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November 10, 2008

VIA ELECTRONIC FILING

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

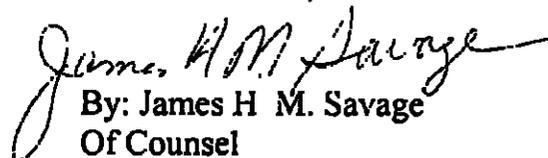
RE: STB Docket No. AB-1020X
East Penn Railroad, LLC-Abandonment Exemption-In Berks and
Montgomery Counties, PA

Dear Ms Quinlan

On behalf of Berks County, we are electronically filing and simultaneously serving a Petition for Leave to Supplement the Record, Verified Valuation Update of Gary E. Landrio, and Request to take Official Notice in connection with this proceeding. A service certification is annexed hereto.

We thank the Board for its time and consideration.

Respectfully submitted,
John D. Heffner, PLLC


By: James H. M. Savage
Of Counsel

JHS/mhd
Enc.

cc. Karl Morell, Esq. (Via Electronic Mail w/enc.)
Laurel Frankston Grass (Via First Class Mail w/enc)

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. AB-1020X

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

**PETITION FOR LEAVE TO SUPPLEMENT THE RECORD,
VALUATION UPDATE, AND
REQUEST TO TAKE OFFICIAL NOTICE**

Submitted By:

**John D. Heffner, PLLC
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**James H. M. Savage
Of counsel**

**Attorneys for Protestant
Berks County, PA**

Dated. November 7, 2008

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. AB-1020X

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

**PETITION FOR LEAVE TO SUPPLEMENT THE RECORD
VALUATION UPDATE, AND
REQUEST TO TAKE OFFICIAL NOTICE**

INTRODUCTION

Pursuant to 49 CFR 1117.1, as well as 49 CFR 1114.1 and 1114.6, Berks County ("the County") hereby submits this Petition for Leave to Supplement the Record, Valuation Update and Request to Take Official Notice in the subject abandonment proceeding. For the reasons set forth below, the Board should grant this Petition for Leave to Supplement the Record, accept the November 7, 2008 Verified Valuation Update of the County's expert witness, Gary E Landrio ("Landrio VS 2"), and take official notice that the price of scrap steel has decreased significantly over the past several weeks, resulting in the calculation of the Line's Net Liquidated Value ("NLV") becoming outdated.

The Board's Decision 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 (served Oct 31, 2008) ("Coos Bay") finds that it is appropriate to establish Net Salvage Value ("NSV") using steel prices in effect as of the date of the Decision. It is likewise incumbent upon the Board to follow the same methodology for determining the value of the track materials East Penn Railroad ("ESPN") intends to salvage pursuant to the proposed abandonment of the Colebrookdale Line ("the Line").

By Decision served August 20, 2008, the Board provided notice of the filing of an unverified Petition for Exemption by ESPN, seeking permission to abandon the Line extending from MP 0.0 in Pottstown, Montgomery County to MP 8.6 in Boyertown, Berks County, all in the Commonwealth of Pennsylvania. The Decision set September 9, 2008, as the due date for submitting protests.

On September 9th the County filed a timely protest of the proposed abandonment. Included therein was the Verified Statement of the County's expert Gary E Landrio ("Landrio VS 1") addressing, *inter alia*, the Net Salvage Value ("NSV") of track materials, which ESPN valued at \$1,082,000, based upon a July 18, 2008 bid submitted by The Tie Yard of Omaha ("the Tie Yard").

Thereafter, on October 31, 2008, the Board served its Decision in Coos Bay, taking notice of the significant decrease in scrap steel prices since August 2008. See, Point II, infra.

For the following reasons, pursuant to 49 CFR 1117.1, 1114.1 and 1114.6, the County seeks leave to supplement the record to include the Valuation Update of the County's expert Gary E Landrio ("Landrio VS 2") which is based upon information that was unavailable when the County filed its September 9th Protest, and further requests the Board take official notice of the significant decrease in scrap steel prices as per the Board's October 31st Coos Bay Decision.

