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April 7, 2017

By E-Filing

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

Re: Docket No. FD 36005, *KCVN, LLC and Colorado Pacific Railroad, LLC*
– *Feeder Line Application – Line of V and S Railway, LLC, Located in*
Crowley, Pueblo, Otero, and Kiowa Counties, Colorado

Dear Ms. Brown:

Accompanying this letter for e-filing in the referenced docket is Applicants' Rebuttal to V AND S Railway, LLC's Reply to Applicants' Supplemental Pricing Information submitted in response to the decisions served in this proceeding on March 3 and March 23, 2017. Because this filing contains some data that is designated as HIGHLY CONFIDENTIAL pursuant to the Protective Order instituted in this proceeding, Applicants are e-filing a Public Version and a version to be filed under seal.

Do not hesitate to contact the undersigned with any questions or if you need additional information.

Sincerely,

Thomas W. Wilcox
Attorney for KCVN, LLC and Colorado Pacific
Railroad, LLC

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 36005

**KCVN, LLC AND COLORADO PACIFIC RAILROAD, LLC – FEEDER LINE
APPLICATION – LINE OF V AND S RAILWAY, LLC, LOCATED IN CROWLEY,
PUEBLO, OTERO, AND KIOWA COUNTIES, COLORADO**

**APPLICANTS’ REBUTTAL TO V AND S RAILWAY, LLC’S REPLY TO
APPLICANTS’ SUPPLEMENTAL PRICING INFORMATION**

Pursuant to the decisions served in this proceeding on March 3, 2017 (“*March 3 Decision*”) and March 23, 2017, KCVN, LLC (“KCVN”) and Colorado Pacific Railroad, LLC (“CPRR”)(together “Applicants”), hereby submit this rebuttal to the Reply of V AND S Railway, LLC to Applicants’ Supplemental Pricing Information (“V&S Reply”). In the V&S Reply, V&S asserts unfounded criticisms of the actual wholesale pricing information submitted by Applicants in response to the Board’s *March 3 Decision* (“Supplemental Pricing Submittal”). However, V&S offers no alternative actual wholesale pricing information of its own for the Board’s consideration. Moreover, instead of limiting its Reply to addressing the wholesale pricing data and revised Net Liquidation Value (“NLV”) submitted by Applicants as specifically instructed by the Board in the *March 3 Decision*, V&S has defied the Board’s instructions and included in the V&S Reply a wholesale revision of its August 30, 2016 NLV calculation that is based on “updated” *retail* prices for rail track and materials provided to V&S by its owner, A&K Railroad Materials (“A&K”). This new NLV calculation and the discussion accompanying it is in no way

responsive to the *March 3 Decision*, goes far beyond its narrow scope, is *prima facie* fundamentally flawed, and it should therefore be disregarded by the Board.

A. The Wholesale Pricing Information Submitted by Applicants is Current, Fully Supported, and the Best Evidence of Record

V&S and its consultants take a scattershot approach to try and criticize the actual wholesale pricing information Applicants provided in their Supplemental Pricing Submission. V&S's approach focuses mostly on the process by which the information was requested and obtained and the weight this data should be given by the Board in this proceeding. However, V&S does not seriously dispute that Applicants obtained and submitted actual wholesale pricing information in response to the *March 3 Decision*. Nor does V&S dispute that the wholesale pricing information was obtained from established, reputable companies that regularly participate in the wholesale and retail markets for rail materials. For the reasons stated below and more expansively in the attached Supplemental Rebuttal Verified Statement of Thomas D. Crowley and Daniel L. Fapp ("Crowley/Fapp SRVS"), V&S's criticisms of the Supplemental Pricing Submission are unfounded. The wholesale pricing information submitted by Applicants was properly requested and obtained, it accurately reflects the current market for the wholesale purchase of the Towner Line track materials, and it is the best evidence of record on wholesale prices to be used in the Towner Line NLV.

As an overarching preliminary point that applies to V&S's criticisms of Applicants' wholesale pricing data, as well as the V&S Reply as a whole, the V&S's use of the testimony of Mr. Kern Schumacher to criticize Applicants' supplemental submission - and V&S's use of pricing and other alleged market information supplied to V&S's consultants exclusively by A&K Railroad Materials, Inc. ("A&K") - must be given no weight, if not ignored entirely. Mr. Schumacher is the Chairman of A&K which is directly affiliated with V&S. As one of the two

sole member/owners of V&S, Mr. Schumacher stands to personally and directly gain financially if the Board establishes a high NLV for the Towner Line. Accordingly, his testimony on the practices of wholesale rail salvagers and their pricing practices, and other statements about the markets for railroad materials, cannot be considered objective or credible. This is particularly true since V&S has included no actual wholesale pricing information in its Reply filing from A&K or any other source.

V&S's criticisms of the process by which Applicants' consultants obtained the actual wholesale pricing information requested by the Board are simply wrong. While V&S weakly asserts it is "not clear that the cited companies knew they were providing 'wholesale' prices," V&S Reply at 5, this was surely the case, as stated in the sworn testimony of Mssrs. Crowley and Fapp. As further explained in the Crowley/Fapp SRVS, each of companies contacted was explicitly asked for *their current wholesale prices*, in multiple phone calls and emails. Crowley/Fapp SRVS at 3-4 and Attachment 1 thereto. This communication included an email that in two places stated unequivocally that the company was being asked for a quote for the wholesale prices the company would currently pay for the Towner Line materials. Crowley/Fapp SRVS at 2-3, and Attachment 1, pages 1, 3, and 5.

While V&S attempts to make much of the fact that Applicants were not able to obtain wholesale prices for all classifications of the Towner Line track, this is simply a reflection of the short time period provided by the Board for Applicants to obtain and submit the requested information. The fact that actual wholesale pricing was not obtained for all track classifications has no relevance whatsoever to the usefulness of wholesale pricing data that *was* obtained for certain categories of track which comprise most of the Towner Line in any event.

V&S's consultants also throw against the wall a number of alleged "ambiguities" about the content of the requests for wholesale price quotes made by Applicants' consultants, with the apparent hope that one or more might stick. Supplemental Verified Statement of Charles L. Banks and John D. Ireland ("Banks/Ireland SVS") at 5-6. Chief among these alleged "ambiguities" is that the quotes were "essentially presented in a vacuum, devoid of any explanation or documentation." This is false. As stated above, the requests were accompanied by explanatory emails and phone calls to the prospective companies. Moreover, the documentation provided to each company consisted of the same materials list of the Towner Line track assets and their respective American Railway Engineering and Maintenance of Way ("AREMA") classifications that has been used by R.L. Banks & Associates, Inc. ("RBLA") throughout this proceeding. Crowley/Fapp SRVS at 6, and Attachment 2. The salvage companies contacted by Applicants' consultants are well-established¹ and fully understood the specific parameters of the Towner Line track materials based on the AREMA classifications for which Applicant's consultants were seeking price quotes.

V&S's consultants also attempt to find "ambiguity" in the fact that the wholesale prices obtained by Mssrs. Crowley and Fapp were not the same for each of the companies that responded, and through the various interpretations of Mssrs. Banks and Ireland of the quotes that were received. These criticisms are also misplaced. Regardless of the rationale for the wholesale prices provided by each company, the prices they provided reflect the current wholesale prices each company would pay to purchase the Towner Line assets. They, therefore by definition, reflect current market prices as to these companies. V&S's attempt to argue otherwise by comparing the companies' wholesale price quotes to past and current market

¹ See Crowley/Fapp SRVS at 7, which includes information on the qualifications of the salvage companies from whom they received wholesale price quotes.

conditions is irrelevant. Market prices are dictated by what a vendor is willing to pay for the assets in the current market. Accordingly, for example, the fact that A&K may have received a higher price for No. 2 fit 112 and 115 pound rail in the past (V&S Reply at 7) is of no relevance to today's market, where the current relay rail market faces a glut of products that is currently depressing prices. Crowley/Fapp SRVS at 7-8.

V&S's arguments against the wholesale tie prices and tie disposal costs developed by Applicants and the recalculated tie values included in the Supplemental Pricing Submission are similarly misplaced. Banks/Ireland at 8-9. Whereas Mssrs. Crowley and Fapp obtained actual wholesale prices for relay and landscape ties, and disposal costs for scrap ties, the V&S Reply contains no actual wholesale price information for ties in its Reply filing that refutes this data. Rather, V&S attempts to discredit Applicants use of actual *wholesale* pricing information for ties by relying on *retail* tie prices supplied to V&S by A&K, and other deficient arguments rebutted by Mr. Gerald W. Fauth III in his Supplemental Rebuttal Verified Statement submitted with this Rebuttal filing ("Fauth SRVS").

