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August 12, 2005

Via Overnight Mail

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-001

Re: Finance Docket No. 34734
Northeast Interchange Railway LLC - Supplemental Filing of the Village of
Croton-on-Hudson in Support of its Petition to Reject NIR's Notice of Exemption

Dear Secretary Williams:

On behalf of my client, the Village of Croton-on-Hudson, New York (the "Village"), I enclose an original and ten copies of the Village's Supplemental Filing in Support of its Petition to Reject NIR's Notice of Exemption. I also enclose a disk containing a scanned pdf version of the Supplemental Filing together with separate pdf files of the exhibits and a word version of the Supplemental Filing itself.

If you have any questions, please give me a call.

Sincerely,



Michael B. Gerrard

Enclosures

cc: Rick Herbek, Village Manager
James E. Howard, Esq. (via Overnight Mail)

EXPEDITED CONSIDERATION REQUESTED

BEFORE THE SURFACE TRANSPORTATION BOARD

FINANCE DOCKET No. 34734

**NORTHEAST INTERCHANGE RAILWAY, LLC – LEASE AND OPERATION
EXEMPTION – LINE IN CROTON-ON-HUDSON, NEW YORK**

**SUPPLEMENTARY FILING OF THE VILLAGE OF CROTON-ON-HUDSON IN
SUPPORT OF ITS PETITION TO REJECT NIR’s NOTICE OF EXEMPTION**

I. Procedural History

The attempt by Northeast Interchange Railway, LLC (“NIR”) to register a waste transfer facility served by an existing spur track as a railroad has already generated a flurry of activity. This proceeding commenced on August 1, 2005 with the filing of a Notice of Exemption (the “Notice”). On August 4, 2004 the Village of Croton-on-Hudson, New York (the “Village”) filed a Petition asking for a stay of the Notice (the “Petition”). On the same day NIR filed a supplement to the Notice (the “Supplement”). On August 5, 2005, NIR filed a reply to the Village’s petition (the “Reply”), and the Surface Transportation Board (the “Board”) granted the stay requested by the Village giving NIR until August 15, 2005 to reply to the Village’s petition. NIR then filed a supplemental reply (the “Supplemental Reply”) on August 11, 2005. Because the Village has found that the Reply and the Supplemental Reply are false and misleading in many material respects and the Village would like to provide the Board with additional grounds for rejecting the Notice, the Village is making this supplemental filing to the Board.

II. NIR's Replies Compound the Misleading and False Statements in the Notice

In trying to explain away false and misleading information in the Notice, NIR confirms that the vagueness of the Notice was an attempt to gloss over the inherent contradictions in the information provided and makes further false and misleading statements. Thus, the Notice must be rejected as void *ab initio*.

A. Statements Regarding Contempt and Regus Affiliates' Compliance Record Were Misleading

The Reply alleges that the Village "has gratuitously asserted that other unnamed affiliates of Regus Industries, the parent of NIR, allegedly have 'poor operating records'" and "Regus and its affiliates have never been found to be in contempt of any orders of regulatory agencies."

Reply at 3. In the affidavit filed with the Supplemental Reply, Mr. Gruson again states that he is unaware of any Regus affiliates being found "in contempt of any orders of state and local agencies." Gruson Affidavit, dated August 10, 2005 ("Gruson Aff.") at 3. These statements are extremely misleading.

The Village has ample documentary basis for its statements. In a letter to another municipality, an attorney representing Regus Industries admitted that Warren Hills LLC was a Regus affiliate and that it had operated the Warren Hills landfill in Ohio from January 2003 to July 2004, accumulating a string of violations. Ex. A. The federal Agency for Toxic Substances and Disease Registry ("ATSDR") declared that landfill to be an urgent threat to public health. Ex. B-1.¹ The Attorney General of Ohio subsequently brought a contempt action against Warren Hills LLC, and its partner Warren Recycling, Inc. on March 11, 2004. Ex. B-4. These Defendants then stipulated to being in contempt and all parties moved the court to make a

¹ For clarity, the numbered Exhibits to Exhibit B are referred to as Exhibit B-__ in this filing.

finding of contempt. Ex. B-5. On November 16, 2004, the court found these Defendants to be in contempt of the court's consent order. Ex. B-6.

Thus NIR's repeated assurances that no Regus affiliates have ever been found to be in contempt of any order of *regulatory agencies* are extremely misleading. Warren Hills LLC, a Regus affiliate, has been found to be in contempt of *a court order*. The truth is therefore worse than the accusation which NIR denied. NIR's attempt to dismiss well documented violations and a finding of contempt against an affiliate of NIR as figments of the Village's imagination conforms with the pattern of lack of candor which NIR has established in this proceeding.

