



June 8, 2018

To: Regional Transportation Commission

From: George Dondero, Executive Director

Re: Response to Greenway's Six Stories

Recently, Santa Cruz County Greenway posted a series of [six stories](#) on the "Case Against Progressive Rail" providing reasons why they think the Santa Cruz County Regional Transportation Commission should not approve the operating agreement with Progressive Rail. The material contains many factual errors, exaggerations and distortions that, if true, would deserve concern. This memorandum will provide some clarity on the facts.

### 1. "Progressive Rail Execs Sued for Fraud"

RTC Response: There are two lawsuits – one filed by the U.S. Government, and another filed as a class action suit. According to Progressive Rail, their executives are not named individually in the government suit, and "The class action suit alleges that we were complicit in a cover-up, which is meritless and without fact. The notion that we were protectors of the founders could not be further from the truth. We upheld our fiduciary responsibilities to the shareholders." Class action suits typically name as many people as possible, knowing full well that only a few may be actually held accountable for the named actions.

### 2. "Stories from Progressive's Midwest Towns"

RTC Response:

- **Minnesota Pollution Control Agency Fine** – The Minnesota Pollution Control Agency did fine Progressive Rail \$75,000. However, this fine was issued due to a trucking company employee spilling much of the contents of one rail car during transloading at a property owned by Progressive Rail. While Progressive Rail was assessed the fine because it occurred on company property, the railroad's personnel did not cause the spill.
- **Bridgewater Township, MN – Proposed Ethanol Facility** – Dave Fellon, Progressive Rail owner and president, and other advocates did pursue construction of an ethanol plant in Bridgewater Township, MN, even appearing regularly on a radio show to discuss the proposed development with the public. While the ethanol plant wasn't constructed there, others have been constructed in southern Minnesota, taking advantage of the local corn supply. According to the Minnesota Bio-Fuels Association, the state hosts 19 such plants and is the fourth largest ethanol producer in the country. Please see: <https://www.mnbiofuels.org/resources/production-in-minnesota>.
- **Eagle Point, WI – Proposed Road Closure** – Due to a spike in train traffic on the Wisconsin Northern Railroad (owned by Progressive Rail), Progressive Rail has pursued a petition to close a lightly-travelled town road in an effort to reduce train blockages at a rail crossing on a busy county road one mile south. The town government is opposed to Progressive Rail's petition, which is pending before the state railroad commissioner for a decision.
- **Lakeville, MN – Environmental Violations and Long-Term Railcar Storage** – Progressive Rail and the City of Lakeville, where Progressive Rail is headquartered, have a healthy relationship. This is best evidenced by Progressive Rail seeking a conditional use permit (CUP) from the City to operate

a propane distribution facility for the first time at the Lakeville transload facility. After Progressive Rail worked with City staff on developing the CUP, the city's Planning Commission and City Council each separately approved the CUP by unanimous support in January 2018. Progressive Rail's preferred method of operating is in collaboration with the local unit of government to reach a favorable outcome.

### **3. "A Secretive, Biased Process"**

RTC Response: Nothing prohibited communications with potential proposers before the release of the formal RFP, nor did any communications give Progressive Rail (or any other proposer) any unfair advantage over any other proposer in the selection process. Progressive Rail was in contact with RTC Deputy Director Luis Mendez and Executive Director George Dondero several months prior to the issuance of an RFP as were several other rail operators during the same time. It was well known in the rail industry (and reported in our local news) that Iowa Pacific was having financial difficulties as early as 2016. We received unsolicited calls and emails from at least three other operators expressing interest in the line should Iowa Pacific depart. All three of these operators (in addition to Progressive Rail) submitted proposals in response to the RFP. Since we knew that Iowa Pacific was likely to end their relationship with us, it was prudent to stay in touch with any and all interested parties. We had informal conference calls and meetings with these parties when they expressed interest in doing so. It was an opportunity for them to learn more about the conditions and operations on the line, and an opportunity for us to informally learn more about the individuals on their respective teams prior to the more formal RFP process. We had the RFP ready to issue in December so as not to delay the procurement process, and we engaged the services of a seasoned railroad consultant with over 50 years experience in the industry to evaluate the proposals. Despite some accusations that staff has been rushing to get a new agreement signed, it has now been six months since Iowa Pacific sent us written notice that they wished to exit.

Copies of our email communications with Progressive Rail are being shown as supposed "proof" of a pre-arranged and "secretive" deal. These emails were obtained through a public information request that only asked for communications with Progressive Rail. No requests were ever made for the communications we had with any of the other rail operators we were in contact with. Looking at the complete picture, the procurement process has been lawful, cautious and fair.