Finally, V&S attempts to eliminate entirely the probative effect of the actual wholesale pricing information obtained by Applicants by raising the red herring that Applicants did not produce firm contracts or binding offers to purchase from the parties its consultants obtained the pricing information from. V&S Reply at 3. In the first place, nowhere in the *March 3 Decision* does it state that firm contracts or binding offers were a condition precedent to submitting actual wholesale pricing information. On the contrary, rather than impose such an impossible condition on Applicants in the short time frame set out in the *March 3 Decision*, the Board gave Applicants the flexibility to use wholesale prices "from whichever source (such as an index) or sources they

see fit, but shall identify the sources of the data and explain the reasons they were selected.”

March 3 Decision at 1. Applicants did just that.

In summary, V&S’s attempts to diminish the significance of Applicants actual wholesale pricing data through a scattershot approach of raising supposed deficiencies and “ambiguities” should be rejected. Moreover, at the end of the day, V&S’s misplaced complaints about process and the content of the requests for wholesale price quotes, and the meaning of the prices that were received, do not change the fundamental fact that Applicants obtained actual wholesale price quotes from reputable track salvage companies in response to the *March 3 Decision*. This information is necessarily imprecise and not subject to binding contracts, but it is fully supported and is the best evidence of record, particularly since V&S declined to submit any actual wholesale pricing data of its own.

It is also significant that the actual wholesale price quotes obtained by Applicants and included in their Supplemental Pricing Submission are *less than half* of the retail prices used by V&S in the NLV included in the August 30, 2016 Comments of V AND S Railway on Applicants Feeder Line Application, and they are far below even the reduced (but still inflated) retail prices V&S has included in the “adjusted” NLV it has improperly proffered the V&S Reply. Even taking into account any uncertainties due to lack of binding contracts or other potential concerns, the wholesale price quotes obtained by Applicants confirm without question that the NLVs proposed by V&S in this proceeding far exceed the level of any NLV calculated using actual wholesale prices for the Towner Line track materials, and should therefore be rejected.

B. Applicants Properly Updated Their Prior NLV Calculation to Incorporate Actual Wholesale Pricing

In addition to its unfounded criticisms concerning the actual wholesale price quotes obtained by Applicants, V&S also attempts to criticize the updated NLV analysis incorporating the wholesale pricing prepared by Mr. Fauth in accordance with the Board's instructions in the *March 3 Decision*. These criticisms are also misplaced, for the reasons summarized below and explained in more detail in Mr. Fauth's SRVS.

1. Applicants Properly Deducted Administrative and Marketing Costs

In the V&S Reply filing, V&S maintains that "it is not appropriate" to deduct "Administrative & Marketing" cost from a Gross Salvage Value ("GSV") calculated with wholesale rail prices. V&S maintains that this is because the railroad salvage company, and not the selling railroad, would always bear all of these costs. V&S Reply at 6. This is not correct. As explained by Mr. Fauth, a railroad or liquidator selling to a wholesale purchaser *does* incur administrative and marketing costs that are properly deducted from the GSV of the line. Fauth SRVS at 5-6. This is particularly true for lines of railroad like the Towner Line, where a significant amount of the track assets are considered relay quality, which generally has a higher value than scrap. In such cases, the selling railroad or liquidator, in order to receive the highest price possible for the relay assets, would obviously incur administrative and marketing expenses associated with selling the relay assets. Since the current market for such a high volume of relay rail is far from robust, it can be reasonably assumed that it would take the railroad or liquidator some time to find a buyer and sell the relay assets. Moreover, because of the large volume and different sizes and types of rail associated with the Towner Line, it is logical to assume that the selling railroad may not be able to sell all the assets to a single buyer. *Id.* at 6. Accordingly,

Applicants' use of a value of 20% for the administrative and marketing of the relay materials to wholesale purchasers is reasonable. *Id.*

2. Applicants Properly Calculated and Deducted Removal and Transportation Costs

In the *March 3 Decision* the Board explicitly directed Applicants to state "whether the source or sources relied on for wholesale prices includes a deduction of the costs of removing the track materials and transporting them to the wholesale purchaser." *March 3 Decision* at 1. The Board further directed that, "if the source or sources do not include a deduction of those costs Applicants shall calculate those removal and transportation costs and deduct them from the gross salvage value derived from the wholesale prices." *Id.* Finally, the Board stated that "the removal and transportation costs must be consistent with shipping the materials to the location of the wholesale purchaser, and the evidentiary basis for those costs must be provided." *Id.*

As stated in Applicants' Supplemental Pricing Submittal, "[t]he wholesale prices obtained by Applicants's consultants do not include a deduction for removal and transportation costs to the wholesale purchaser." Supplemental Pricing Submittal at 4. Accordingly, as instructed by the Board, Mr. Fauth calculated removal and transportation costs and deducted them from the GSV derived from applying actual wholesale prices to the Towner Line track materials. Moreover, Mr. Fauth calculated and provided the evidentiary basis for transportation costs that were consistent with "shipping the materials to the location of the wholesale purchaser," in this case California and Pueblo, Colorado.

V&S has appears to have conceded that Applicants' deduction of removal costs was appropriate. V&S Reply at 6, note 6. On the other hand, despite the fact that Applicants complied with the Board's directives in every respect, V&S claims in its Reply (1) that transportation costs should not have been deducted from Applicants' NLV based on actual

wholesale prices; and (2) Applicants' calculation of transportation costs of relay rail to the facilities of the purchasers of the track materials was improper. V&S Reply at 6-7. V&S's convoluted and internally inconsistent discussion on this point should be rejected. Among many deficiencies, V&S attempts to change the facts in record, asserting that even though the wholesale purchasers responding to Applicants' requests for price quotes did not include removal and transportation costs in their prices, they would still bear those costs. V&S Reply at 6. There is no evidence offered to support this assertion. Second, as Mr. Fauth explains, transportation costs would obviously have to be deducted from a GSV calculated by either wholesale or retail prices. At some point in the liquidation of the Towner Line, the inventory would have to be salvaged and transported, either from the line or from a temporary storage location. This is a necessary cost associated with the liquidation of the line, and the Board has historically deducted transportation costs from the GSV to produce the NLV. Fauth SRVS at 7.

Applicants' calculation of transportation costs associated with a GSV calculated using actual wholesale price quotes complied with the Board's *March 3 Decision* and is fully supported by Mr. Fauth's SVS. While V&S has attempted to adjust transportation costs in its NLV in its Reply filing, Mr. Fauth demonstrates that V&S has significantly understated the actual transportation costs that should be deducted from the GSV for a number of reasons. *Id.* at 8-9.

Finally, V&S's arguments against the deduction of administrative and marketing fees and transportation costs from a NLV calculated using actual wholesale prices are flatly inconsistent with V&S's own filing. Specifically, its improperly proffered "updated" NLV calculation, which purportedly uses surrogates for wholesale prices, deducts all of these costs from the GSV calculated using the derived wholesale prices. The notion that NLV's calculated using *actual*

wholesale prices should not deduct these costs, but that NLV's calculated using *surrogates* for wholesale prices should deduct such costs is not logical or consistent, and is not supported by any agency precedent in any event.

3. Applicants Correctly Calculated Tie Removal and Transportation Costs

In recalculating the NLV using wholesale prices, Mr. Fauth utilized the wholesale prices for relay, landscape, and scrap ties obtained by Mssrs Crowley and Fapp. Crowley/Fapp SVS at Exhibit 1. He also calculated the costs associated with transporting and/or disposing of the 437,380 ties making up the Towner Line. Based on his calculations, he determined that the net tie value of the Towner Line would be negative. Consequently, the tie GSV, tie removal cost, tie marketing and administrative costs, and tie transportation costs were all set at \$0 in the Applicants' restated NLV using actual wholesale pricing data.

V&S has attempted to criticize Mr. Fauth's finding as to ties mostly using new information that was supplied to it solely by A&K. This consists primarily of; (1) newly proffered *retail* prices for ties purportedly based on "conversations with A&K staff and a review of recent A&K sales data;"² and (2) anecdotal testimony by Mr. Kern Schumacher, owner of V&S Railway, about the alleged willingness of farmers in rural agricultural areas to take scrap ties for windscreens, landfills in Lamar Colorado, and trucking costs. None of this evidence is credible, and it ranges far beyond the scope of Applicants' Supplemental Pricing Submission. It should largely be disregarded.