B. Statements Regarding Expansion, Revenue Assumptions, And Environmental Thresholds Are False

The Notice and the Reply are riddled with internal inconsistencies. Although the Village has no way of determining which of the inconsistent statements are false, it is clear that at least some of them must be.

As the Village pointed out in its Petition, NIR is trying to have its cake and eat it when it discussed planned expansion on the one hand and environmental thresholds on the other. Petition at 6-7. In the Reply NIR has added to this confusion by assuming in its revenue projection that "the number of rail cars in the first year or so of operation will be substantially the same as the number of rail cars at the site in prior years." Reply at 4. In the Supplemental Reply NIR further elaborated stating that the volume of waste material being shipped will remain the same as the current level for the foreseeable future. Gruson Aff. at 5.

The existing lessee ("Metro" or "Metro Enviro") is the only shipper on the spur at present. The assumption that the amount of traffic will remain the same is correct only if NIR takes over the operations and the spur continues to serve only the waste processing facility. However, the Notice states that NIR intends to build additional tracks on the leased property to

serve shippers and receivers of containers, lumber, brick, road salt, steel, and bulk liquids.

Notice at 3. If true, NIR's traffic and revenue predictions are false and its failure to take account of the expansion in the environmental analysis is a fatal flaw. NIR is trying to simultaneously maintain two mutually exclusive positions. This is obviously not permissible. Either NIR intends to expand, in which case it should take account of the proposed expansion in its revenue predictions and environmental analysis, or it intends to operate the spur and the waste processing facility in the same way they are operated by the current lessee.

C. Statements Regarding the DEC Permit Are False and Misleading

NIR now states that it "never alleged that the [DEC] license could be transferred without such [DEC's] consent." Reply at 3. The Notice actually stated "The [NYS]DEC permit could be assigned to NIR, if NIR elects to do so." Notice at 3. It made no mention of the need for DEC permission and neither did the Supplement. The statement in the Notice makes it appear that the only condition relevant to assignment of the permit is whether NIR elects to have it assigned. This is highly misleading, because it is by no means clear that the DEC permit would be assigned to NIR, even if NIR so requests. Indeed, the Village has written to DEC opposing any such assignment, because the operations of some entities controlled by Mr. Reger, the owner of NIR have a very poor compliance record. *E.g.* Ex. B. Furthermore, although on August 3, 2005, NIR stated that it intends to transfer the DEC permit to itself, Supplement at 1, DEC confirmed by telephone on August 11, 2005 that no application to transfer the DEC permit to NIR has yet been made. This is particularly surprising because NIR has asked for the Notice to become effective immediately. Supplemental Reply at 1.

Although NIR states that it intends to operate in accordance with the DEC permit, *e.g.* Gruson Aff. at 3, it is clear from the description of its intended waste processing operations, Gruson Aff. at 6 and Supplemental Reply at 4, that it does not understand the terms of that

permit. The DEC permit describes the facility as a “construction and demolition (C&D) debris *processing* facility and Special Condition 5E requires adherence to detailed procedures regarding waste processing that are specified in an Operation and Maintenance (“O & M”) Manual. Ex. C at 1, 4. The Operation and Maintenance Manual states that every load must first be inspected by the site foreman and “it is then unloaded and *processed* to remove recyclables.” Ex. D at 15. Before crushing the procedures also require segregation of unacceptable wastes. *Id.* Thus, once again NIR wants to have it both ways. It states that it will meet the terms of the DEC permit, which requires waste *processing* above and beyond crushing the waste for volume reduction, but its description of its intended operations are not in compliance with the requirements of the permit. NIR has a choice – it must either state that it will process waste in accordance with the DEC permit, or it must admit that it does not intend to meet the terms of the DEC permit. Until NIR makes this choice, the Board should reject the Notice.

D. Certification Regarding the Projected Revenue of NIR Is False

The Reply confirms that NIR provided a sworn certification that its projected revenues are less than \$5 million per year, when the current lessee of the facilities has sworn that it has revenue of over \$9 million. Reply at 3. NIR attempts to explain this discrepancy by stating that the revenue for actually moving rail freight cars will be substantially less than \$5 million. Reply at 4.

This way of projecting the revenue of NIR illustrates the Village’s essential point. The revenue of the current lessee comes entirely from waste processing. At present there are no railroad operations carried out by the lessee. If NIR took over, the railroad operations, if any, could at most consist of moving freight cars down the rail spur a few hundred feet. Thus, railroad revenues would be minimal or zero. However, if the waste processing operations were to be an integral part of NIR’s railroad operation the revenue of NIR’s operation will be closer to

\$9 million, even without the additional revenue from freight car movement, and without movement of the addition materials that NIR seeks to add.

