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September 13, 2010

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BY E-FILING

Cynthia T. Brown
Chief of the Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

RE: *Escanaba & Lake Superior Railroad Company – Abandonment Petition for Exemption – Line in Ontonagon and Houghton Counties, MI, STB Docket No. AB-415 (Sub-No. 2X)*

Dear Ms. Brown:

The Escanaba & Lake Superior Railroad Company (“ELS”) hereby requests that the Board address the merits of the above-referenced abandonment petition for exemption, and issue a decision by or before September 27, 2010, granting ELS authority to abandon the subject rail line. As will be shown below, there has been no material change in the circumstances surrounding the subject rail line over the past 60 days, there are still no solid prospects of sufficient traffic returning to the line to return it to profitability, and further delay of Board action in this proceeding, such as an further suspension of the proceeding, would therefore be unwarranted.

As background, ELS filed the above-referenced abandonment petition for exemption (the “Petition”) on April 9, 2010, seeking Board authority to abandon approximately 42.93 miles of rail line (the “Line”) running from milepost 365.09 at Sidnaw, MI, to milepost 408.02 at Ontonagon, MI. The Board gave notice of the Petition on April 27, 2010, and, in so doing, established a procedural schedule under which comments responsive to the Petition were due by no later than May 12, 2010. In that notice, the Board also stated its intention to issue a decision on the merits by or before July 28, 2010.

Only the Michigan Department of Natural Resources & Environment (“MDNRE”) submitted timely comments, which, in MDNRE’s case, expressed interest in the Line’s right-of-

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way for future recreational purposes. The County of Ontonagon, MI (“Ontonagon County”), Heartland Business Bank (“Heartland”), Senator Carl Levin (“Levin”), and Smurfit-Stone Container Corporation (“Smurfit”)¹ submitted documents to the Board well after the May 12 deadline, some of which the Board has accepted as formal comments in this proceeding.²

As ELS has pointed out before, not one of the aforementioned letter filers disputes ELS’s economic evidence showing that abandonment is warranted. Moreover, although they know that the Line is inactive, none of the letter filers has identified a single entity that would want or need rail service over it. Some of the letter filers claim that adverse community impacts would flow from abandonment, although the truth is that there is no active industry on the line that opposes or would be harmed by the proposed abandonment, and there is no evidence to show that abandonment would result in any loss of essential transportation services. While the community around Ontonagon clearly has been harmed by the closure of the Smurfit mill – just as ELS has been harmed – the record, even at this late date, shows that abandonment of the Line would result in no significant harm to shippers or to the community.

In light of the letter filers various urgings against expeditious Board action, ELS submitted a filing dated July 12, 2010, and served upon all parties, in which it requested that the Board issue an order holding the subject proceeding in abeyance for 60 days. ELS sought such an order as a good faith gesture toward concerned parties, reasoning that postponement of Board action *might* facilitate a resolution of the pending matter without the need for further Board action on the Petition, including, possibly, an arrangement whereby Ontonagon would retain access to rail service. In requesting an abeyance, ELS expressed skepticism that the postponement of Board action would simply buy concerned parties time, but would not yield any material change in current circumstances warranting abandonment of the Line.

In a decision served on July 21, 2010, the Board granted ELS’ abeyance request, stating that it would issue a decision in this proceeding on September 27, 2010.

¹ Collectively, the “letter filers.”

² As it did in response to Heartland’s letter, ELS objects categorically to the Board’s decision to allow the letter filers’ documents to become part of the formal record in this proceeding. All of the documents offered by the letter filers were submitted well after the Board’s deadline, and none of the letter filers offers justification for late filing. Moreover, most, if not all of the letter filers’ submissions were tendered without appropriate service upon all other parties of record. (Curiously, the Board has not to date deemed Smurfit’s letter as a formal filing, despite the fact that it was offered in essentially the same manner as was the letter from Ontonagon County.) In the view of ELS, the Board’s acceptance of any of the letter filers submissions effectively sanctions the abuse of the Board’s procedures, and it sends an inappropriate message to those who may in the future consider offering untimely “filings” to the Board in an attempt to disrupt the orderly processing of an abandonment proceeding.

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Although the July 21 decision did not specifically so provide, ELS offers this filing as a status report, with the hope that it will be tendered in sufficient time for the Board to take account of it in preparing a final decision in this proceeding on September 27. The situation now calls for prompt Board action on ELS' abandonment request, including issuance of a final decision on the Petition by September 27, 2010, as the Board has previously committed to do.

In sum, since the issuance of the Board's abeyance order on July 21, the Line's circumstances and prospects have not changed materially. The Line is inactive, and, despite ELS' outreach to Ontonagon County, the community has not come up with any plan to preserve the Line as a transportation asset. Moreover, although ELS has taken the initiative to consult with Smurfit (who is arranging for the sale of the inactive paper mill facility at the end of the Line in Ontonagon), no prospective shipper or purchaser of the mill has come forward with any demonstrated need justifying preservation of the Line for common carrier service. To date, and despite the ongoing abandonment proceeding in which the future of the Line is clearly at stake, no prospective shipper or purchaser of the Ontonagon mill site has contacted ELS to express even mere interest in rail service.

