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July 10, 2017

*By e-filing*

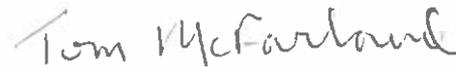
Ms. Cynthia T. Brown, Chief  
Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20024

Re: Finance Docket No. 35952, *Great Lakes Basin Transportation, Inc. -- Application to Construct and Operate a Rail Line in Wisconsin, Illinois and Indiana*

Dear Ms. Brown:

Hereby transmitted is a Petition for Rejection of Application for filing with the Board in the above referenced matter.

Respectfully submitted,



Thomas F. McFarland  
*Attorney for the Opposition Groups*

*TMcf:mg:\1735-A\efSTB2*

cc: All parties on the Official Service List  
Mr. Mark Melin  
Mrs. Mirjam Melin

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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GREAT LAKES BASIN )  
TRANSPORTATION, INC. -- RAIL )  
CONSTRUCTION AND OPERATION -- ) FINANCE DOCKET  
IN ROCK COUNTY, WI; WINNEBAGO, ) NO. 35952  
OGLE, LEE, LASALLE, GRUNDY AND )  
KANKAKEE COUNTIES, IL; AND )  
LAPORTE, LAKE AND PORTER )  
COUNTIES, IN )

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**PETITION FOR REJECTION OF APPLICATION\***

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Clinton, WI 53525

KANKAKEE COUNTY, IL BLOCK GLB  
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Bonfield, IL 60913

RAILED, LaPorte, Porter & Lake Counties, IN  
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Kouts, IN 46347

CITIZENS AGAINST THE GLB  
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WINNEBAGO COUNTY AGAINST THE GLB RAILROAD  
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Attorney for Opponents

DATE FILED: July 10, 2017

\* If the Board issues a decision accepting the Application for filing before it disposes of this Petition for Rejection, the Board is respectfully requested to treat this Petition as a Petition for Reconsideration of such decision.

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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GREAT LAKES BASIN	)	
TRANSPORTATION, INC. -- RAIL	)	
CONSTRUCTION AND OPERATION --	)	FINANCE DOCKET
IN ROCK COUNTY, WI; WINNEBAGO,	)	NO. 35952
OGLE, LEE, LASALLE, GRUNDY AND	)	
KANKAKEE COUNTIES, IL; AND	)	
LAPORTE, LAKE AND PORTER	)	
COUNTIES, IN	)	

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**PETITION FOR REJECTION OF APPLICATION**

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Pursuant to 49 C.F.R. § 1150.1(b), the parties listed on the cover page (collectively, the Opposition Groups) hereby petition for rejection of the Application filed by Great Lakes Basin Transportation, Inc. (GLBT) on May 1, 2017, as supplemented on June 22, 2017.

If the Board issues a decision accepting the Application for filing before it disposes of this Petition for Rejection, the Board is respectfully requested to treat this Petition as a Petition for Reconsideration of such decision.

**GROUND FOR REJECTION**

Compliance with the Board's regulations for applications under 49 U.S.C. § 10901 is *mandatory*. Thus, it is provided in 49 C.F.R. § 1150.1(b) as follows:

*Content of the Application. Applications filed under this subpart shall include the information set forth in § 1150.2 through 1150.9 . . . (emphasis added)*

It bears repeating that such information must be set forth *in the Application* because GLBT apparently is of the view that it need not provide evidence of financial capability and public

support for the rail line in the application, but instead the Board should find that the track construction would be financed, and rail carriers and shippers would use the rail line, when it is known that the Board has authorized the track construction; e.g., (Application at 9; “GLBT . . . does not anticipate [obtaining financing commitments] until it receives STB authority to construct the proposed line”).

That is the opposite of the Board’s process for track construction projects. As will be shown, there must be evidence *at the outset* of ability to fully fund a track construction, and of the likelihood that rail carriers and shippers will make use of the rail line. There is no such evidence in GLBT’s Application. Having failed to provide evidence that is essential to its case-in-chief, GLBT would not be permitted to provide that evidence in rebuttal. *Malone Freight Lines, Inc. v. United States*, 204 F. Supp. 745, 755 (ND Ala., 1962). The absence of such evidence, therefore, is fatal to GLBT’s Application. That being the case, there is no need nor justification for additional proceedings. The Application should be rejected for failure to have provided essential evidence.