In the Supplemental Reply, NIR makes plain that it now intends not to take title to the waste, but merely to direct it to a disposal point specified by the hauler. As explained elsewhere, NIR could not operate in this way and meet the requirements of the DEC permit. In any event, even if the disposal costs of around \$20 per ton² are subtracted from Metro's current revenues, the residual revenue would still be over \$7 million.³ Thus, because NIR is claiming that the waste processing operation is part of its railroad operations, the certification is false.

Moreover, if only the track operations and not the waste processing operations were included in railroad operations, then the waste processing operations could not be eligible for any sort of federal preemption.

E. NIR Falsely Asserts It Will Meet the Village Zoning Code

NIR claims that its proposed use will be in compliance with Section 230-18B of the Village Zoning code. Gruson Aff. at 4. However, while Section 230-18B permits "railroad lines and stations," Section 230-18E prohibits waste transfer stations, as follows:

Prohibited uses. Solid and liquid waste transfer and storage stations and landfills (including construction and demolition materials) are prohibited. For the purposes of this section, solid and liquid wastes are defined as follows: all putrescible and nonputrescible materials or substances that are discarded or rejected as being spent, useless, worthless or in excess to the owners at the time of such discard or rejection, including but not limited to liquids, garbage refuse, industrial, commercial and household waste, sludges from air or water treatment facilities, rubbish, tires, ashes, contained gaseous

² Dennis Patano, the chief operating officer of Regus Industries stated in today's New York Times that "in Ohio we're still beating our heads against each other to get \$18, \$20 a ton [of waste disposed]." Jeff Bailey, *Waste Yes, Want Not*, N.Y. Times, August 12, 2005 at C3.

³ The facility processes around 10,000 tons of waste per month, yielding a revenue of around \$185,000 per week.

material, incinerator ash and residue and construction and demolition debris.

The situation with respect to zoning is somewhat complex and is the subject of ongoing litigation in New York State court. However, no party in the zoning litigation has argued that the current use falls within the “railroad lines and station” permitted use category.

F. Other False and Misleading Statements

NIR states categorically that “the New York Court of Appeals did not technically give the Village the ‘right to close’ the Metro facility.” Reply at 4. This is misleading. On January 27, 2003, the Village Board adopted a resolution ordering the Metro facility to close. Metro successfully petitioned for that order to be annulled at trial, but the Village prevailed at both levels of appeal and the Court of Appeals ultimately dismissed Metro’s petition. Thus, the Court of Appeals has confirmed that the Village had, and continues to have, the right to close the Metro facility. Metro and the land owner recently obtained a temporary restraining order preventing the Village from implementing the closure order, but at oral argument in the current litigation on July 21, 2005, Justice Nicolai stated, “The Court of Appeals has said they can close them [Metro] down.” Ex. E. The attorney representing Metro and the land owner responded “That’s precisely right.” *Id.* Thus, NIR’s assertion regarding the Court of Appeals holding is misleading. Only the landowner’s rights are genuinely at issue, not Metro Enviro’s.

To try to brush off the false address issue, NIR asserts that 1A Croton Pointe Ave. is its operating address. This is false. NIR has no permit to operate the facility at 1A Croton Pointe Avenue. This facility is still being operated by Metro Enviro, which holds DEC and Westchester County permits. Moreover, the Notice refers to its acquisition of the Metro facility as a “proposed transaction.” Thus, if the proposed transaction is complete, the Notice was false and NIR is operating unlawfully, or if it is not, the address provided was false.

III. Transaction Requires More Scrutiny Than The Class Exemption Process Provides

Even if the Notice and Reply were not false and misleading, the Board should reject the Notice because the class exemption process is not an appropriate means of resolving this matter. The Board has previously rejected notice transactions involving transloading operations because they warrant more detailed scrutiny than would be afforded under the agency's class exemption process. *Riverview Trenton Railroad Company – Acquisition and Operation Exemption – Crown Enterprises, Inc.*, STB Finance Docket No. 33980 (STB served Feb. 15, 2002). The Board explained that “the class exemption procedures were adopted to serve shippers and community interests by facilitating continued rail service on lines that the selling carrier could no longer operate profitably.” *Id.* at 10. Class exemption is not appropriate where the transaction is controversial, private carrier service would be converted to common carrier service, local control of the property involved is a major issue, and substantial factual and legal issues are presented which require detailed scrutiny and the development of a complete record. *Id.* at 10-14.

