

January 12, 2006

*By Messenger*

Victoria J. Rutson  
Chief, Section of Environmental Analysis  
Surface Transportation Board  
1925 K Street, N.W., Room 504  
Washington, DC 20423-0001

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RECEIVED

RE: STB Finance Docket No. 34795; Roquette America, Inc. -- Petition for Exemption from 49 U.S.C. 10901 to Construct a New Line of Rail in Keokuk, IA

Dear Ms. Rutson:

On January 9, 2006, the Keokuk Junction Railway Co. ("KJRY") submitted a letter in which it continues to allege that Burns & McDonnell Engineering Company, Inc. ("B&M"), the third party contractor engaged to assist the Board's environmental analysis of the proposed rail construction project by Roquette America Railway, Inc. ("Roquette"), has an impermissible conflict of interest. KJRY persists with these allegations despite the firm rejection of those claims by the Section of Environmental Analysis ("SEA") in a December 21, 2005 letter to KJRY's counsel. KJRY's letter does not provide any basis for the Board to alter its original determination.

As the SEA noted in its December 21 letter, B&M voluntarily disclosed that it was engaged in work for Roquette's parent company, Roquette America, Inc. ("RAI"), on a cogeneration project that involved the development of a steam generation boiler at RAI's Keokuk facility that is not related to transportation. Furthermore, the SEA noted that B&M had voluntarily implemented a formal screen or "firewall" between the B&M staff working on the two unrelated projects. The SEA concluded that, even absent the firewall, there was no conflict of interest and that B&M's role as a third party contractor was not undermined or otherwise compromised.<sup>1</sup>

KJRY now claims that information uncovered during discovery of Roquette suggests that B&M has a "financial or other interest in the outcome of the project" within the scope of 40 C.F.R.

<sup>1</sup> KJRY submits that the effectiveness of the "firewall" has already been compromised. KJRY Letter, p. 4, note 5. But KJRY well knows from documents supplied to it by Roquette in discovery (which KJRY failed to cite or discuss in its letter) that Roquette brought the matter involving B&M's work on the cogeneration project to the attention of SEA on July 8, 2005, *before* SEA approved B&M as the third-party contractor on July 11, 2005. Furthermore, SEA stated, in its August 25, 2005 letter to Roquette, that "Although a conflict of interest is not apparent, SEA accepts B&M's offer to employ the formal screen to allay any remaining concerns regarding the appearance of a conflict of interest." Thus, the "firewall" clearly was not intended to address an actual conflict of interest, but simply to allay any possible concerns about the appearance of a conflict.

January 12, 2006

Page 2

§ 1506.5(c) that would create an impermissible conflict of interest. In order to reach that conclusion, however, KJRY engages in substantial supposition and innuendo, based on a highly selective and inaccurate use of e-mail communications produced by Roquette in discovery. This is most evident in the following passage from KJRY's letter:

KJRY submits that B&M does have a direct financial interest in the outcome of this case, notwithstanding the use of a screening mechanism. It is unclear from the materials that have been provided to you (and now to us) that the cogeneration project is in fact unrelated to the proposed rail build-out project. They may in fact be inextricably linked. At the very least, they both purport to have a financial impact on the same plant, one allegedly cutting expenses and the other involving capital expenditure. It is not hard to imagine that the two are linked economically and indeed, some documents produced in discovery appear to link the projects.

KJRY Letter, p. 3 [emphasis added]. KJRY engages in rabid speculation on the meaning of documents that it admits are "unclear" in order to "imagine" ways in which the B&M projects for Roquette "may" be linked. But, the only documents that purportedly "link" the two projects are the very documents in which Roquette addresses the alleged conflict through implementation of the "firewall." The most that KJRY seemingly is able to "imagine" from these documents is that the two B&M projects are linked because they both have a financial impact on the Keokuk facility. That fact does not pose a conflict of interest for B&M under any plausible scenario.

KJRY also advances an overly broad interpretation of the CEQ regulations defining third party contractor conflicts of interest that has been rejected by the courts. Those regulations state that third party contractors may not have a "financial or other interest in the outcome of the project." 40 C.F.R. § 1506.5(c). The courts, however, have observed that this phrase has not in fact been applied as broadly as KJRY suggests. In a frequently cited opinion, the U.S. Court of Appeals for the Tenth Circuit noted that:

Whether the Contractor had a conflict of interest or not rests on the definition of "financial or other interest" under § 1506.5(c). That phrase, however has eluded precise definition. In 1981, the CEQ interpreted the conflict provision "broadly to cover any known benefits other than general enhancement of professional reputation." Forty Questions, 46 Fed. Reg. at 18,031. Even then, however, the CEQ conceded that a contractor may "later bid in competition with others for future work on the project" if that

January 12, 2006

Page 3

contractor "has no promise of future work or other interest in the outcome of the proposal." *Id.* After discovering that many agencies had "been interpreting the conflicts provision in an overly burdensome manner," the CEQ instructed that, absent an agreement to perform construction on the proposed project or actual ownership of the construction site, it is "doubtful that an inherent conflict of interest will exist" unless "the contract for EIS preparation...contains...incentive clauses or guarantees of any future work on the project." Guidance Regarding NEPA Regulations, 48 Fed. Reg. 34,263 34,266 (Council on Env'tl. Quality 1983).