In addition, Mssrs. Banks and Ireland state that a representative of Progress Rail suggested to them that in some areas of the country local entities will allow salvagers to burn scrap ties "free of charge," although he added he was not familiar with the regulations and

² Banks/Ireland SVS at 17.

disposal options in eastern Colorado. Banks/Ireland SVS at 6. As explained by Msrs. Crowley and Fapp, burning railroad ties in the vicinity of the Towner Line is simply not practicable or safe for a variety of reasons, not the least of which is that much of the land in the vicinity of the Towner Line is involved in the Conservation Reserve Program Grasslands (“CRP Grasslands”), which seeks to preserve grasslands to be used for conservation benefits. Crowley/Fapp SRVS at 10. These CPR Grasslands have been determined to pose a high risk of fire by the National Park Service, and so the prospect of multiple fires along the 121.9 mile length of the Towner Line would be reckless and dangerous. *Id.* Added to the risk of environmental degradation and fire is the obvious environmental harm caused by the thick smoke created by burning creosote, which is a probable human carcinogen. *Id.* Given that Colorado is also one of the most environmentally active states in the country, the comment by Progress Rail representative about some locations other than Colorado allowing railroad ties to be burned cannot be relied upon by V&S to argue in this proceeding that the wholesale tie disposal costs for Towner Line ties obtained by Applicants from Progress Rail, or any other source, are not valid or should be reduced.

To the limited extent V&S’s Reply does address Applicants’ recalculated NLV as it pertains to ties, Mr. Fauth has rebutted each one of the V&S’s arguments. Fauth SRVS at 10-13. In general, however, V&S’s attempt to discredit the actual wholesale pricing information for ties obtained and developed by Applicants through the use of improperly proffered new retail tie prices from A&K, unreliable anecdotal testimony from V&S’s owner, coupled with V&S’s failure to properly calculate transportation costs in accordance with Board precedent, should lead the Board to conclude that actual wholesale pricing data and related analysis submitted by

Applicants concerning tie removal, transportation, and disposal should be accepted as the best evidence of record.

C. V&S's "Updated" NLV Calculation Based on Retail Prices Should be Disregarded

As stated above, while V&S offers misplaced criticisms of Applicants' Supplemental Pricing Submittal, V&S declined to submit any actual wholesale pricing information of its own in response to the *March 3 Decision*. Instead, V&S has improperly attempted to greatly expand the narrow focus of the *March 3 Decision* by including in its Reply an "updated" NLV calculation that is based solely on *retail* prices for track materials, which prices were purportedly supplied to V&S's consultants by A&K. For the reasons discussed below, this "updated" NLV calculation ranges far beyond the scope of the *March 3 Decision* and should be disregarded by the Board.

First, in lieu of providing actual wholesale pricing information as requested by the Board, V&S has proposed to reduce the new retail prices supplied to it by A&K by certain percentages for the purpose of producing a surrogate for wholesale prices. Percentage reductions have been used in past feeder line and abandonment cases by the STB to produce a surrogate for wholesale prices, *but only when actual wholesale prices are unavailable*. Here, the Board specifically requested, and Applicants have supplied, current actual wholesale pricing data has been collected and supplied by Applicants. V&S's gratuitous new NLV submission is therefore superfluous. Moreover, Applicants submit that if the Board wanted either party to prepare an updated NLV using new retail prices and applying proposed percentage reductions, the *March 3 Decision* would have directed them to do so. It did not, and so V&S's unilateral submission of such new evidence and argument in its reply evidence is improper and should be disregarded for that reason as well.

Second, because V&S's new NLV submission obviously ranges far beyond the narrow focus and purpose of the *March 3 Decision*³ as well as scope of Applicants' Supplemental Pricing Submittal, Applicants have not conducted (and indeed could not conduct) an in depth analysis of this aspect of V&S's Reply in the five business days allotted for this rebuttal filing. However, even a cursory reading of this part of V&S's Reply reveals that it suffers from numerous fundamental flaws, not the least of which is applying its small percentage reduction to high starting retail prices supplied by A&K, an obviously biased source. Moreover, the mere 5% percentage reduction for retail profit applied by V&S to purportedly convert its retail prices into the equivalent of wholesale prices is arbitrary and obviously result oriented.⁴ It is also directly contrary to Board precedent, where the Board has more typically applied a 15-20% reduction to retail prices to eliminate profit and inventory costs for the purpose of producing a surrogate for a wholesale price (again, when no actual wholesale prices are available). *See, e.g., STB FD 34335, Keokuk Junction Railway Company – Feeder Line Acquisition – Line of Toledo, Peoria, and Western Corporation between La Harpe and Hollis, II*, (seved October 28, 2004). This typical reduction for retail profit is consistent with the approach to profit margin utilized by at least one well-established railroad salvage company.⁵ In contrast, in the only case cited by V&S where the Board allowed a reduction for profit and overhead of only 5%, it was because the salvager submitted sworn testimony that this amount was all he had agreed to collect for

³ *March 3 Decision* at 1-2 (“V&S may file a reply concerning *this data*,” meaning the wholesale price data requested by the Board) (emphasis supplied),

⁴ According to V&S' consultants Banks and Edwards, the 5% reduction for profit was “developed” by them after they were advised by V&S counsel that the Board had accepted this profit margin in prior cases and because Mr. Schumacher told them it was a reasonable estimate for them to use. Banks/Edwards SVS at 13, note 16. There is no indication in V&S's filings that its experts asked Mr. Schumacher what A&K's real profit margins are, or that he provided them.

⁵ *See Crowley/Fapp SRVS, Attachment 1, page 6* (where Vice President of Harmer Steel states “we generally shoot for 30% gross margin”).

salvaging the line. STB Docket No. AB-914X, *McCloud Railway Co. – Abandonment and Discontinuance of Service Exemption – In Siskiyou, Shasta, and Modoc Counties, CA* (served August 25, 2006) at 5. Here, the only “evidence” supporting V&S’s minor 5% reduction for retail profit is the recommendation of Mr. Schumacher to his consultants to use 5% as “an average railroad salvage company profit margin across all materials,” which is not supported by any quantitative evidence or proof, and is in fact directly contradicted by the statement of the Harmer Steel representative referenced in footnote 5, *supra*.

It should therefore come to no surprise to the Board that the methodology behind V&S’s “updated” NLV calculation using retail rates produces derived surrogate “wholesale” prices that are far in excess of the actual wholesale rate quotes obtained by Applicants’ consultants. This further highlights its fundamental flaws. Other obvious flaws include that V&S, after claiming that administrative and marketing costs, and transportation costs must not be deducted from an NLV based on actual wholesale costs (V&S Reply at 6), inconsistently continues to deduct these same costs from V&S “updated” NLV calculation. *See Banks/Ireland SVS at 8-9 and Table 1; Fauth SRVS at 6, 8.* But all of these issues concerning the “updated” NLV calculation are far beyond the limited scope of the *March 3 Decision*, and therefore have been improperly introduced by V&S in the reply phase of this very narrow request by the Board. Applicants submit that should the Board desire for the parties to prepare revised NLVs based on surrogate wholesale prices, then fundamental fairness would require the V&S Reply to be considered V&S’s opening submission, and Applicants should be provided a reasonable opportunity to respond to it and submit their own such analysis for the Board’s review.

Finally, V&S’s strained efforts to find support for its retail price based NLVs through (1) pricing information A&K received from Cando Rail Services (“Cando”); and (2) selected

correspondence between V&S and the Kiowa County Assessor's office actually provide support for the Board accepting Applicants' NLV calculations. As for Cando, Mssrs. Crowley and Fapp point out that the one page letter from Mr. Ryan Wannamaker of Cando included as Exhibit A to Mr. Schumacher's verified statement does not contain any wholesale pricing information. Rather, according to Mr. Wannamaker, the amounts listed are for the current market values of the track materials at *retail* prices. Crowley/Fapp SRVS at 11. Mr. Wannamaker confirmed to Mssrs. Crowley and Fapp that the prices listed in the Schumacher V.S. Exhibit A are not the prices Cando would pay for the materials at wholesale. Rather, they are the prices he estimated the rail would sell for in the current retail market. Consequently, instead of confirming the validity of V&S's NLV calculations, the Cando letter merely confirms Applicants' assertions that V&S's NLV calculations are significantly overstated because they are based on high retail prices, not wholesale prices or a legitimate surrogate for wholesale prices.