LEGAL ARGUMENT

POINT I

THE BOARD MAY TAKE OFFICIAL NOTICE OF CORROBORATIVE MATERIAL RELIED UPON BY EXPERTS IN FORMING THEIR OPINION

The Board's Rules provide, in 49 CFR 1117.1 that a party seeking relief not provided for in any other rule may file a petition for such relief. The Board's General Rules of Evidence provide, in 49 CFR 1114.1 that any evidence which is sufficiently reliable and probative will be admissible. Subpart §1114.6 provides that the Board may take official notice of materials which are otherwise subject to

specific rules governing admissibility, where the admissibility is for purposes of corroboration of testimony.

Similarly, the Federal Rule of Evidence (hereinafter "FRE") provide, in FRE 702, "If scientific, technical or otherwise specialized knowledge will assist the [fact finder] to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion[.]"

FRE 703 provides, "The facts or data in the particular case upon which an expert bases an opinion or inference . [i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the fact or data need not be admissible in evidence "

The Board accepts supplementation of the record when three factors are met. First, the information sought to be offered into evidence must be central to the proponent's case. Second, it must be the case that the offered evidence could not have reasonably been introduced earlier. Third, the offered information must materially influence the outcome of the proceeding. Duke Energy Corporation v. Norfolk Southern Railway Company, STB Docket No. 42069, slip op. at 2 (served: Mar. 25, 2003). The new evidence offered by the County in this petition to supplement satisfies all three factors: First, the offered information is central to the

County's case because it shows that ESPN's proffered NSV for the Line is many hundreds of thousand dollars greater than the Line's current NSV. See, Landrio VS 2 at 2. Second, the current NLV calculation could not have been offered earlier because it is based on the *current* steel prices shown in the American Metals Market index. See, *Id.* at 2. Third, the offered information materially influences the outcome of the proceeding because it directly affects the Line's profitability calculation. See, *Id.* at 4

POINT II

BOARD PRECEDENT SUPPORTS USE OF CURRENT RAIL LINE VALUATION DATA

In Coos Bay, the feeder applicant filed a petition for leave to supplement the record with changes to its estimate of the value of the Line's assets, specifically citing the significant decline in the scrap steel market since August 2008. Rejecting the incumbent carrier's ("CORP") argument that the record was closed, the Board found evidence of significant changes to the line's value prior to the Board's decision central to the case. Hence, the supplemental evidence was accepted. Such a precedent bears directly on a central issue in this case, the Line's profitability when all significant economic factors are taken into consideration, including the Line's NLV.

In Coos Bay the Board concluded that the NSV of the Line should be calculated as of the day of its decision, and not at some arbitrary earlier date, such as the filing date of the feeder line application. The Board noted that the Coos Bay proceeding began when the price of steel was abnormally high.¹ Through February 2008, the average price of scrap rail was between \$233 and \$287 per net ton. The price of scrap steel began to spike in mid-March 2008, when the average price rose to \$304 per net ton. In subsequent months the average price continued to rise, peaking at \$540 per net ton in August 2008. By September 26, 2008, however, the price had dropped to \$277 per net ton. This proceeding likewise began when the price of steel was abnormally high. Today however, the price of steel has returned to more historically consistent levels. See, Landrio VS 2 at 2

It is incumbent on the Board to use the best evidence available on the value of the NLV component. When a protestant submits evidence demonstrating that the market value of a major component of a railroad's NLV has changed in a significant manner during the pendency of a proceeding aimed at determining NLV, the Board must determine whether the more recent evidence undercuts any other prior valuation evidence in the record or provides better evidence of the true value of a line. With some possible exceptions, such as when the market price is

¹ The parties' economic experts presented evidence of the American Metals Market ("AMM") steel price index throughout the relevant time period

fluctuating or when the drop in price reflects an historically abnormal downward spike, steel price valuation evidence that is contemporaneous with the Board's valuation decision is most likely to reflect the value of the property on the date that it is directed to be sold pursuant to the Board's decision—thereby ensuring that the property owner receives the constitutional minimum value.

In this case, particularly given the significant drop in the price of steel between the conclusion of the formal procedural schedule and today's decision, the Board should conclude that the fair market value of the Line's assets should be based on the current prices and not on the anomalous prices occurring at some earlier date. See, CSX Transportation, Inc.—Abandonment Exemption—In Laporte, Porter and Starke Counties, IN, STB Docket No. AB-55 (Sub-No 643X) (served. Apr. 30, 2004) (finding that it would be improper to reject late-filed evidence of steel price changes because doing so would result in an inaccurate NLV).

