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January 9, 2009

VIA ELECTRONIC FILING

Hon. Anne 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 the Berks County Board of Commissioners, we are electronically filing this Reply to East Penn Railroad, LLC's motion to reject Request to Set Terms.

We thank the Board for its time and consideration.

Respectfully submitted,
John D. Heffner, PLLC


By: James H. M. Savage
Of Counsel

Enc.
cc: all counsel (w/enc.)

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. AB-1020X

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

**REPLY OF THE BERKS COUNTY BOARD OF COMMISSIONERS TO
EAST PENN RAILROAD, LLC'S MOTION TO REJECT THE COUNTY'S
REQUEST TO SET FINANCIAL TERMS AND CONDITIONS**

Submitted By:

John D. Heffner
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Washington, DC 20006
Tel. (202) 296-3334

James H. M. Savage
Of counsel

Attorneys for Offeror
Board of Commissioners
Berks County, PA

Dated: January 9, 2009

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. AB-1020X

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

**REPLY OF THE BERKS COUNTY BOARD OF COMMISSIONERS TO
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REQUEST TO SET FINANCIAL TERMS AND CONDITIONS**

COUNTER STATEMENT OF FACTS AND PROCEDURAL HISTORY

On July 31, 2008, East Penn Railroad, LLC ("ESPN") filed an individual petition for exemption with the Board seeking permission to abandon the Line. By Decision served August 20, 2008, the Board provided notice of the filing.

On September 9, 2008 the Board of Commissioners of the County of Berks ("Berks" or "the County") filed a timely protest of the proposed abandonment. Thereafter, on November 10, 2008 the County filed a Petition to Supplement the

record in light of a very recent Board decision¹ finding it appropriate to establish Net Salvage Value (“NSV”) using steel prices in effect as of the date of the decision rather than the higher prices contained in an earlier written offer from a salvage company.

On November 18, 2008, the Board granted ESPN’s petition, denying the County’s Motion without prejudice to renew in the event the County filed an OFA.

Berks filed an OFA on November 26, 2008, to acquire the Line for \$500,000. The Board then issued an order on December 2, 2008, acknowledging Berks’ offer and postponing the effective date of the abandonment to allow negotiations to proceed. In so doing, it found that the County, as an entity presumed financially responsible, had made an offer of financial assistance and had explained the basis for its offer. The Board set December 29, 2008, as the due date for filing this Petition should purchase negotiations prove unsuccessful.

On December 24, 2008, pursuant to 49 U.S.C. 10904(f) (3) and 49 CFR 1152.27(g) (1), the County filed a request for the Board to establish the purchase price and set terms and conditions for the purchase by the County from ESPN of an 8.6 mile line of railroad known as the Colebrookdale Branch between milepost 0.0 at Pottstown in Montgomery County, PA and milepost 8.6 at Boyertown in Berks County, PA (hereinafter “the Line”). Berks requested that the Board set the

¹ Oregon International Port of Coos Bay—Feeder Line Application—Coos Bay Line of the Central Oregon & Pacific Railroad, Inc., STB Finance Docket No. 35160 (Coos Bay).

purchase price at \$596,804 and prescribe the terms customarily imposed by it in offer of financial assistance (“OFA”) purchase transactions.

By December 24th letter to the Board’s Acting Secretary, offeror’s counsel indicated that the December 24th filing was *not* complete, and that it was to be supplemented on or before the December 29th filing deadline with certain additional materials to be supplied by the County’s real estate appraiser. See, Exhibit A. On December 29th the County made a supplemental filing, providing the additional materials referenced in the December 24th letter to the Board. See, Exhibit B. ESPN’s December 31st reply acknowledges receipt of a complete copy of the County’s filing, including the supplemental exhibits, served via hand delivery before noon on December 29th.

ESPN filed two replies to the County’s request, on December 29th and 31st, followed by this motion to reject. This filing constitutes the County’s reply to the motion to reject.

LEGAL ARGUMENT

The County takes issue with ESPN’s argument that the December 24th *incomplete* filing triggered the incumbent railroad’s 49 CFR 1152.27(g)(1) obligation to reply. In the County’s view, the only reasonable construction of the regulation would be for the 5 day reply period to commence upon the *completion* of the filing, which occurred December 29th. ESPN’s construction would place

respondent in the untenable position of being forced to reply to a pleading sight unseen. Such could not possibly have been the Board's intent in enacting the regulation.

Moreover, by the Board's December 2nd Order the County's request to set terms was due for filing on December 29th. The filing was completed in timely manner on December 29th. The incumbent railroad was served on December 29th in the same manner (by hand delivery) and at the same hour (between 11 a.m. and noon) as the pleading was filed with the Board. There is no irregularity alleged with regard to the December 29th certificate of service. The County stipulated that ESPN's time for reply should not begin to run until December 29th. Any disadvantage inuring to the incumbent railroad as a result of filing its reply in fewer than 5 days after December 29th was self-created, and could easily have been cured by the simple expedient of ESPN's counsel contacting the Board's Office of Proceedings to seek permission (the County's consent for which being already in hand) to file its reply on the fifth day after December 29th.

ESPN cites two decisions, both by Article III courts, as supporting precedent. Significantly, no decisions by this Board or by its predecessor agency are cited. In neither case cited by ESPN did movant's counsel serve opposing counsel within the strict time limits required by the Rules. Here, the pleading was served upon respondent the same day, December 29th, the filing was completed,

which, not insignificantly, was timely per both the regulations and the Board's December 2nd Order.

