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Great Lakes Basin "Quick Take" Eminent Domain Background

Great Lakes Basin LLC Capital Structure

Great Lakes Basin LLC ("GLB") is a Domestic Limited Liability Company registered in the state of Indiana. Our present plan is to incorporate three separate rail corporations as subsidiaries of GLB, one in each of our three states: Great Lakes Basin Rail Wisconsin ("GLBRWI"), Great Lakes Basin Rail Illinois ("GLBRIL"), and Great Lakes Basin Rail Indiana ("GLBRIN"). After construction, the three entities would be operated under common management as a unified rail carrier.

An alternate option might be to set up a single corporation in one state (many large corporations prefer Delaware due to its business-friendly law and settled precedents) and qualify it as a foreign corporation in the three states where GLB plans to do business. This corporation would construct the entire railroad and be controlled by GLB.

We expect our future partners will have substantial input into the eventual corporate form of the enterprise and the security they require for their financial participation.

We ask the reader of this document to assume that in each of our three states we will be qualified to do business in one of the foregoing ways.

Eminent Domain-- Railroads

The power of eminent domain has long been used in the United States to acquire property for public use. Eminent domain "appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty." *Boom Co. v. Patterson*, 98 U.S. 403, 406 (1879). However, the Fifth Amendment to the U.S. Constitution stipulates: "nor shall private property be taken for public use, without just compensation." Thus, whenever the United States, any state, or a private entity acquires a property through eminent domain, it has a constitutional responsibility to justly compensate the property owner for the fair market value of the property. See *Bauman v. Ross*, 167 U.S. 548 (1897); *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 9-10 (1984).

The Surface Transportation Board (STB), by approving or exempting the application of GLB (or its railroad subsidiaries) to construct the proposed railroad, will provide the authority required under state law to proceed with land acquisition, either through negotiated transactions or by exercise of eminent domain, in Wisconsin, Illinois, and Indiana.

GLB intends to offer fair prices for the property interests required to construct the railroad and to acquire as much property through negotiated transactions as possible. However, in some cases, GLB expects it will have to resort to the exercise of eminent domain powers. GLB should be able to take advantage of "Quick Take" eminent domain procedures in each of its states to keep recalcitrant

landowners from holding the entire project hostage. Under Quick Take, GLB would be allowed to take possession of property needed for the project by paying a court-determined amount, which would be held by the court as the actual value of the property taken is litigated. Appraisals are required in Indiana and Wisconsin, and as a practical matter they would need to be obtained in Illinois as well to support arguments as to what the preliminary and final valuation of taken property should be.

The timing of land acquisitions will need to be carefully considered to provide the land as it is needed for construction while maintaining the capital budget for the project. The capacity of the judicial system also will be a factor, as individual condemnation proceedings would need to be filed in the counties where the land is to be taken, which tend to be rural with a small number of judges.

In addition, GLB must deal with holders of permanent easements for right of way for gas and ammonia pipelines, high tension wire lines, fiber optic lines, sewers and other built infrastructure the railroad's path will cross. GLB would need to negotiate agreements and potentially pay for protective measures such as encasing pre-existing pipelines in concrete where they would cross under the tracks. GLB also would need to negotiate with state and county governments for road crossings (either grade separated or at grade) and secure state authority for the planned grade crossing protection of all level crossings.

Once GLB determines its preferred route, but before the STB proceeding advances very far, we plan to hold town hall meetings at county seats along the route to discuss the project with the residents and in particular those owning property needed for right of way in an informal setting. This would precede individual discussions with landowners. We are considering coordination of these meetings and providing information to the local press.

Indiana Railroad Eminent Domain Rights

The following is a short summary of the Indiana eminent domain process applicable to Indiana railroad companies.¹ GLBR plans to utilize this process in connection with creation of the rail corridor for Great Lakes Basin Railroad. This is just a summary of the process, and is intended to show that it would probably be difficult for an individual property owner (or group of owners) in Indiana to significantly delay the eminent domain process.

1. Once GLBR forms as an Indiana railroad company (GLBRIN), it would be authorized to enter upon any land to examine and survey the land necessary for proper construction and maintenance of the proposed rail line
2. GLBRIN deposits with each Indiana county clerk a description of the rights and interests to be appropriated in the county

¹ While the process customarily utilized for Indiana Eminent Domain proceedings (IC 32-24-1 et seq.) might be available to GLRB, IC Title 8 appears to represent a clearer eminent domain path for Indiana railroads.

