinue service over the Kellar Branch, (see January 12 Decision granting CIRY's request to withdraw its petition for exemption in STB Docket No. AB-1066X to discontinue service over the Kellar Branch), CIRY continues to have a common carrier obligation over the center portion and any attempt by CIRY or the City to remove that portion would be a violation of the statute.

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<sup>5</sup> Here also, Peoria and/or Peoria Heights presumably would address PIRY's allegedly misleading statements rather than designate a non-party proxy to attempt an end run around section 1104.13(c). In fact, according to a March 22, 2007 article in the *Peoria Journal Star*, the Tri-County Planning Commission, "which is taking a neutral position on the ongoing rails versus trails dispute," is currently studying "possible alternatives" if the Kellar Branch "track cannot be transformed into part of the trail's system." One can presume that one of alternatives being studied is the rail-with-trail option that Mr. Burrier dismisses out of hand.

- FRITI states that Union Pacific Railroad is the “parent corporation” of Keokuk Junction Railway Company (“KJRY”). *Id.* at 3. This is quite obviously untrue.
- FRITI claims PIRY blocked access to the Western Connection so that Carver was deprived of rail service for several months. *Id.* This accusation is as scurrilous as it is baffling. At no time has PIRY blocked service to or from Carver. Indeed, if PIRY had done so, it would be inconceivable that Carver would support, as it does, PIRY’s efforts to restore its service to Carver via the Kellar Branch.<sup>6</sup>

It is entirely ironic that FRITI’s untimely and unauthorized filing, which it has offered to “clarify” the record and to refute allegedly false and misleading statements in PIRY’s March 15<sup>th</sup> Reply, would itself be full of misstatements, errors and untruths. Although some of FRITI’s errors are nonsensical and comical (such as the statement that UP controls KJRY), others are such serious misrepresentations of fact that they appear to be done solely for malicious intent.<sup>7</sup> Most notably, at page three of FRITI’s Letter, FRITI states that PIRY had previously agreed with Peoria to abandon and salvage the middle portion of the Kellar Branch for the purposes of converting that right-of-way to a recreational trail. FRITI claims that PIRY reneged on this agreement with Peoria and that PIRY is now trying to block trail use efforts that it had committed to support under a contract executed February 24, 1998 (“February 1998 Agreement”), which FRITI has attached as Exhibit 2 to its Letter. This is a serious misrepresentation of the facts.

FRITI is correct that the February 1998 Agreement existed and that this agreement contemplated the removal of the middle portion of the Kellar Branch, but *nothing else* that FRITI

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<sup>6</sup> FRITI offers several newspaper articles and editorials ostensibly to support its claim that Carver was deprived of service due to PIRY’s alleged blockage of the Western Connection. Those articles do not support FRITI’s assertion. In fact, the very first article FRITI has included in this exhibit, a story from the January 15, 2005 edition of the Peoria Journal Star, contradicts FRITI’s claim and reflects that Carver *was* receiving service from PIRY.

<sup>7</sup> If so, then FRITI’s Mr. Burrier, who is a licensed attorney, could be sanctioned for having filed knowingly misleading statements.

says in connection with that agreement is true. To begin with, that agreement discloses that any termination of Kellar Branch rail service (in favor of new service via the contemplated Western Connection) would have to be accomplished in such a way that Kellar Branch shippers (such as Carver) would experience no material increase in rates or deterioration of service via the alternate route. See February 1998 Agreement, third preamble (“Whereas”) paragraph,<sup>8</sup> and Article 3.1. It is no accident that FRITI, like other single-minded trail advocates, overlooks that critical provision.