As for Kiowa County, Mr. Schumacher's statement that the County's reliance upon RLBA's 2014 NLV as basis for its 2016 tax assessment of the portion of the Towner Line in Kiowa county "further confirm[s] the validity of RLBA's valuation," Schumacher V.S at 8, is disingenuous, and the selected correspondence between the Kiowa County Assessor's office and representatives of A&K included as Exhibit B to his Verified Statement is highly misleading. Both mask what appears to be V&S's true opinion of the RLBA NLV valuation methodology, which is contained in a January 27, 2017 letter from V&S to the Kiowa County assessor that was omitted from V&S's Reply. Letter from Mr. Bradley Ross, Vice President, Real Estate, V&S Railway to Mr. Steve Baxter, Kiowa County Assessor, dated January 27, 2017, Exhibit A to this Rebuttal. Far from praising the County for relying on RLBA's valuation, V&S forcefully *objected*, stated it was remitting the 2016 tax assessment "under protest" and that "V&S

strenuously disagrees with the amount of the 2016 tax assessments *and methodology, if any*, used by Kiowa County to value V&S's property in Kiowa County" (emphasis supplied). V&S also "advised" the County that "at the conclusion of the Feeder Line Application litigation instituted by KCVN, LLC at [the STB] attempting to force V&S to sell it the line, for which Kiowa County submitted a letter of support to the STB, V&S will decide whether to pursue rights and remedies it may have available to in in relation to the 2016 tax assessment." The letter concluded with a statement by V&S that its "payment is being made under protest and shall not be used to establish agreement on the part of V&S with either the amount of the tax assessment *or the methodology used* by Kiowa County to value V&S's property" (emphasis supplied). The views expressed by V&S in the January 27, 2017 letter directly refute any notion that V&S believes the County's assessment confirms the validity of RLBA's NLV analysis. On the contrary, Applicants submit V&S's statements to the County call into question the extent of V&S's belief in the validity of the NLVs it has submitted to the Board in this proceeding.

D. Conclusion

In conclusion, Applicants have complied with the *March 3 Decision* in all respects, and have provided the Board with current, accurate and probative actual wholesale price information that can be used by the Board to establish the NLV for the Towner Line. V&S's criticisms of the actual wholesale price quote data and revised NLV calculation submitted by Applicants are misplaced, and V&S elected to not submit any actual wholesale pricing data of its own that refutes Applicants data.

Applicants' wholesale price data is accordingly the best evidence of record and should be used by the Board in this proceeding to establish the NLV for the Towner Line.

Respectfully submitted,



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(202) 342-5248

*Attorneys for KCVN, LLC and
Colorado Pacific Railroad, LLC*

April 7, 2017

EXHIBIT A



January 27, 2017

Mr. Steve Baxter
Kiowa County Assessor
P.O. Box 247
Eads, CO 81036

Re: Kiowa County 2016 Property Tax Assessment in the amount of \$367,494.96

Dear Mr. Baxter:

I am writing in relation the property taxes assessed by Kiowa County in 2016 attributable to the Towner railroad line owned by V and S Railway, LLC ("V&S").

By virtue of this letter, please consider the Kiowa County 2016 property tax payments by V&S to be remitted under protest. V&S strenuously disagrees with the amount of the 2016 tax assessments and the methodology, if any, used by Kiowa County to value V&S's property in Kiowa County.

Please be advised that at the conclusion of the Feeder Line Application litigation, instituted by KCVN, LLC at the United States Surface Transportation Board (STB) attempting to force V&S to sell it the line, for which Kiowa County submitted a letter of support to the STB, V&S will decide whether to pursue rights and remedies it may have available to it in relation to the 2016 Kiowa County tax assessments.

Accordingly, V&S's payment is being made under protest and shall not be used to establish agreement on the part of V&S with either the amount of the tax assessments or the methodology used by Kiowa County to value V&S's property.

Sincerely,

V AND S RAILWAY, LLC


Bradley J. Ross | Vice President | Real Estate

PUBLIC VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 36005

)
)
) **KCVN, LLC and Colorado Pacific**
) **Railroad, LLC – Feeder Line Application**
) **– Line of V and S Railway, Located in**
) **Crowley, Pueblo, Otero and Kiowa**
) **Counties, Colorado**
)

Supplemental Rebuttal
Verified Statement

of

Thomas D. Crowley
President

and

Daniel L. Fapp
Senior Vice President

L. E. Peabody & Associates, Inc.
On Behalf Of

KCVN, LLC
And Colorado Pacific Railroad, LLC

Due Date: April 7, 2017

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LIST OF ATTACHMENTS

| <u>ATTACHMENT NO.</u> | <u>DESCRIPTION</u> |
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| (1) | (2) |
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I. INTRODUCTION

We are Thomas D. Crowley and Daniel L. Fapp. We are economists and President and Senior Vice President, respectively, of L. E. Peabody & Associates, Inc., an economic consulting Firm that specializes in solving economic, transportation, marketing, financial, accounting and fuel supply problems.

We are the same Thomas D. Crowley and Daniel L. Fapp who previously submitted verified testimony and evidence on behalf of KCVN, LLC and its wholly owned subsidiary, Colorado Pacific Railroad, LLC (“KCVN/CPRR”) in this Surface Transportation Board (“STB” or “Board”) proceeding. Our prior testimony and evidence was included as Exhibit F to *KCVN/CPRR Reply to Comments of V and S Railway, LLC* dated September 27, 2016 (“RVS”), and in *Applicants’ Supplemental Pricing Information* filed March 17, 2017 (“SVS”). Our RVS addressed the unit price calculations for track infrastructure assets included in the Track Asset Valuation performed by R. L. Banks & Associates, Inc. (“RLBA”) as part of a Net Liquidation Value (“NLV”) analysis of the V and S Railway’s (“V&S”) rail line between Towner Junction, CO and NA Junction, CO (“Towner Line”) included in the comments of V and S Railway, LLC (“V&S”) filed in this proceeding on August 30, 2016. Our SVS addressed the Surface Transportation Board’s (“STB” or “Board”) March 3, 2017 direction to KCVN/CPRR and to V&S “to file with the Board the wholesale prices (rather than the retail prices)” for the development of the Towner Line NLV.

We have been asked by KCVN/CPRR to respond to the Supplemental Reply Verified Statement of Charles A. Banks and John D. Ireland (“Banks/Ireland RSVS”) in which they claim that the wholesale prices we included in Exhibit No. 1 to our SVS were simultaneously ambiguous and conservative, and do not reflect the true current wholesale prices for used

railroad materials. Banks/Ireland also assert, based on alleged conversations with the representatives of the salvage companies, that we did not inform the railroad salvage companies that were seeking wholesale pricing information.¹

Banks/Ireland's claims and assertions are incorrect. The material price information we obtained from the salvage companies and included in Exhibit No 1 to our SVS reflect the current prices large, independent, third-party railroad salvage companies are willing to pay for the materials on the Towner Line, and therefore reflect the true wholesale prices of the materials. When contacting the salvage companies, we made it abundantly clear that we were seeking wholesale pricing information, which they subsequently provided.

The remainder of our comments are organized under the following topical headings:

- II. The Salvage Companies Were Repeatedly Informed to Provide Wholesale Prices
- III. Sufficient Information Was Given to the Salvage Companies to Provide Wholesale Prices
- IV. The Prices Provided Reflect Current Market Prices

¹ See, Banks/Ireland RSVS at pages 5 to 8.

II. THE SALVAGE COMPANIES WERE REPEATEDLY INFORMED TO PROVIDE WHOLESALE PRICES

Banks/Ireland contend that the prices we included in Exhibit No. 1 to our SVS were presented in a vacuum and were devoid of any explanation or documentation.² They also claim that we did not indicate how the information requests were framed to the railroad salvage companies, and that a representative to one of the companies we contacted did not recall our indicating we were seeking wholesale pricing information.³

Contrary to Banks/Ireland's claims, the companies we contacted were well informed that we were seeking wholesale pricing information. After the STB issued its March 3, 2017 decision asking the parties to provide wholesale pricing information for the materials found on the Towner Line, we contacted twelve (12) railroad salvage companies seeking the wholesale prices they would pay for the Towner Line materials.⁴ We explicitly asked these companies to provide their current wholesale prices for the railroad materials, and not their current retail prices. Three (3) of the twelve (12) railroad salvage companies we contacted, Progress Rail, L.B. Foster, and Harmer Steel ("Salvage Companies"), indicated they would be willing to provide the wholesale pricing information requested.

Once we confirmed that the Salvage Companies would provide wholesale pricing information, we emailed each company a brief overview of the pricing information we sought. We included copies of the emails sent to the Salvage Companies and their subsequent responses as Attachment No. 1 to this Supplemental Rebuttal Verified Statement ("SRVS"). As shown in Attachment No. 1 to this SRVS, we specifically indicated to the salvage companies:

We are conducting a Net Liquidation Value study for a STB proceeding. Attached is a list of the track materials. I would like a quote for the

² Banks/Ireland RVS at page 5.

³ Banks/Ireland RVS at pages 5 and 6.

⁴ The twelve companies we contacted are the same companies listed in Exhibit No. 3 to our RVS.

wholesale prices of the materials. I would like the prices to not include any dismantling or transportation fees. In other words, Hypothetically speaking, I would like the prices to be the wholesale prices you would be willing to pay for the materials if they were sitting on the back of loaded trucks at the jobsite in Colorado.⁵ (emphasis added)

As shown in the excerpt above, we indicated twice in a short paragraph that we were seeking the wholesale prices for the materials on the Towner Line.