In neither reply does ESPN articulate, much less establish, any prejudice arising or resulting from the County's December 29th filing. In its subsequent motion ESPN raises three claims of prejudice. None withstand scrutiny. ESPN's first claim concerns their alleged to their inability to verify the steel prices cited by the County's expert Gary Landrio in his verified statement. This is an exceptionally weak objection, as the prices were taken directly from a then-current American Metals Market Report, and were not the subject of any speculation or conjecture on Mr. Landrio's part, and indeed none is alleged by ESPN. In the County's opinion, this simple arithmetic could easily have been accomplished within the 5 day reply period allotted by the regulations. At any rate, in its motion, the railroad fails to adequately explain the basis for its objection.

ESPN's second objection concerns the County's so-called "unauthorized" use of the 1998 real estate appraisal report of Douglas Golden as evidence supporting of the County's its claims as to the ownership and value of the real estate comprising the subject rail Line. The 1998 appraisal report is a public document, created and prepared at the direction of the Pennsylvania Department of Transportation for a project involving the use of public funds, namely the valuation and purchase of the Line. The author of that report lacks legal or proprietary rights

to restrict its use in any subsequent proceeding.²

ESPN's third objection is based upon new title information allegedly acquired in response to the County's evidence. Nowhere does the railroad explain what a "brief of title" is or how it relates to the Line in question. No legally competent expert opinion is provided to tie the railroad's new evidence to the subject Line. At most, the railroad seems to be saying is that given an unlimited amount of time, it would present further evidence that it should have presented in its initial abandonment petition. Such is not the way the regulations concerning abandonments work, particularly with respect to offers of financial assistance, where strict time limits are to be observed. Once again, the railroad improperly seeks to introduce new evidence by way of collateral pleading, a practice which the Board should not countenance.

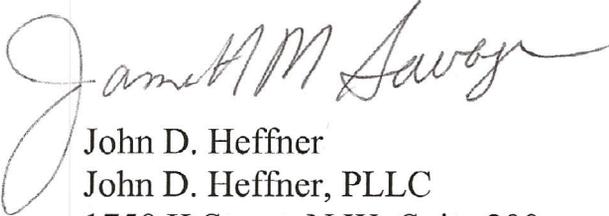
Lastly, to the extent that ESPN seeks to introduce new evidence in its replies to the request to set terms or in this motion, it is the County which is prejudiced by its inability to reply. The County therefore requests that the Board not consider the railroad's new evidence in rendering its Decision.

² According to ESPN, the author of the 1998 appraisal report has "changed his mind" and now expresses the opinion that the RR holds title in fee to the lands he previously referred to as easements. There are several problems with this. Firstly, the appraiser's new opinions are not provided by way of verified statement, rendering them unreliable. Secondly, a self-contradicting affidavit should be regarded with skepticism by the Board, particularly where, as here, the witness was being paid by the party for whom he rendered the self-contradictory opinion. Thirdly, this new evidence may not be introduced by collateral pleading.

CONCLUSION

For the above stated reasons and based upon the above cited points and authorities, the County requests the Board deny ESPN's motion to reject.

Respectfully submitted,



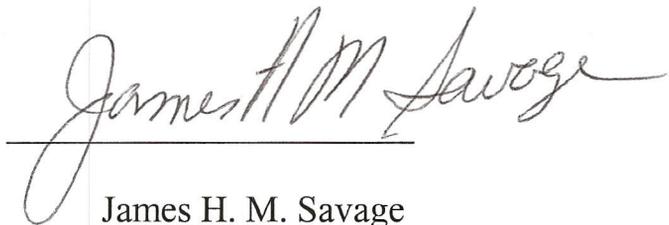
John D. Heffner
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1750 K Street, N.W.-Suite 200
Washington, D.C. 20006
(202) 296-3334

James H. M. Savage
Of counsel

Dated: January 9, 2009

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: January 9, 2009

EXHIBIT A

LAW OFFICES
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December 24, 2008

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

VIA HAND DELIVERY

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

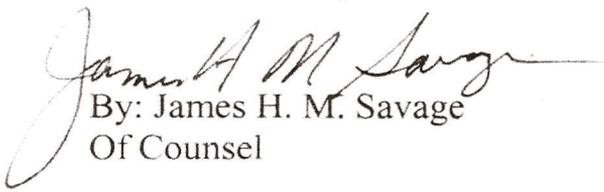
Dear Ms. Quinlan:

On behalf of the Berks County Board of Commissioners, we are filing an original and 10 copies of a Request to Set Financial Terms and Conditions for the County's Offer of Financial Assistance. A check for the \$22,700 filing fee, a service certification and a disc formatted in MS Word 2003 are also enclosed. Please date stamp and return the 11th copy to our messenger.

Please note that the County expects to file a photographic addendum to the MRC Appraisal Report on or before the filing deadline of December 29, 2008.

We thank the Board for its time and consideration.

Respectfully submitted,
John D. Heffner, PLLC


By: James H. M. Savage
Of Counsel

Enc.

cc: all counsel (w/enc.)

EXHIBIT B

LAW OFFICES
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STAMP & RETURN



December 29, 2008

BY HAND DELIVERY

Hon. Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20023

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

Dear Ms. Quinlan:

Please accept the original and 10 copies of the accompanying Appraisal Report of Matthew R. Cremers which the Berks County Commissioners (“the County”) are filing in support of their Request to Set Financial Terms and Conditions for the Sale of the Line pursuant to the County’s Offer of Financial Assistance.

This submission completes the County’s filing of the above above-captioned pleading. Accordingly, Petitioner’s time to respond should begin to run as of December 30, 2008 and continue through January 5, 2009.

Also attached is the County’s Affidavit of Service. Please date stamp and return one copy of this letter.

Sincerely yours,
John D. Heffner, PLLC

James H M Savage
By: James H. M. Savage
Of Counsel

cc: Karl Morell (via hand delivery)
Laura Frankston Grass (via first class mail)