In *Tongue River R. Co. -- Construction and Operation -- Western Alignment*, 2007 WL 2936132 (F.D. No. 30186 [Sub-No. 3], decision served Oct. 9, 2007) (*Tongue River*), the Board identified the three traditional elements of public convenience and necessity (PC&N) as that term is used in 49 U.S.C. § 10901(c), viz at \*8:<sup>1/</sup>

- (1) whether the applicant is financially able to undertake the project and provide rail service; and

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<sup>1/</sup> A fourth element is whether the transportation benefits of the proposed rail line are outweighed by adverse effects of the proposal on public safety. See *Construction and Operation -- Indiana & Ohio Ry. Co.*, 9 ICC 2d 783, 788 (1993).

- (2) whether there is a public demand or need for the proposed service; and
- (3) whether the proposal is in the public interest and will not unduly harm existing services.

GLBT's Application should be rejected because it does not contain information required by regulations governing two of those elements of PC&N, i.e., (1) 49 C.F.R. § 1150.6, financial ability, and (2) 49 C.F.R. § 1150.4, public need.

**1. Financial Fitness**

By virtue of 49 C.F.R. § 1150.6(a), GLBT was required to provide information *in the Application* regarding -

the manner in which applicant proposes to finance construction . . . the kind and amount of securities to be issued, the approximate terms of their sale and the total fixed charges, the extent to which funds for financing are now available . . . Explain how the fixed charges will be met.

Notwithstanding that explicit requirement, GLBT failed to comply (Application at 9, 14, emphasis added):

. . . GLBT has not yet obtained financing commitments for this entire amount (i.e., the \$2.8 billion cost of construction) and *does not anticipate doing so until it receives STB authority to construct the proposed line*. There are no relevant (financial) agreements (at 9).

x x x

GLBT has been discussing, and continues to discuss, options for financing the permitting phase of the project and land acquisition and construction *following approval* with private investors . . . (at 14).

It is beyond dispute that GLBT has not complied with the applicable regulations, instead alleging that it will obtain funding at an indefinite future date when GLBT will have received authority to construct the track. The plain meaning of 49 C.F.R. § 1150.1(b) and 49 C.F.R. § 1150.6(a) is that essential financial information must be included *in the Application*.

In *Tongue River, supra*, the Board explained the purpose of determining whether an applicant has the financial wherewithal to complete a track construction project<sup>2/</sup>, viz 2007 WL 2936132 at \*8:

... (O)ur purpose is ... to protect ... the affected communities from needless disruption and environmental impacts if the applicant were to start construction but not be able to complete the project and provide the proposed service ...

*Accord: New Mexico Navajo Ranchers Assn. v. ICC*, 702 F.2d 227 (DC Cir., 1983).

Thus, there must be evidence of sufficient funding of the cost of track construction *at the outset* so that once construction is started it can be completed instead of leaving a partially completed eyesore that would be difficult or impossible to economically dismantle. That is to say that there must be adequate evidence *at the outset* of the ability to *fully fund* a project.

At page 14 of the Application, GLBT states broadly that the project will be privately funded, but it provides no specifics regarding such funding. A general reference to a private source of funding does not constitute adequate evidence of financial ability to undertake a track construction project. Thus, in revoking an exemption for a track construction and operation in *Ozark Mountain Railroad -- Construction Exemption*, 1994 WL 698676 (F.D. No. 32204, decision served Dec. 15, 1994), the ICC said, at \*4:

... Ozark has indicated that Bartow Group will provide financing. But Ozark provides no information about Bartow Group or any investors associated with Bartow Group. The financing is described as private with investors receiving a stock interest in Ozark.

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<sup>2/</sup> Another purpose is to protect existing shippers from financial decisions that could jeopardize the carrier's ability to carry out its common carrier obligation to serve them (*id.*). That purpose does not apply in the present case because GLBT does not have any existing shippers.

Reopening was denied in the *Ozark* case, 1995 WL 561990, (decision served Sept. 25, 1995). A Petition for Judicial Review of the ICC's decisions was voluntarily dismissed. *Ozark Mountain Railroad v. STB*, 1996 WL 247943 (DC Cir, No. 95-1107, order dated April 4, 1996). The Petitioner did not file an application for authority to construct and operate the rail line. The proposed track was not constructed.

In support of its Petition to Reopen the *Ozark Mountain Railroad* decision, the proponent of track construction submitted a statement by Innova Capital Support Group that it will "still continue our work in providing financing" as evidence of the proponent's ability to obtain funding of the project *in the future*. In response, the Board said (1995 WL 561990, at 4):

. . . The statement, however, does not constitute compliance with the requirements of section 1150.6 . . . Nor is the information adequate to show that Ozark has a reasonable prospect of financing the project.