Even where the Board has not immediately rejected notices involving the alleged transloading of waste materials by start-up carriers, it has granted long term stays of notices where the proposed transactions were controversial. *See New Haven National Rail Terminal Transportation Company, L.L.C.--Lease And Operation Exemption--3.5 Miles Of Track In The Former Cedar Hill Yard, New Haven And North Haven, Ct*, 2005 WL 1396281, STB Finance Docket No. 34690 (STB served June 14, 2005) (notice held in abeyance pending further discussions between interested parties); *LB Railco, Inc. – Lease and Operation Exemption – Providence and Worcester Railway Company*, STB Finance Docket No. 34281 (STB served Nov. 22, 2002) (notice of exemption stayed on Board's own motion to obtain additional information); *New Jersey Rail Carrier, LLC – Acquisition and Operation Exemption – Former*

Columbia Terminals, Kearny, NJ, STB Finance Docket No. 34392 (STB served Aug. 13, 2003) (class exemption stayed to obtain additional information).

Recognizing the inapplicability of the class exemption process to proposals involving transfer of construction waste, in some cases the parties themselves commenced proceedings in a way that allowed more detailed scrutiny of their proposals. *See e.g. Hi Tech Trans, LLC – Petition For Declaratory Order – Newark, NJ*, STB Finance Docket No. 34192 (Sub-No. 1) (STB served Aug. 14, 2003) (filed as a petition for a declaratory order requesting a finding of preemption); *New England Transrail, LLC, d/b/a Wilmington and Woburn Terminal Railroad Company – Construction, Acquisition, and Operation Exemption – In Wilmington and Woburn, MA*, STB Finance Docket No. 34391 (STB served May 3, 2005) (filed as petition for exemption).

Both *Hi Tech* and *New England Transrail* are highly relevant to the Notice because they both involved operations in which construction waste was being loaded on to rail trucks. Ultimately, the Third Circuit resolved the key issue in the *Hi Tech* case, finding that the Board did not have jurisdiction over the waste transloading operations at issue, even though the operator did not process the waste. *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295, 308-09 (3d Cir. 2004). The *New England Transrail* proceeding terminated after the Board dismissed its petition because the applicant did not fully disclose its plans at the environmental review stage and did not keep the Board informed of significant changes. *New England Transrail* at 4-5.

NIR's proposed transaction is even more deserving of close scrutiny than those reviewed concerning *Riverview Trenton Railroad*, *Hi Tech*, and *New England Transrail*. Like *Riverview Trenton Railroad* the motivation behind the transaction is to invoke federal preemption where a decision has been taken by a municipality that the owner or operator wishes to avoid. Like *Hi*

Tech and *New England Transrail* the transaction involves alleged transloading of construction waste. However, unlike either *Hi Tech* or *New England Transrail* the waste processing facility at issue has operated for around 7 years under permits from the State, the County, and the Village.

Around a month ago the New York Court of Appeals ruled that the Village Board “was entitled to conclude that the history of repeated, willful violations created an unacceptable threat of future injury to health or the environment” and that the Village Board’s closure order was valid. Granting an exemption that includes the waste processing facility would therefore undercut the decisions of the Village and the Court of Appeals, New York’s highest court. This confirms that the NIR transaction requires more detailed scrutiny than is possible in the class exemption process and so the Board should reject the Notice.

IV. NIR Cannot Obtain An Exemption

Even if the Notice were not void *ab initio*, if NIR had provided complete information, and if NIR had employed the appropriate process, the Board would still have to reject the Notice for numerous reasons. As discussed in the Village’s Petition, the track at issue is spur track, environmental impact analysis is required, and the waste processing facility would not be subject to the Board’s jurisdiction. In addition, NIR cannot obtain an exemption because NIR would function as a waste processor and shipper and not as a rail carrier.

A rail carrier is “a person providing railroad transportation for compensation.” 49 U.S.C. 10102(5). The facility does not provide railroad transportation, it provides construction waste disposal. The haulers who bring construction waste to the facility for processing do not contract with the landfill to dispose of the waste and with Metro to ship the waste, they contract with Metro to dispose of the waste. Unlike true shippers, the haulers are indifferent to the destination of the waste. They merely seek the most economical means of lawful disposal. That Metro

controls the destination of the waste is shown by the fact that currently all the construction waste from the facility is directed by Metro to one landfill in Ohio. Although NIR states that the haulers would become the shippers if it takes over, such an arrangement would merely be a sham to create the impression NIR would be providing transportation rather than waste disposal services.