With regard to the evidence put forward by the incumbent carrier that it had firm salvage bids, while acknowledging that it has accepted firm bids in other cases as convincing evidence of the fair market value of a rail line, the Board did not find the bids submitted by CORP to represent the best evidence of what the track assets currently are worth in the marketplace. Both bid offers submitted by

CORP contain language that the offeror retains the right to revise its offer if there is a substantial change in the market. That reservation of a unilateral right by the offeror to change its price to account for an event like the significant scrap steel price drop that actually occurred here, coupled with the lack of a deadline in either offer by which CORP must accept, precludes consideration of these offers as truly "firm." Accordingly, the Board found the offers unreliable in reaching NSV. Here, ESPN has submitted a single bid offer which suffers from the same flaw as the bids CORP presented in Coos Bay, *to wit*, the Tie Yard's July 18th bid contains no acceptance date, rendering it unreliable.

As Mr. Landrio states in his VS 2, experts typically rely upon published market values for commodities like steel in arriving at their opinion regarding the NLV of railroad lines, and further values derived therefrom, culminating in a *determination of the Line's profitability. Indeed, published market values are the most reliable indicator of the price a scrap commodities dealer might be willing to pay to a railroad owner for steel under a given set of economic circumstances.*² NLV includes the value of the underlying real estate ("REV") plus the NSV of track and track materials The Kansas City Southern Railway Company---

² ESPN has provided no indication that the July 18th salvage bid remains "on the table" in light of the drastic change in economic climate since September 15th

Abandonment Exemption—Line in Warren County, MS, STB Docket No AB-103
(Sub-No. 21X) (served: February 22, 2008).

In conclusion, the Board should grant the County's petition and accept the NSV update because it represents "up-to-date information that more accurately reflects the current situation to assure that...[the Board] has a complete record.

Tongue River Railroad Company – Construction and Operation – Western Alignment, STB Finance Docket No. 30186 (Sub-No. 3), slip op. at 5 (served: Mar. 11, 2003) (Board accepts petition to update the record filed pursuant to 49 CFR § 1117.1).

POINT III

A PARTY MAY SUPPLEMENT THE RECORD TO PRESENT
EVIDENCE UNAVAILABLE WHEN ITS ORIGINAL PLEADING WAS
FILED

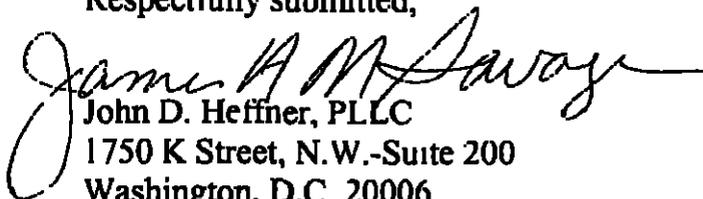
Although the Board disfavors petitions to supplement, where the evidence submitted was unavailable to the proponent at the time their original pleading was submitted, the Board has relaxed its evidentiary protocols to accept newly available evidence. *Accord, The Kansas City Southern Railway Company—Abandonment Exemption—Line in Warren County, MS, STB Docket No. AB-103* (Sub-No. 21X) (Served: February 6, 2008).

Moreover, in Denver & Rio Grande Railway Historical Foundation—
Adverse Abandonment—In Mineral County, CO, STB Docket No. AB-1014X
(served: May 23, 2008) (“D&RG”), the Board took official notice of a newspaper
article submitted by Petitioner over Protestant’s objection, accepting as
supplemental evidence a newspaper article containing information which had not
been available at the time the original Petition was filed.

CONCLUSION

For the above stated reasons and based upon the above cited points and
authorities, Protestant Berks County requests the Board grant Protestant’s petition
for leave to supplement the record, accept the Verified Valuation Update submitted
by Gary E. Landrio, and take official notice of current scrap-steel market prices.

Respectfully submitted,


John D. Heffner, PLLC

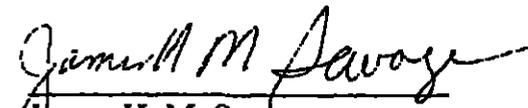
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James H. M. Savage
Of counsel

Dated: November 7, 2008

CERTIFICATION OF PROOF OF SERVICE

I certify that I served this day by electronic mail on counsel for Petitioner,
and by first class mail upon counsel for Montgomery County a true copy of the
within pleading.


James H. M. Savage

Dated: November 7, 2008