After receiving the wholesale prices from the Salvage Companies, we made follow-up phone calls to clarify the information they provided. We again emphasized during these phone calls that we were seeking wholesale and not retail prices.

The emails we originally sent to the Salvage Companies, shown in Attachment No. 1 to this SRVS, make it unmistakably clear that the Salvage Companies were fully briefed that their quotes were for wholesale prices of the Towner Line materials. Any notion that any of the three (3) Salvage Companies were unaware that the prices they were asked to provide were anything other than wholesale prices is incorrect.

⁵ See, our SRVS Exhibit No. 1 at pages 1, 3 and 5.

III. SUFFICIENT INFORMATION WAS GIVEN TO THE SALVAGE COMPANIES TO PROVIDE WHOLESALE PRICES

Banks/Ireland assert that the wholesale pricing information we provided in our SVS was devoid of any explanation and that we did not provide the Salvage Companies any detailed information on the conditions and qualities of the materials. According to Banks/Ireland, this caused the Salvage Companies to provide extremely conservative material prices since they were providing pricing on unseen materials.⁶

Banks/Ireland's assertion, however, is contrary to prior evidence presented by their firm in this proceeding that stated used track materials are customarily graded along defined standards within the rail salvage industry. Therefore, the information we provided to the Salvage Companies was certainly sufficient to provide accurate pricing information.

In RLBA's July 19, 2016 Report discussing its valuation of the Towner Line, RLBA, Banks/Ireland's employer, discussed how it performed field inspections of the Towner Line to determine the conditions of the Line's assets. The Report also discussed how used railroad track and other track materials are classified into different classifications, or levels of "fitness" based upon the level of wear shown. RLBA indicated that:

Generally, rail in the main track designated as 'fit' or 'relay' can be reused in other railroad applications, if it weighs at least 85 pounds per yard or greater... At the time of this valuation it was found that certain V&S rail met two suitable, relay categories: Fit #1, which includes all rail with less than 1/8 of an inch head wear and Fit #2, all rail with less than 3/16 of an inch head wear.⁷

Attachment No. 2 to this SRVS shows the track and other material classifications included in RLBA's July 19, 2016 Report, which is the same material list we sent to the Salvage

⁶ Banks/Ireland RVS at pages 6 to 8.

⁷ See, STB Docket No. FD 36005, *KCVN, LLC and Colorado Pacific Railroad, LLC – Feeder Line Application – Line of V and S Railway, Located in Crowley, Pueblo, Otero and Kiowa Counties, Colorado*, Appendix 6 to Exhibit "F-1", filed August 30, 2016, page 6.

Companies to obtain the wholesale prices.⁸ Simply stated, the materials list that we presented to the Salvage Companies is identical to the materials list used by RLBA throughout this proceeding.

The fitness classifications used by RLBA are not arbitrary, but are instead recommended relay rail grading classifications by the American Railway Engineering and Maintenance of Way Association (“AREMA”). AREMA is a voluntary organization whose mission is the development and advancement of both technical and practical knowledge and recommended practices pertaining to the design, construction and maintenance of railway infrastructure.⁹ As part of this mission, AREMA publishes manuals that cover multiple aspects of railroad design, construction and maintenance. These manuals include classification of relay track based upon the physical wear shown on the material. These classifications are used throughout the railroad materials and construction industry, as can be seen by the fact that both A&K, the owner of V&S, and L.B. Foster, one of the Salvage Companies whose prices we relied upon, provide these track grade classifications on their websites.¹⁰

The Salvage Companies from whom we received the wholesale prices included in Exhibit No. 1 to our SVS are respected railroad salvage companies and knowledgeable of railroad material categorization standards. Banks/Ireland imply that because we did not provide detailed business information about the Salvage Companies, their capabilities to provide reliable price

⁸ See, STB Docket No. FD 36005, *KCVN, LLC and Colorado Pacific Railroad, LLC – Feeder Line Application – Line of V and S Railway, Located in Crowley, Pueblo, Otero and Kiowa Counties, Colorado*, Appendix 6 to Exhibit “F-1”, filed August 30, 2016, page 7.

⁹ See, <https://www.arena.org/overview.aspx>.

¹⁰ See, <http://www.akrailroad.com/products/arena-rail-grading-relay-rail> and http://www.lbfoster-railproducts.com/rail_pdf_profiles/LBF_Relay_Grading_Specs_Handbook.pdf.

quotes are questionable.¹¹ Their implication is a red herring. Each of the Salvage Companies are known and respected throughout the railroad industry:

- L.B. Foster is a publicly traded company whose Rail Products and Services segment provides a full line of new and used rail, trackwork, and accessories to railroads, mines, and other customers in the rail industry. In 2016, L.B. Foster's Rail Products and Services division generated more than \$239 million in revenues.¹² L.B. Foster Company was founded in 1902 to provide used, or relay, rail to coal mines. Because of its rich heritage in the rail industry, L.B. Foster has been able to maintain an extensive selection of used rail and used rail accessories.¹³
- Progress Rail Services is a wholly owned subsidiary of Caterpillar Corporation and is one of the largest integrated and diversified suppliers of railroad and transit system products and services worldwide. In 2006, the year it was acquired by Caterpillar, Progress Rail had revenues of approximately \$1.2 billion. Progress Rail offers a full range of reconditioned and remanufactured railcar components, rail and track products, railcar and locomotive repair, rail welding, maintenance of way equipment and railcar dismantling. At the time of its acquisition by Caterpillar, Progress Rail indicated they were a leader in many of its lines of business.¹⁴
- Harmer Steel began in 1928 as supplier of rail and track accessories. Today, as one of North America's leading rail products suppliers, Harmer Steel maintains a large inventory and provides a wide variety of rail fabrication services and new and used rail and accessories. Harmer is private company, and does not release its revenue figures, but operates rail supply services across the United States and Canada.¹⁵

The Salvage Companies are all long-standing players in the railroad supply industry, and clearly understood the specific parameters of the materials about which we were seeking prices based on the standard AREMA classifications. To claim that the Salvage Companies could not assign prices to materials based on standard industry categories ignores the whole reason for standard categorization of materials.

¹¹ Banks/Ireland RVS at page 5 "... limited or no information is provided about the sales volumes, market shares, capabilities or business strategies of any of the three salvage companies."

¹² See, L.B. Foster 2017 SEC Form 10K at page 4.

¹³ See, <http://www.lbfoster-railproducts.com/relayrail.asp>.

¹⁴ See, <https://www.sec.gov/Archives/edgar/data/1323280/000104746906006107/a2169595zs-1a.htm>. Caterpillar does not report Progress Rail business results separately.

¹⁵ See, <http://harmersteel.com/capabilities/new-used-inventory/>.

IV. THE PRICES PROVIDED REFLECT CURRENT MARKET PRICES

Banks/Ireland contend that the prices we included in Exhibit No. 1 to our SVS are not true wholesale prices because they are inconsistent between the different salvage companies, and, in some instances, below then current scrap rail prices. Banks/Ireland also contend that the prices the Salvage Companies quoted for removing and salvaging ties were not reflective of the true market costs for tie disposal because the specific salvage company, Progressive Rail, was unfamiliar with the Colorado market.

Banks/Ireland's contentions are misplaced. The wholesale prices listed in Exhibit No. 1 to our SVS reflect the current market wholesale prices for the materials on the Towner Line because those are the prices the vendors are willing to pay for the materials. A market price is customarily held to mean the current price at which an asset or service can be bought or sold by a willing buyer and willing seller. In this instance, the prices quoted by the Salvage Companies reflect the current prices for which the Salvage Companies will pay for the Towner Line assets. These prices, therefore, must reflect the current market prices.

Banks/Ireland attempt to support their contention that the Salvage Company prices do not reflect market wholesale prices by stating that the prices quoted by the Salvage Companies are unreasonably low given past and current market conditions. For example, Banks/Ireland opine that the wholesale prices quoted by the Salvage Companies for 112 pound and 115 pound relay rail are lower than current scrap metal prices, while simultaneously stating that historical A&K sales data indicate A&K "has routinely sold no. 2 fit 112 and 115 pound rail for nearly twice as much."¹⁶ Even if these points were true, they are irrelevant. Market prices are dictated by what a vendor is willing to pay for the assets in the current market. As we stated in our RVS, the

¹⁶ See, Banks/Ireland RVS at page 5.

current relay rail market faces a glut of products that is currently depressing prices.¹⁷ The fact that vendors are not willing to pay more than scrap prices for a certain category of rail assets does not mean that the quoted prices do not reflect the market price for that particular asset. It just means the market is sending a signal that there is an overabundance of that product in the market.¹⁸ The market dictates the value and prices for Fit #2 112 pound and 115 pound rail, and the current market value, as expressed by those in the market, is clearly listed in Exhibit No. 1 to our SVS.