Having an arrangement where the haulers specify the place of disposal would also violate the DEC permit. According to the terms of the permit requiring the operator to follow the procedures in the O & M manual (DEC Permit Special Condition 5E, Ex. C at 4), the transfer station operator must reject unacceptable waste, sort the incoming acceptable waste, and direct it to authorized disposal facilities. *See also* DEC Permit Special Condition 23, Ex. C at 6. Until a load is inspected, accepted, and sorted, the destination or destinations of the wastes within it cannot be determined. Thus, the hauler who brings the waste to the processing facility cannot be the shipper, because (s)he cannot determine in advance to which facility the waste will be sent. Furthermore, although NIR states that it intends only to crush the waste, this would also violate the terms of the DEC permit, which requires careful sorting of the waste streams. Thus, NIR would not become a rail carrier if the proposed transaction were completed.

NIR has responded to the village's argument that, even if NIR were a rail carrier, the waste processing facility would not be part of any railroad operations, by trying to distinguish *Hi Tech Trans.* on the basis that the operation at issue in that case was not owned by a railroad. Supplemental Reply at 5. This is a distinction without a difference. If the invocation of federal preemption was merely a question of form rather than substance, many operations like that considered in *Hi Tech Trans.* would surely be acquired by railroads. This would make no overall difference to the amount of rail traffic, but it would deprive municipalities and states of the

ability to regulate these potentially harmful facilities. Furthermore, the Board has a policy of classifying track on the basis of use rather than ownership. It should adopt the same approach to deciding which operations are part of railroad operations and which are not, rather than using a crude ownership test which would create undesirable incentives.

NIR also cites to a Second Circuit case deciding that pure transload facilities may fall within the definition of rail transportation. *Green Mt. R.R. Corp. v. Vermont*, 404 F.3d 638 (2d Cir. 2005). The court stated “[The Railroad] serves industries that rely on trucks to transport goods *from the rail site for processing*; so the proposed transloading and storage facilities are integral to the railroad's operation and are easily encompassed within the Transportation Board's exclusive jurisdiction over ‘rail transportation.’” *Id.* at 644 (emphasis added). Although there is some tension between this Second Circuit holding and the Third Circuit’s holding in *Hi Tech Trans.*, the present case is distinguishable from both of those cases, because NIR is proposing to operate a waste *processing* facility, not to move goods from the rail site for processing. NIR also cites to a recent district court case, but fails to note that the court was only deciding a preliminary injunction motion and not the merits of the case. *Canadian Nat’l Railway Co. v. City of Rockwood*, 2005 WL 1394077 (E.D. Mich. 2005). In addition, in that case the facility was not already in operation and had not been found to be a threat to public health and the environment by the municipality in which it was sited, as upheld by the state’s highest court.

Wider policy implications also point to the same outcome. Many industrial facilities in the United States have rail spurs. Many of these would be sorely tempted to file notices of exemption to become rail carriers if that meant that they could thereby avoid some of the many state and local rules that ensure that their operations are safe, environmentally sound, and compatible with local land uses. This result would be intolerable and would be incompatible

with the Termination Act, which wisely specifically excepted spur track from Board authority, presumably to avoid just such a result. 49 U.S.C. § 10906.

V. NIR Admits The Track Will Not Be A Rail Line

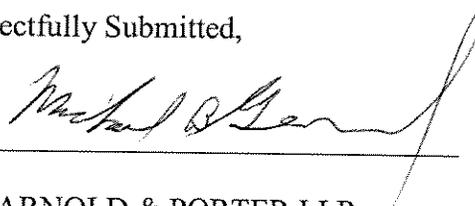
NIR's main contention, that its track will not be spur track, is undercut by its admission that a rail line must serve multiple customers and be operated by a common carrier. Reply at 7. Because NIR has also admitted that the track will have no more rail cars on it than at present, Reply at 4, it follows that it will continue to serve only one existing shipper, the waste processing facility. Furthermore, as discussed above, because NIR must process waste and direct where the waste goes to meet the terms of the DEC permit, it cannot become a mere provider of transportation. This means that NIR would not be operating a rail line. Thus, NIR's attempts to show that it will be subject to the jurisdiction of the Board have in fact confirmed the opposite. NIR will not be a rail carrier in control of a rail line, instead it will be a waste processor that leases spur track over which CSX provides pick up and drop off service for rail cars.

VI. Conclusion

The Board should reject the Notice as void *ab initio* and direct NIR to utilize the petition process if it wishes to reapply for an exemption.

DATED: New York, New York
August 12, 2005

Respectfully Submitted,



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