In *Dr. Daniel R. Fiehrer -- Feeder Line Application -- Line of BNSF Railway Co. between Helena and Great Falls, MT*, 2006 WL 3380865 (STB Docket No. FD 34947, decision served November 22, 2006) (Fiehrer), the Board rejected an Application under 49 U.S.C. § 10907 and 49 C.F.R. § 1151.1 *et seq.* for failure to provide financial information and evidence of public support that was required by the Board's regulations. The applicant in that case was a financially-well-headed person, as is Mr. Frank Patton of GLBT. In an attempt to comply with the Board's regulation regarding financial fitness, the applicant submitted a statement of his net worth from a CPA. The Board found that statement to be insufficient to comply with the financial fitness regulation, viz, (*id* at \*2):

Dr. Fiehrer submits a statement of his net worth from a certified public accountant and apparently assumes that, in view of that net worth, he could obtain commercial loans and revolving lines of credit to support the operation of this rail

line. Without a firm commitment from lending sources, however, Dr. Fiehrer's net worth does not establish that he will receive such loans. See Forty Plus Foundation/Manhattan Central Railway Systems, LLC-Feeder Line Acquisition-The Manhattan Highline, STB Finance Docket No. 34606, slip op. at 4 (STB served Jan. 25, 2005) (Forty Plus) (application deficient for failure to provide any details regarding loan sources for operating funds); PYCO Industries, Inc.-Feeder Line Acquisition-South Plains Switching, Ltd. Co., STB Finance Docket No. 34844, slip op. at 4 (STB served June 2, 2006) (feeder line application by a large commercial enterprise found incomplete for lack of a loan commitment or assurance of sufficient available cash to acquire and operate rail line). Likewise, Dr. Fiehrer's reliance on his eligibility to participate in government programs that provide loans and grants to railroads does not establish financial responsibility because the mere existence of these programs does not represent a committed source of funds. See Forty Plus, slip op. at 4.

On that basis, the Board said (*id*):

The failure to provide sufficient evidence of financial responsibility is, in itself, grounds to reject the application as incomplete . . .

It is evident from the foregoing that if the Board were to authorize a track construction without ensuring that there was adequate evidence of the ability to fully fund the construction, the Board would be powerless to protect farm communities and other members of the public from the disruptions and environmental harms that result from incomplete and abandoned track structures along the proposed rail line. It follows that authorizing a track construction without adequate evidence of ability to fully fund the construction would be directly contrary to the purpose of the financial fitness test.

In *Dakota, MN & Eastern RR -- Construction -- Powder River Basin*, 3 STB 847 (1998) (*DME*), the Board found that a lack of evidence of committed financing in an application was not a ground to reject the application (*id* at 892). However, the decision in that case is both factually unlike the present case, and is out of step with the financial fitness test.

That case is factually distinct because there was evidence that the applicant in that case had participated in serious discussions with reputable sources of financing prior to filing of the application (3 STB at 892).<sup>3/</sup> The Board may have concluded on that basis that notwithstanding the absence of committed funding, there was a reasonable prospect that the applicant would be able to finance the project. In contrast, in the present case there is no evidence that GLBT has discussed financing with any identified entity. There is thus no basis in the present case to find that GLBT has a reasonable prospect of obtaining financing.

Of greater importance, the decision in the *DME* case is out of step with the financial fitness test because the Board in that case failed to recognize and apply the purpose of that test “to protect . . . affected communities from needless disruptions and environmental impacts if the applicant were to start construction but not be able to complete the project and provide the proposed service . . .” *Tongue River, supra*, 2007 WL 2936132 at \*8. Thus, the Board in the *DME* case stated that the sole purpose of the financial fitness test is to protect existing shippers, (3 STB at 866; *See* note 2 of this Petition, *supra* at 5), but the Board failed to refer to the purpose of that test to protect affected communities from disruptions and harms resulting from projects that may be abandoned before completion. The *DME* case thus does not provide valid authority for omitting evidence of financial fitness in a track construction application.

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<sup>3/</sup> The applicant submitted evidence and testimony from several sources concerning funding, including Morgan Stanley who stated its belief that the project would appear to be attractive to investors (3 STB at 892).

2. **Public Need**

The record regarding public need for the rail line is every bit as barren as the record regarding financial fitness. Thus, by virtue of 49 C.F.R. § 1150.4(e), an application for authority to construct a track is required to contain:

. . . the volume of traffic estimated to be interchanged; and a description of the principal terms of agreements with carriers covering operation, interchange of traffic, division of rates or trackage rights.