Furthermore, unlike FRITI’s statements, PIRY never reneged on its agreement, nor did it shirk its responsibilities under it while it was in effect. In fact, not only was PIRY never in breach, but Peoria terminated the February 1998 Agreement pursuant to the terms of Article 4.1. FRITI does not explain how PIRY violated a contract that was terminated before the alleged actions causing the violations have even occurred. Indeed, if anything, it is PIRY who has abided by the intent of the February 1998 Agreement (by attempting to restore service over the Kellar Branch) because certainly neither CIRY nor Peoria have provided service to Carver or prevented rate increases. If FRITI’s reliance on the February 1998 Agreement were an innocent mistake based upon its limited understanding of the history of that agreement, then this is further proof that the arguments FRITI is raising in its untimely and unauthorized filing are matters appropriately addressed by the *parties* to this proceeding – Peoria and Peoria Heights – rather

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<sup>8</sup> “WHEREAS [PIRY] and [Peoria] desire to provide for the long-term future of rail service to the customers on [the Kellar Branch] ... so that the customers do not experience any increase in rates or deterioration in the level or frequency of service...” If anything, this paragraph from the February 1998 Agreement demonstrates Peoria’s commitment at the time to ensuring adequate service for shippers, an objective that CIRY, Peoria, and FRITI have since abandoned or would rather the Board overlook.

than by an ill-informed latecomer of a non-party whose agenda has overtaken its ethical obligation to depict of the facts responsibly.<sup>9</sup>

Finally, notwithstanding FRITI's wholly inappropriate "spin" on the facts, FRITI's filing is ultimately nothing more than a "piling on" by interests dedicated to converting the Kellar Branch to a recreational trail regardless of the impact on shippers and the Board's statutory obligation to fulfill its PC&N balancing of the interests. As such, FRITI's Letter is not only contrary to the Board's regulations and orders, but it is also redundant and immaterial. It should be stricken. See St. Louis Southwestern Railway Company -- Abandonment -- In Smith And Cherokee Counties, TX, Docket No. AB-39 (Sub-No. 12), 1992 ICC LEXIS 65 (March 23, 1992) at \*3 (striking a reply to a reply which was redundant, raising no new issues).

### CONCLUSION

As shown above, there is absolutely no basis under the Board's regulations, precedent, or its orders in this proceeding for accepting FRITI's Letter. It is both untimely and unauthorized. It is also replete with untruths and errors, and redundant of timely filings made by parties to this proceeding. Moreover, FRITI is not a party and has not been authorized to speak on behalf of any party. In this Motion, PIRY briefly has addressed some of the incorrect and misleading assertions that FRITI has made, but there are other issues – such as FRITI's discussion of Keokuk Junction Railway Company – Alternative Rail Service – Line of Toledo, Peoria and Western Railway Corporation, STB Finance Docket No. 34397 and FRITI's allegations concerning the costs that the Cities incur by owning the Kellar Branch – to which PIRY has chosen not respond unless the Board for some reason dispenses with its ordinary procedures and

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<sup>9</sup> PIRY's principal purpose in responding to FRITI's Letter is to have it stricken from the record as an inappropriate and unauthorized reply to a reply. If FRITI's letter is for any reason

accepts FRITI's Letter. Accordingly, should the Board accept FRITI's Letter, PIRY respectfully requests a full and fair opportunity to respond to that filing in its entirety.

FRITI's letter, being so far from timely, appears designed to delay the Board's consideration of the reopened adverse discontinuance proceeding against PIRY. The Board should not so delay. Carver Lumber has been without adequate rail service for almost two years now. It is time for the Board to act, and in doing so, it should reject FRITI's Letter and proceed accordingly with its PC&N analysis in connection with the reopened adverse discontinuance proceeding.

Respectfully submitted this 29<sup>th</sup> day of March, 2007,

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accepted, then PIRY requests a full and fair opportunity to refute that filing beyond the passing commentary PIRY has directed to FRITI's Letter in this Motion to Strike.

**CERTIFICATE OF SERVICE**

I, Robert A. Wimbish, hereby certify that on March 29, 2007, I caused a copy of the foregoing Motion to Strike to be served by first class mail, postage prepaid, or by more expeditious service upon all parties of record to this proceeding reflected on the Board's website as well as upon Friends of the Rock Island Trail, Inc.

  
Robert A. Wimbish