Banks/Ireland also contend that Harmer Steel's lower price quote for Fit #3 112 pound rail is simply a reflection of the company's disinterest in participating in the market for such materials. However, the \$60.00 price quoted by Harmer Steel perfectly represents the current market for that company. We contacted Harmer Steel by phone after we received the quote included in our SVS, and were told that it was not aggressively pursuing opportunities to purchase that rail type because of a glut of material in the market. Harmer's representative went on to say that there is a large glut in the market for all relay rail materials, and that relay rail prices dropped in the last year meaning prices are lower than in the past. Rejecting Harmer's allegedly "low price" for Fit #3 112 pound rail would be foolish since Harmer's price reflects the current glut in the market. While the price is low, it reflects Harmer Steel's unbiased estimate of the value of that product.

Banks/Ireland also state that the \$20.00 tie disposal costs quoted by Progress Rail in Exhibit No. 1 to our SVS is a "worst case scenario", and does not reflect the market price for disposing of rail ties. This is incorrect. The tie disposal cost is actually the minimum amount

¹⁷ See, Crowley/Fapp RVS at page 13.

¹⁸ This is the same economic reason the U.S. has begun to see negative wholesale prices in certain electric power pools. Overabundance of cheap electricity from renewable sources has pushed wholesale prices negative in some cases as generators pay to move their power on the electric grid.

KCVN would have to pay to dispose of the scrap ties according to Progress Rail. After receiving Progress Rail's wholesale prices via email before we finalized our SVS, we contacted the company to clarify their tie disposal cost. The Progress Rail representative indicated they would incur at least a \$20.00 per tie cost to dispose of the scrap ties.

Banks/Ireland state that the Progress Rail representative indicated that it may be possible to burn the Towner Line's scrap ties at no cost instead of incurring a disposal fee.¹⁹ Burning the ties is not a practical option. Much of the land located in Kiowa County, Colorado, where the Towner Line is located, is involved in the Conservation Reserve Program Grasslands ("CRP Grasslands"). The CRP Grasslands is a federally funded voluntary program that contracts with agricultural producers so that environmentally sensitive agricultural land is not farmed or ranched, but instead used for conservation benefits.²⁰

Burning ties over the Towner Line's 121 miles would create a need for either many small fires along the length of the Towner Line, or one very large central fire. However, according to a study conducted by the National Park Service, CRP Grasslands in Kiowa County pose a high risk for wildfires.²¹ Starting a fire to burn scrap ties near CRP Grasslands could be a reckless and dangerous endeavor. In addition to the risk of wildfires, burning the Towner Line's scrap ties would allow for the release of large amounts of creosote smoke into the air. The Environmental Protection Agency has determined that creosote is a probable human carcinogen and several case reports of human carcinomas associated with exposure to creosote have been published.²² This is a major concern when creosote products are burned, i.e., the creosote evaporates and pollutes the air, unless specific controls are in place. Burning scrap ties on a large scale will produce

¹⁹ See, Banks/Ireland RVS at page 6.

²⁰ See, <https://www.fsa.usda.gov/programs-and-services/conservation-programs/crp-grasslands/index>.

²¹ See, <http://static.colostate.edu/client-files/csfs/pdfs/KiowaCountyCWPP2007-AppxAdd2013.pdf>.

²² See, <http://www.tercenter.org/pages/crossties.cfm>.

large amounts of potentially hazardous emissions that will not be welcomed by the citizens near the Towner Line.

Bank/Ireland's claim that we should factor into account that KCVN/CPRR could burn scrap ties for free is impractical and without any support. There is no guarantee that KCVN will be able to burn any scrap ties free of charge, let alone all of them. Therefore, Progress Rail's quote and follow up conversation is the best representation of the current market value for scrap rail ties.

To ensure we were capturing as much wholesale pricing information as possible, we also contacted Cando Rail after reviewing Mr. Kern Schumacher's Verified Statement ("Schumacher VS") filed by V&S in its Supplemental evidence.²³ We spoke with Mr. Ryan Wannamaker at Cando Rail Services, the person who provided the letter included as Exhibit A to the Schumacher VS, to clarify the pricing information included in the letter. According to Mr. Wannamaker, the market values listed in Exhibit A to the Schumacher VS are the retail, or end user prices, for the Towner Line materials and not the wholesale prices. Mr. Wannamaker went on to say that the prices listed in the Schumacher VS Exhibit A are not the prices Cando would pay for the materials, rather, they are the prices in the current retail market.

Our SVS responded to the STB's March 3, 2017 direction to KCVN/CPRR "to file with the Board the wholesale prices (rather than the retail prices)" for the development of the Towner Line NLV. While it may be difficult for salvage companies to provide "spot wholesale pricing on individual components" as claimed by Banks/Ireland, that is exactly what the Board asked the parties to do. The Salvage Companies who provided quotes are all nationally known and

²³ Cando was not one of the rail salvage companies we originally contacted to obtain current market prices for relay track and OTM.

respected resellers of salvaged railroad materials. They are more than qualified to provide their views on the current wholesale prices for the Towner Line materials.

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**DOCKET NO. FD 36005,
KCVN, LLC AND COLORADO PACIFIC RAILROAD, LLC
- FEEDER LINE APPLICATION -
LINE OF V AND S RAILWAY, LLC LOCATED IN
CROWLEY, PUEBLO, OTERO, AND KIOWA COUNTIES, CO**

**SUPPLEMENTAL REBUTTAL VERIFIED STATEMENT
OF
GERALD W. FAUTH III**

My name is Gerald W. Fauth III. I am President of G. W. Fauth & Associates, Inc., an economic consulting firm with offices at 116 South Royal Street, Alexandria, Virginia 22314. I am the same Gerald W. Fauth III who previously submitted verified testimony and evidence on behalf of KCVN, LLC (“KCVN”) and Colorado Pacific Railroad, LLC (“CPRR”) (Collectively “KCVN/CPRR” or “Applicants”) in this Surface Transportation Board (“STB”) “Feeder Line” proceeding.¹ My testimony has focused on the current Net Liquidation Value (“NLV”) of the Towner Line based on the STB’s standards and precedent and the evidence submitted in this proceeding.

¹ My prior testimony and evidence is included in: (1) Exhibit D to Applicants’ March 18, 2016 Feeder Line Application to purchase the so-called “Towner Line” in southeastern Colorado, which is currently owned by V and S Railway, LLC (“V&S”); (2) Exhibit E to Applicants’ Reply to Comments of V&S, filed on September 27, 2016; and (3) Applicants’ Supplemental Comments filed on March 17, 2017.

PUBLIC VERSION

On March 3, 2017, the STB issued a decision which directed the Applicants to file additional evidence concerning the NLV for the Towner Line. Specifically, the STB requested information from Applicants concerning “wholesale prices (rather than retail prices) for the materials as they are classified and inventoried by V&S.” (Decision, page 1) The Decision further stated that Applicants could use wholesale prices “from whichever source (such as an index) they see fit, but shall identify the source or sources of that data and explain the reasons they were selected.” (Id.) The STB also directed the Applicants to state whether the source or sources relied on for the wholesale prices used included a deduction for “the cost of removing the track materials and transporting them to the wholesale purchaser.” (Id.) If no such deduction was present, the Board directed Applicants to calculate those costs and deduct them from the Gross Salvage Value (“GSV”) calculated using actual wholesale prices. In addition, to the extent removal and transportation costs resulted in changes to other costs, the Board stated Applicants could recalculate those costs. Finally, Applicants were directed to calculate a revised NLV.

In response to the Decision’s directives, KCVN/CPRR asked me to recalculate the NLV of the Towner Line materials (as they are classified and inventoried by V&S) with wholesale prices for the materials and revised track removal, transportation and other costs. The details showing this recalculated NLV were included as Applicants’ Supplemental Exhibit No.1. I have summarized this revised NLV calculation in the following table:

PUBLIC VERSION

Table 1

**Towner Line NLV with Wholesale Prices For
Materials as Classified and Inventoried By V&S
(March 2017)**

| Ln. | Item | Amount |
|------------|---|--------------------|
| 1. | Gross Salvage Value (GSV) | \$11,900,526 |
| 2. | Removal and Liquidation Costs | \$6,378,008 |
| 3. | Net Salvage Value (L.1 minus L.2) | \$5,522,518 |
| 4. | Real Estate/Land Value | 0 |
| 5. | Net Liquidation Value (NLV) (L.3 plus L.4) | \$5,522,518 |

The wholesale prices used in my NLV recalculation were based on wholesale prices for rail and track materials included in the Supplemental Verified Statement of Thomas D. Crowley and Daniel L. Fapp (“TDC/DLF SVS”) also submitted with Applicants’ filing (see TDC/DLF SVS, Exhibit No.1). Specifically, Messrs. Crowley and Fapp obtained wholesale pricing data from four companies (Harmer Steel, Progress Rail, L. B. Foster and EVRAZ Rocky Mountain Steel) who, like V&S’s parent company, A&K Railroad Materials, Inc. (“A&K”), buy and sell used railroad assets.