GLBT's response reveals an absence of rail carrier or shipper intent to use the rail line

(Application at 12, emphasis added):

The volume of traffic estimated to be interchanged at each of these locations will ultimately be determined by interchange, rate division, haulage, and operating rights agreements to be negotiated with each railroad, decisions of each railroad and their shipper customers with respect to routing, and day to day operating conditions in the Chicago terminal. *GLBT has entered into no agreements with any railroad regarding operations, interchange of traffic or rates . . .*

Thus, as in the matter of financial fitness, there is no evidence whatsoever in the Application of a public need or demand for the rail line proposed by GLBT, and no opportunity for establishing such a need in rebuttal. *See Malone Freight Lines, Inc. v. United States, supra.*

In the *Fiehrer* case, similar to GLBT's position in the present case, the applicant alleged that there would be a public need for the proposed rail line because it provided a more direct route than the current route for overhead traffic moving between Canada on the one hand, and the southern United States and Mexico on the other. 2006 WL 3380865 at \*3. The Board's response to that contention is equally applicable to the present case, viz, *id*:

. . . (T)he lack of statements in support from shippers or other railroads undermines the likelihood that a sufficient number of those shipments would occur . . .

The Opposition Groups are prepared to provide affirmative evidence that at least two Class I rail carriers have stated publicly that they would not use the proposed rail line, and there is compelling evidence that the other Class I rail carriers operating in the Chicago Rail Terminal would be unlikely to use that line. However, providing such evidence should be unnecessary because proof of a public need for the proposed rail line is an essential element of GLBT's case-in-chief, and GLBT has utterly failed to provide any such proof. That being the case, rejection of the Application is warranted.

**3. Rejection Is Warranted By Burden Of Proof Principles**

Rejection of the Application for failure to provide evidence of financial fitness and public need is fully in line with the requirement of 49 U.S.C. § 10901(c) that a track construction is to be authorized unless the Board finds that the construction would be "inconsistent with the public convenience and necessity". Usually, when a statute provides for an action to be authorized unless it would be inconsistent with a stated standard, a presumption arises that the stated standard has been met, and that an opponent would have the burden to go forward with evidence to rebut the presumption.

However, in the case of track constructions, there is a recognition in the law that much of the evidence that bears directly on the PC&N of a proposed track construction is solely in the possession of the proponent of the construction. Accordingly, the Board has provided that the proponent of track construction is required to file an application containing the information specified in 49 C.F.R. § 1150.2 through § 1150.9. Therefore, at least in cases serious and controversial enough to warrant formal application procedure instead of exemption practice, the proponent of track construction must carry the initial burden to go forward with evidence of

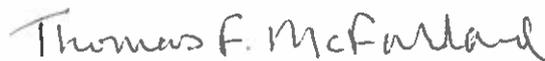
PC&N, at least with respect to the items specified in the Board's regulations, including financial fitness under 49 C.F.R. § 1150.6 and public need under 49 C.F.R. § 1150.4. Thus, basic evidence of financial fitness and public need are essential elements of a proponent's case-in-chief in support of a proposed track construction.

Not only does the proponent of track construction have the burden to go forward with evidence to the extent described above, the proponent also has the ultimate burden of proof, often referred to as the burden of persuasion. That is so because the burden of persuasion is always on the person who is seeking a change in the status quo. *Salt Lake City Corp. -- Adverse Abandonment -- in Salt Lake City, UT*, 2002 WL 368014 at \*7 (Docket No. AB-33 [Sub-No. 183], decision served March 8, 2002); *North American Freight Car Ass'n v. BNSF Ry. Co.*, 2007 WL 201203 at \*3 (Docket No. 42060 [Sub-No. 1], decision served Jan. 26, 2007). In the present case, GLBT is the person seeking a change in the status quo. Accordingly, GLBT has the burden to prove the elements of PC&N as applied to the proposed track construction. As has been shown, GLBT utterly failed to sustain that burden. That being the case, burden of proof principles warrant rejection of the Application.

#### **CONCLUSION AND REQUESTED RELIEF**

WHEREFORE, for the reasons stated, the Application should be rejected.

Respectfully submitted,



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DATE FILED: July 10, 2017

**CERTIFICATE OF SERVICE**

I hereby certify that on July 10, 2017, I served the foregoing document, Petition For

Rejection Of Application on the following:

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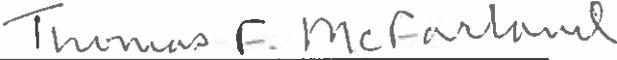
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