*Associations Working for Aurora's Residential Environment v. Colorado Dept. of Transportation*, 153 F. 3d 1122, 1127 (10th Cir. 1998) [underscore added] ("*AWARE*"). In this proceeding, B&M has no agreement to perform any construction on Roquette's proposed rail project and it has no ownership interest in the construction site. Neither has Roquette provided B&M with any incentives or guarantees of future work on this, or any other, project.<sup>2</sup>

Indeed, the alleged B&M conflict of interest is even less significant than the conflict alleged in the *AWARE* decision, where the Tenth Circuit concluded that a contractor's subsequent work on the *same* project for which it provided environmental analysis did not constitute a "financial or other interest" in violation of § 1506.5(c). If the contractor's subsequent arrangement in *AWARE* did not constitute a conflict of interest, *a fortiori* the lack of *any* arrangement or agreement whatsoever in this case between Roquette and B&M (other than Roquette's agreement to pay for B&M's work under the supervision of the STB under the Memorandum of Understanding between Roquette, the STB and B&M), cannot constitute a conflict of interest. In other words, SEA's conclusion, in its August 25, 2005 letter to Roquette, that the facts of this matter involving Roquette and B&M do not constitute a conflict of interest, correctly applies the law. Moreover, in this case, B&M's "firewall" adds yet a further layer of protection.

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<sup>2</sup> KJRY portrays a July 25 and a September 21, 2005 e-mail from Roquette as an impermissible holding out to B&M of the prospect of future business. KJRY Letter, p. 4. The quoted text, however, does not promise or guarantee any such business to B&M. In fact, these e-mails acknowledge that no work has been, or is guaranteed to be, awarded to B&M. It also is worth noting that B&M's work on the cogeneration project concluded on August 31, 2005. Any subsequent contracts that Roquette might award to B&M on that, or any other project, would be subject to SEA approval pursuant to Section II.D.(2) of the Memorandum of Understanding between SEA, B&M and Roquette. Thus, there currently can be no conflict of interest for B&M.

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January 12, 2006

Page 4

KJRY's letter also resurrects its claim that the SEA's environmental review process through November has been "secretive."<sup>3</sup> But, KJRY's complaint is with the SEA's process in general, not with anything specific to this case, since the SEA's December 21 letter plainly states that "The process for gathering and considering public comments is the same in this case as in all Board cases." Even in this context, however, KJRY presents no compelling reason why the SEA should alter its process.

KJRY contends that this "secretive" process resulted in "undisclosed work [that] led...to solicitation of environmental comments based on incorrect or slanted information" that somehow rendered the stakeholder comments less responsive to the actual facts of the proceeding. KJRY Letter, p. 5. KJRY seems to be suggesting that the SEA should solicit public comment on its letters that solicit public comment. The absurd circularity of this proposition is evident on its face. At what point could SEA issue any request for comment without first seeking public input?

Furthermore, KJRY's best example of allegedly "incorrect or slanted" information illustrates the absurdity of its argument. KJRY states that the SEA's November 3, 2005 environmental consultation letter misled stakeholders by stating that the Keokuk facility "receives rail service exclusively from the" KJRY, and that "[T]he proposed rail line would provide Roquette with competitive rail service." KJRY Letter, p. 5. First of all, these statements are absolutely true; KJRY cannot dispute that it is the only rail carrier with direct physical access into the Keokuk facility. But, even if they were not true, KJRY does not suggest how this alleged "inaccuracy" would in any way affect comments on the environmental impacts of the project.

KJRY makes numerous other assertions that it acknowledges are not "directly relevant to the environmental portion of this case." KJRY Letter, p. 2. Therefore, Roquette will not waste time responding to those assertions in this letter, except to note that KJRY has distorted and slanted many of its factual allegations.

Lastly, the SEA should be skeptical of KJRY's motives. Because this build-out threatens KJRY's exclusive access to the Keokuk facility, KJRY has every incentive to obstruct and delay this project by whatever means are available. Indeed, KJRY has vowed to Roquette that it will do

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<sup>3</sup> KJRY describes a June 21, 2005 Roquette e-mail summarizing a meeting with the STB as an attempt "to enlist the Board in preventing public knowledge of the project for an unusually long time." KJRY Letter, p. 5. While Roquette informed the Board of the confidential nature of the project, Roquette never asked the Board, and the Board never promised, to withhold any information concerning the project. The Roquette e-mail merely reflects the STB's observation to Roquette that the public would inevitably become aware of the project once consultation letters are sent to environmental stakeholders. Furthermore, although KJRY attempts to impugn Roquette's desire to preserve the confidentiality of the project, there is nothing unusual or sinister in preserving the confidentiality of a project with competitive implications until public disclosure is absolutely necessary.

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January 12, 2006

Page 5

just that. By disqualifying B&M, KJRY likely would set back the timetable on this project by several months. Thus, it appears that KJRY's interest is less with the sanctity of the environmental review process than with abusing that process for the purpose of delay.

Sincerely,



Nicholas J. DiMichael

Jeffrey O. Moreno

cc: Vernon A. Williams, Secretary, Surface Transportation Board  
William A. Mullins, Esq.  
David A. Reeves, Esq.  
Steve Thornhill, Burns & McDonnell