3. GLBRIN negotiates with land owners regarding appropriation damages
4. If agreement cannot be reached with any owner, GLBRIN delivers an appropriation document to each owner (or provides public notice to owners who cannot be located)
5. After delivery of the appropriation document (or public notice), the county circuit court appoints three individuals (one disinterested landholder and two disinterested licensed appraisers) to assess damages
6. Appraisers complete damages assessment and file report with circuit court clerk
7. GLBRIN makes payment to the clerk (or to the owner) of damages assessed
8. GLBRIN authorized to take possession of the property following payment
9. Owner or GLBRIN may file exceptions within 20 days following filing of appraisers' award and court may order a new appraisal
10. GLBRIN would be able to take (or continue in) possession during the pending appeal, and subsequent proceedings only affect the amount of compensation

For your reference, the Indiana statutes which create Eminent Domain rights for Indiana Railroads are IC § 8-4-1-14 (*General Powers and Duties*), IC § 8-4-1-15 (*Eminent Domain; Right to Acquire Title*) and IC § 8-4-1-16 (*Eminent Domain; Damages; Appraisals; Appeals*).

Illinois Railroad Eminent Domain Rights

In Illinois eminent domain is governed by the Eminent Domain Act, 735 ILCS 30 *et seq.* Once GLBRIL obtains authority to construct its railroad from the Surface Transportation Board, it can proceed to secure right of way from private landowners with whom it is unable to reach agreement through one of two provisions of this Act:

- A • Section 5-5-5(c): proving by "clear and convincing evidence" that the acquisition is (i) primarily for the benefit of the public and (ii) necessary for a public purpose.
- OR
- B • Section 5-5-5(e): proving by a preponderance of the evidence that the acquisition is (i) necessary for a public purpose, (ii) subject to a 40-year commitment to use the property

for that purpose, and (iii) to be owned or used by a railroad for freight transportation purposes.

The former alternative requires a stricter burden of proof, but the latter entails a 40-year commitment to use the condemned property for railroad purposes.

Proper venue for a condemnation action is "the circuit court of the county where the property or any part of the property is situated" (735 ILCS 30/10-5-10(a)). If the court finds the plaintiff has met the foregoing statutory requirements, compensation for the property shall be "the amount of money that a purchaser, willing, but not obligated, to buy the property, would pay to an owner willing, but not obliged, to sell in a voluntary sale" (735 ILCS 30/10-5-60). The court may appoint three appraisers at plaintiff's expense to act "as agents of the court to evaluate the property to which the motion relates and to report their conclusions to the court" (735 ILCS 30/20-5-10).

At any time after a condemnation action is filed, the plaintiff may move for quick take either immediately or on a date set forth in the future (735 ILCS 30/20-5-5). If this motion is granted, the court will determine preliminary compensation for the landowners (735 ILCS 30/20-5-10). Once the plaintiff pays that amount into court, it may take possession of the property (735 ILCS 30/20-5-10). The plaintiff must pay interest on unpaid compensation at 6% per year on the difference between the preliminary compensation and the final compensation as determined by the court in further proceedings until the balance due is paid (735 ILCS 30/20-5-30).

Wisconsin Railroad Eminent Domain Rights

Under Wisconsin Statue 32.02(3), "[a]ny railroad corporation" (GLBRWI) may "acquire by condemnation any real estate and personal property appurtenant thereto or interest therein which they have power to acquire and hold . . ." This expressly includes rights of way across other railroads (Wisconsin Statue 32.03(2)). Wisconsin Statue 32.05 governs condemnation for "transportation facilities," which presumably includes freight railroads although this statute doesn't mention them. After negotiations with the owner do not result in conveyance, the railroad must tender a "jurisdictional offer" of compensation supported by an appraisal. If the owner does not accept the offer within 20 days, and convey the property within 60 days, or commence court action to challenge the taking, the railroad may tender an award to the owner and take possession of the property. However, the owner has the right to challenge the valuation by appealing the award to either "a commission of county condemnation commissioners" or the circuit court.