The pricing data represents the price that these companies would pay to purchase the Towner Line railroad assets in bulk. These purchase prices are, in fact, wholesale prices, since it is what the company would pay for the “first sale” of the materials on the Towner Line. Because these prices are wholesale prices from actual market participants, and because they are sufficiently current, being offered as recently as March 13, 2017, they are appropriate for use in the revised NLV analysis requested by the STB.

PUBLIC VERSION

The wholesale prices researched and developed by Messrs. Crowley and Fapp are significantly lower than the retail prices used by V&S in its NLV calculations of the Towner Line. On August 30, 2016, V&S filed comments on KCVN/CPRR's Application and maintained that the two largest rail inventory categories (i.e., 115 lb. Jointed Relay #1 and 136 lb. CWR Relay#1) have a retail value of \$ per ton. Using this and other inflated and unadjusted retail values, V&S maintained that the Towner Line had a GSV of \$ a NLV of \$. In my previous testimony, I have indicated that V&S has repeatedly applied inflated relay rail prices in its NLV analyses, which has greatly inflated the resulting NLV.

On March 31, 2017, V&S submitted its Reply to Applicants' Supplemental Pricing Information. Although the STB specifically directed Applicants to submit "wholesale prices (rather than retail prices) for the materials as they are classified and inventoried by V&S," and stated V&S "may file a reply concerning *this data*," (emphasis added), V&S has gone far beyond the narrow scope of the March 3 Decision and has submitted an "adjusted" NLV calculation which once again continues to be based on untested high *retail* prices for relay rail and other materials, with only a minor % profit adjustment to purportedly create a surrogate for actual wholesale prices.² Based on the new retail prices it has arbitrarily reduced by a mere %, V&S now maintains that Towner Line has a GSV of \$ and a NLV of \$.³

² V&S effectively concedes the points made in my prior testimony that retail relay prices in the NLV submitted in its August 30, 2016 Comments on the Application were far in excess of market (for example, V&S now seeks to reduce 136 lb. CWR Relay #1 from \$ per ton to \$ per ton). However, V&S's new retail values, which were supplied to it by A&K, are still higher than the retail values developed by Messrs. Crowley and Fapp.

³ See Supplemental Verified Statement of Charles H. Banks and John D. Ireland ("Banks/Ireland SVS"), Table 1, page 14.

PUBLIC VERSION

V&S's retail price based NLV ranges far beyond the limited scope and purpose of the Decision, and the Board should disregard it. In this Supplemental Rebuttal Verified Statement, I rebut V&S's criticisms of several aspects of my revised NLV based on actual wholesale prices.

A. Administrative & Marketing Costs

In its Reply filing, V&S maintains that "it is not appropriate" to deduct Administrative & Marketing costs from a GSV calculated with actual wholesale rail prices. V&S maintains that this is because the railroad salvage company, and not the selling railroad, would bear all of these costs. (V&S Reply at 6). However, this is not the case. A railroad or liquidator selling the inventory to a wholesale purchaser would incur administrative and marketing costs that are properly deducted from the GSV of the line.

In many past STB NLV analyses, the Administrative & Marketing cost has not been a major issue since, in many cases, the entire railroad inventory of an abandoned line was considered as scrap or reroll value, which has an established market place. Consequently, in many past cases, the STB has utilized the American Metal Market ("AMM") scrap and reroll values to Chicago. There may be less marketing costs associated with scrap and reroll rail versus relay rail, however, there would certainly still be administrative costs associated with selling the scrap or reroll. Telephone calls would have to be made, emails would have to read and sent, terms would be established and ultimately a transaction would occur. There would be an administrative cost associated with that process. In past cases the STB has accepted "handling" charges for scrap and reroll, which is essentially the same thing as administrative and marketing.

PUBLIC VERSION

I utilized an administrative and marketing value of 10% for the scrap assets, which I think is reasonable considering the required liquidation process. In this case, however, a significant amount of the Towner Line's assets are considered relay quality, which generally has a higher value than scrap. Thus, the selling railroad or liquidator, in order to receive the highest price possible for the relay assets, would obviously incur administrative and marketing expenses associated with selling the relay assets. Since the current market for such a high volume of relay rail produced by the Towner Line is far from robust, it is reasonable to assume that it would take the railroad or liquidator some time to find a buyer and sell the relay assets. Moreover, because of the large volume and different sizes and types of rail, it is logical to assume that the railroad or liquidator may not be able to sell all the assets to one buyer. For example, there may be one buyer of the 136 lb. CWR and another for the 115 lb. Jointed rail.

Accordingly, my use of a value of 20% for the administrative and marketing of the relay materials is very reasonable considering required liquidation process and the additional marketing cost that would be associated with relay materials.

I also note that V&S's claim that such costs should not be deducted from a GSV calculated with wholesale prices is not consistent with V&S's own filing. In its "updated" NLV, V&S proposes a surrogate for wholesale prices through a small percentage reduction to high *retail* prices, and V&S continues to apply the % adjustment for administrative and marketing for relay materials and a % adjustment for scrap materials that it applied in its prior NLVs, which are based on unadjusted retail prices. V&S Reply at 8. V&S's apparent position that a NLV calculated with *actual* wholesale prices should not deduct such costs, but a NLV calculated with *derived* wholesale prices may deduct such costs, is fundamentally inconsistent and not supported by any precedent of which I am aware.

PUBLIC VERSION

B. Removal and Transportation Costs

In the Decision, the Board explicitly directed Applicants to deduct removal and transportation costs from the GSV derived from wholesale prices if those prices did not include a deduction for those costs. Decision at 1. The wholesale prices obtained by Messrs. Crowley and Fapp clearly did not include removal and transportation costs. Moreover, removal and transportation costs are not included in the AMM and Iron Age wholesale prices for scrap materials, which the Board has indicated represents a wholesale price. Accordingly, my restated NLV deducted these costs from the GSV, which I calculated using actual wholesale prices.

Nevertheless, V&S maintains in its Reply filing that transportation costs should not be deducted from a GSV calculated with actual wholesale prices, since in V&S's view the salvage company, not the selling railroad, would bear 100% of those costs (V&S Reply at 3). On the other hand, V&S appears to concede that it was appropriate for me to deduct removal costs (Id. at 6, footnote 6).

Transportation costs would obviously have to be deducted from a GSV calculated using either retail or wholesale prices. At some point in a liquidation of the Towner Line, the inventory would have to be salvaged and transported off the Towner Line (or from a temporary storage location) to the purchaser, whether the selling railroad obtains retail or wholesale prices for the inventory. Transportation would be a necessary cost associated with the liquidation of a line and the Board has historically included it as a separate cost item which is deducted from the GSV to produce the NLV.

PUBLIC VERSION

Like its treatment of administrative and marketing costs, V&S's position that transportation costs should not be deducted from a GSV calculated using wholesale prices is also not consistent with V&S's own filing, since V&S would deduct transportation costs from its "updated" NLV that purports to use surrogates for wholesale prices.

Additionally, V&S responded to my revisions to the transportation costs in Applicants' NLV caused by using actual wholesale prices in part by making an adjustment for transportation costs in its Reply filing. However, V&S's calculated \$ _____ in transportation costs is significantly understated. First, V&S significantly understated the number of railroad cars that would be required to move the relay and scrap inventory. V&S utilized a value of _____ carloads, which effectively excludes _____ cars that would be required to move over _____ tons of relay tie plates, joint bars, anchors, spikes and bolts. This understatement is illustrated in the following table:

Table 2

V&S's Understatement of Transportation Costs

| Item | Relay Cars | Scrap or Reroll Cars | Total Rail Cars |
|--|------------|----------------------|-----------------|
| Rail | | | |
| Tie Plates | | | |
| Joint Bars | | | |
| Anchors | | | |
| <u>Spikes & Bolts</u> | | | |
| Total OTM | | | |
| Total Rail Cars Required | | | |
| V&S Rail Rate to Pueblo | | | |
| Total Rail Transportation Cost | | | |
| Total Cars Used By V&S | | | |
| V&S Rail Rate to Pueblo | | | |
| Total V&S Transportation Cost | | | |

PUBLIC VERSION

V&S maintains that the transportation cost is based on the “assumption that all relay material would be transported to a combination of existing and temporary holding yards established in Pueblo, CO.” (Banks/Ireland SVS, page 16). As Table 2 illustrates, however, Banks and Ireland failed to account for the transportation of relay OTM cars to Pueblo.