As further information, the undersigned counsel for ELS contacted James Jessup, Ontonagon County Prosecuting Attorney and representative of Ontonagon County in this proceeding, on July 19 and again on August 31 to discuss any developments related to the line. On both occasions, Mr. Jessup had little of substance to offer, allowing during the first conversation that it was unlikely, in his view, that the mill site would be used again for paper production. In the later conversation, Mr. Jessup had even less offer, stating only that he understood that Smurfit's efforts to sell the mill site were continuing apace, and that he had received unconfirmed reports about potential purchasers of the site, and about the type of industrial activities for which they might convert the mill site. On both occasions, Mr. Jessup was urged promptly to contact ELS in the event that Mr. Jessup became aware of developments that would be of interest to ELS and of potential significance for the future of the Line. During the later conversation, ELS' counsel advised Mr. Jessup that – (1) ELS intended to file the instant status report on September 13, in order to enable to permit the Board adequate time to rely on the latest developments (or, in this case, the lack thereof) when framing a decision for September 27; and (2) that, if Ontonagon County was so inclined, it might want to consider providing its own status report to the Board on or about the same date. ELS has not heard from Mr. Jessup or anyone else from Ontonagon County, aside from the aforementioned consultations.

On July 23, ELS received an email inquiry from Roger Storm of MDNRE, in which the state agency proposed to acquire certain trackage located elsewhere on ELS' system for purposes of developing this railroad property into recreational trails. (MDNRE has in the past engaged in discussions with ELS concerning possible MDNRE purchase of the subject rights-of-way, but no agreements have ever been reached.) The apparent thrust of MDNRE's proposal appears to be that, if ELS would agree to sell its interest in these other rail properties to MDNRE, then ELS might be able to use the proceeds of such a transaction to forestall the abandonment of the Line. ELS responded to MDNRE's inquiry on August 11, declining the invitation to sell any other portions of its existing network at this time, but expressing a willingness to resume discussions

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with MDNRE if and when ELS might have an interest in disposing of any of the targeted assets. ELS advised that the trackage in which MDNRE had an interest was of strategic importance to the railroad, and that these tracks (unlike the Line, which is more remote) were advantageous to ELS, because they earn car storage revenue for the railroad. ELS also explained that the property sale MDNRE proposed would not prevent the long-term losses that ELS would incur in its continued ownership of the Line – an unprofitable rail asset with considerable salvage value.

On July 21, and again on August 31, the undersigned counsel for ELS contacted Ronald Megna, the Smurfit representative who had previously written to Chairman Elliott in connection with this proceeding. On June 21, ELS' counsel advised Mr. Megna of the Board's decision granting ELS' 60-day abeyance request, and inquired about the status of Smurfit's mill site sale. Mr. Megna reported that Smurfit had been approached by roughly a half dozen potential buyers, none of which Mr. Megna was at liberty to identify. Also at that time, ELS urged Smurfit to encourage any potential mill site buyer with an interest in, or need for, rail service promptly to contact ELS. Mr. Megna committed to do so.

ELS did not hear, and has not heard, from any entity interested in future rail service over the Line. Under the circumstance, ELS has no reason to think that any prospective buyer/developer of the Smurfit mill site will require rail service.

Smurfit did not follow up with ELS on issues discussed in the July 21 conversation until August 31, when Mr. Megna returned a call from ELS' counsel seeking an update on the Ontonagon mill sale. On August 31, Smurfit reported that it was in discussions with two possible mill site buyers – one a "green" entity that, as ELS' counsel recalls, Mr. Megna reported "probably would not require rail service;" and the other a consortium of interested buyers that Mr. Megna indicated "might be interested" in rail service. Once again, ELS' counsel urged Smurfit to have the prospective consortium buyer contact ELS as soon as possible to discuss future rail shipping needs. ELS' counsel reminded Smurfit of the anticipated STB decision on September 27, advised Mr. Megna of ELS' plans to file a status report with the STB on September 13 – much as it had done with Mr. Jessup of Ontonagon County – and indicated that Smurfit could offer its own status report to the Board if it wished to do so.

Since conferring with Smurfit on August 31, ELS has not heard from Smurfit, and, again, *ELS has at no time heard from any potential mill site buyer or any other prospective shipper regarding interest in rail service via the Line.*

Counsel for ELS understands that the ELS-Heartland collection action litigation continues, and that there have been discussions between the two litigants since the Board's July 21 decision that appear to have no material bearing on this proceeding. ELS is of the opinion that there has been no significant change in the *status quo* vis-à-vis Heartland, and that the requested abandonment authority would be in the best interest of both parties.

As it has stated before, ELS cannot afford to wait indefinitely for a possible alternative to abandonment, especially in light of the detailed and undisputed evidence of record regarding the

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economic merits of abandonment in this case, and in light of the economic pressures ELS faces stemming from the Heartland collection action. There is no reliable prospect that any shipper will materialize in the future that will need rail service over the Line, and that will ship in sufficient volumes to make the Line profitable once again. In fact, the totality of the circumstances indicate quite clearly that whatever the future may hold for the Ontonagon mill site, those with an immediate interest in the property (including prospective buyers) have made it clear that the Line is not needed.

For these reasons, ELS urges the Board to grant its Petition on September 27, 2010.

Respectfully Submitted,



Keith G. O'Brien

Robert A. Wimbish

Counsel for Escanaba & Lake Superior

Railroad Company

Cc: All parties of record
Ronald Megna
Thomas Klimek
Robert Bach
Paul Arsenault