While I have previously accepted the fact that the scrap cars would move to Pueblo rather than Chicago or some other location, it is reasonable to assume that the relay materials acquired by a wholesale purchaser would likely require transportation to a much further location. In addition, the Decision explicitly instructed Applicants to calculate the transportation costs that are “consistent with *shipping the materials to the location of the wholesale purchaser.*” Decision at 1 (emphasis added).

In my analysis, therefore, I assumed that the Relay #1 rail and relay quality OTM would move a distance of 1,566 miles to Chowchilla, CA since Harmer Steel and L. B. Foster – the parties who supplied the wholesale price quotes - both have facilities there. Since Harmer Steel indicated that there was no market for less than Relay #1 quality rail, I assumed that Relay #2 and #3 rail would move to Pueblo.

Even if the Board were to accept V&S’s unsupported assertion that relay rail could be shipped to yards in Kansas City, KS (miles) and Salt lake City, UT (miles), the transportation cost to these points would obviously be greater than the cost V&S has estimated for transporting cars to Pueblo (i.e., per carload). For example, using the same approach that I employed in my development of a rate to Chowchilla, CA (i.e., utilizing the STB’s URCS program and a 1.80 markup ratio) I have estimated that a railroad rate to Kansas City would be approximately \$2,450 per carload. If this developed rate to Kansas City is applied to the relay cars, V&S’s transportation costs would increase from \$ to \$.

PUBLIC VERSION

C. Ties

In my revised NLV based on wholesale prices, I utilized the wholesale prices for relay, landscape, and scrap ties obtained by Messrs. Crowley and Fapp. Based on these values, I determined that the net tie value of the Towner Line would be negative and consequently, the tie GSV, tie removal cost, tie marketing and administrative costs, and tie transportation costs were all set at \$0 in the Applicants' restated NLV.

In its Reply, V&S does not produce any comparable or different actual wholesale prices for ties. Rather V&S has attempted to criticize my analysis through a combination of (1) newly proffered *retail* prices for ties purportedly based on "conversations with A&K staff and a review of recent A&K sales data," which V&S's consultants have reduced by arbitrary percentages to produce supposed surrogate wholesale tie prices, and (2) brand new, anecdotal testimony by Mr. Kern Schumacher, owner of V&S Railway, about the alleged willingness of farmers in rural agricultural areas to take scrap ties for windscreens, a landfill in Lamar Colorado, and trucking costs. All of this new information goes far beyond the limited scope of the March 3 Decision, which sought examples of actual wholesale pricing from Applicants and gave V&S an opportunity to reply to that data. The sole sources of the information, which is unverifiable in the extremely short period allowed for this rebuttal, are A&K and Mr. Schumacher, which are simply not a credible source of information due to their direct financial interest in the outcome of this proceeding. Consequently, to the extent the discussion of ties in V&S's Reply goes beyond the scope of Applicants Supplemental Pricing Submission, it should be disregarded.

This part of my Supplemental Rebuttal Verified Statement accordingly focuses on V&S's arguments as to ties to the extent they reply to the discussion of the wholesale prices of ties in my Supplemental Verified Statement.

PUBLIC VERSION

First, V&S claims that the wholesale disposal cost for scrap ties of \$17.50 developed by Messrs. Crowley and Fapp from actual wholesale price quotes is “grossly overstated.” V&S Reply at 7. However, the only “evidence” produced by V&S to counter this actual data is newly proffered anecdotal testimony submitted by Mr. Schumacher which claims that farmers will use ties for windscreens and that there is a landfill in Lamar, Colorado that accepts railroad ties. *Id.* Even if these claims were true, V&S offers no evidence that any particular farmers or the landfill have the desire or capacity to purchase the huge volume of scrap ties on the Towner Line. The \$17.50 disposal cost developed by Messrs. Crowley and Fapp is based on actual wholesale price quotes, which is clearly the best evidence of record on this point.

In discussing how the use of actual wholesale pricing for ties affected the Applicants’ prior NLV, I pointed out that V&S did not develop a separate cost for the removal of ties from the Towner line in its August 30, 2016 NLV, which is required for a STB NLV calculation. Nor did V&S properly account for transporting and disposing of the scrap ties. In V&S’s Reply, Messrs. Banks and Ireland have attempted to correct this glaring deficiency in their prior NLV by now maintaining that the tie removal costs are somehow included “in the ‘Preparation Cost Adjustment’ and ‘Administrative and Estimated Marketing Expense’ calculations included in RLBA Net Liquidation Value of Track Assets Calculations.” (Banks/Ireland SVS, page 10).

As I have previously indicated, the Board’s NLV procedures require that tie removal costs be expressed separately in order to ensure that the tie removal cost do not exceed the value of the ties. Therefore, I have used a conservative value of \$2 per tie for tie removal and I have estimated that the total tie removal cost would be \$874,761. V&S did not separately express a tie removal cost in its August 30, 2016 NLV calculation.

PUBLIC VERSION

Although V&S maintains that tie removal cost is somehow included in its “Preparation Cost Adjustment” and “Administrative and Estimated Marketing Expense,” it does not indicate what portion of these cost were associated with tie removal. For example, V&S claims that tie removal is a portion of V&S’s estimated “Fit Rail & OTM Removal” (relay ties are not mentioned) cost of \$ per mile, but V&S does not indicate what percentage of this expense is presumably associated with tie removal.

In Appendix 2 to their “adjusted” NLV calculation presented with V&S’s Reply filing, Banks and Ireland list supposed “Prep Cost” and “Restoration Cost” totaling \$ per tie for relay ties, \$ for landscape ties and \$ for scrap ties. However, these costs were not deducted from V&S’s “adjusted” NLV. As I emphasized in my Supplemental Verified Statement, the Board’s NLV procedures assumes that “All ties are removed by the same process and at the same time, with the exact quality of the ties not even determined until after removal.” Thus, the tie removal cost should be the same for each type of tie. Moreover, there would also be a cost associated with removing scrap ties, which Messrs. Banks and Ireland have ignored.

In my Supplemental Verified Statement, utilizing V&S’s inventory and the wholesale tie values developed by Messrs. Crowley and Fapp (\$11 for relay ties, \$1 for landscape ties and negative \$17.50 for scrap ties), I estimated that the ties would have a GSV of \$564,215. V&S, in the other hand, has utilized unadjusted inflated *retail* tie values (\$ for relay ties, \$ for landscape ties and a negative \$ for the disposal of scrap ties) and estimated that the ties have a GSV of \$. This estimated GSV for ties is obviously not based on actual wholesale prices as the Board requested, and because it is based on inflated retail prices it is therefore obviously significantly overstated. It must be rejected.

PUBLIC VERSION

Finally as to ties, V&S has failed to separately account for the transportation cost associated with relay and landscaping ties. I have estimated that the cost of transporting the relay ties by rail to Pueblo based on a rate of \$ per car would be \$111,600 and \$630,000. Banks/Ireland SVS, Appendix 2 estimates that the transportation cost for relay ties is only \$ per tie (which would equal \$) and only \$ per tie for landscaping ties (which would equal \$). Both of these estimated costs are much lower than V&S's estimated cost of \$ for scrap tie transportation.

In summary, I have estimated that the ties have a GSV of \$564,215 based on V&S's classifications (which I do not agree with) and the wholesale tie prices developed by Messrs. Crowley and Fapp (which I believe are reasonable). I have estimated that the tie removal cost is \$874,761 and the total tie transportation cost would be \$790,200, both of which exceed the tie GSV (i.e., \$564,215). Therefore, I have assumed that the ties would have no (\$0) GSV or NLV. V&S's arguments to the contrary are wrong and should be rejected.

Since V&S's Reply is devoid of any actual wholesale pricing information as requested by the Board, the wholesale prices obtained and developed by Messrs. Crowley and Fapp and utilized in my NLV calculation represent the best evidence of record. Therefore, the Board should accept Applicants' revised NLV calculations. The Board should disregard V&S's "adjusted" NLV calculation based on high retail prices because it is far outside the narrow scope of the March 3 Decision, and in any event suffers from readily apparent, significant fundamental flaws.

Verification

I, Gerald W. Fauth III, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to sponsor this Verified Statement.

Executed April 7, 2017.

A handwritten signature in black ink, appearing to read "Gerald W. Fauth III", written over a horizontal line.

Gerald W. Fauth III

CERTIFICATE OF SERVICE

I do hereby certify that on this 7th day of April, 2017, I have served a copy of the foregoing Applicants' Rebuttal to V AND S Railway's Reply to Applicants' Supplemental Pricing Information by email and first class mail on the following persons or entities:

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The Honorable Judge John P. Dring
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(also via email at carlos.clemente@ferc.gov)

And by first class mail to the other entities on the official service list for this proceeding.



Thomas W. Wilcox