A similar accusation was made by Trail Now, indicating that RTC staff had violated Public Contract Code section 20216. This code does not apply to the RTC's process to select an operator. It specifically applies to a "competitive negotiation" procurement process undertaken by specified agencies engaged in transit operations to contract for the manufacture and delivery of specified goods, transit vehicles, or equipment. Adopted in 1992, its purpose was to regulate the purchase by agencies engaged in transit operations of specialized transit equipment and apparatus (such as computers, telecommunications equipment, fare collection equipment, microwave equipment, and other related electronic equipment and apparatus, and rail cars) under laws exempting such purchases from competitive (low-bid) requirements. It has no application to this contract.

### **4. "We Don't Need to Hire a New Operator"**

RTC Response: As our legal counsel explained in a confidential memo to RTC Commissioners on January 17, 2018, "In sum, the SCCRTC has both legal and practical reasons to pursue a new operator to continue freight operations on the rail line," and again in a letter dated June 1, 2018 to Ryan Whitelaw, a copy of which was sent to RTC Commissioners and included in the June 14, 2018 agenda packet. It reads in part:

“ As is publicly available on the RTC's website and was communicated publicly in response to questions by the Commission at its April 19, 2018, Transportation Policy Workshop (and

subsequently published in the Santa Cruz Sentinel), the conditions of approval by the California Transportation Commission (“CTC”) of the use of \$10,200,000 of Proposition 116 funds for purchase of the Santa Cruz Branch Rail Line require that the RTC commit to be responsible to continue freight rail service and to initiate recreational passenger rail service.

Specifically, CTC Resolution PA-10-06, which was adopted by the CTC Board at its meeting of June 30-July 1, 2010, upon the express prerequisite that the RTC meet the five conditions set forth therein<sup>1</sup>, at Paragraph 2.1, subdivisions (3) and (4), requires that:

1. “SCCRTC commits, via a board resolution, to be responsible for *initiating recreational passenger rail service*, in accordance with PUC Section 99640”; and
2. “SCCRTC commits, via a board resolution, *to be responsible for continuing freight rail service* for as long as would be required by the Surface Transportation Board, as provided in 49 USC sections 10901, 10910 and 11347.”

CTC Resolution PA-10-06, Paragraph 2.2, further states: “in the case where SCCRTC ceases to utilize the Branch Line for the original purpose as approved by the Commission, SCCRTC commits, via a board resolution, to reimburse the State, the greater of either the amount allocated or the then present fair market value as determined by STATE.”

In light of these requirements (in addition to the subsequent commitments made by the RTC Board in accordance therewith) it cannot be reasonably argued that the RTC has not undertaken a legal commitment to continue freight service on the line, or that a decision to abandon rail service on the line would not result in potential financial liability to the RTC.”

## 5. “Flawed Rail Contract”

RTC Response:

- a. The previous contract with Iowa Pacific is not what failed – it was the operator.
- b. Freight service takes priority – this clause was required by the Federal Surface Transportation Board (STB). The reality is that simple coordination between freight and excursion trains will be needed. The frequency of either is not likely to create unsolvable conflicts on the line. Since Progressive would be operating both the freight and excursion trains, there should not be any issues with this coordination.
- c. Trail must not interfere with Railway’s rights and operations – when the Master Plan for the trail was developed, the planning team consulted frequently with Iowa Pacific to ensure that no conflicts between trail and railway uses was being incorporated into the plan. Rail with trail projects have succeeded in many other places and we are confident it can work here as well.

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<sup>1</sup> See CTC Minutes of June 30-July 1, 2010 at [http://www.catc.ca.gov/meetings/2010/2010-08/May\\_June\\_Minutes.pdf](http://www.catc.ca.gov/meetings/2010/2010-08/May_June_Minutes.pdf); see also, CTC Minutes of January 19-20, 2011, at [http://dot.ca.gov/hq/transprog/ctcbooks/2011/0311/006\\_1.2.pdf](http://dot.ca.gov/hq/transprog/ctcbooks/2011/0311/006_1.2.pdf), finding the RTC met the conditions of approval (“approval of application to program this project for Proposition 116 funds as the applicant has met all conditions”).

d. Graffiti control – RTC has always been responsible for removing graffiti. It has been a problem, but one that we have and will continue to manage. We now have a tracking system to record reports of graffiti, and an on-call contractor to paint it out or remove it.

e. Locomotive inspection pit on the west side of Santa Cruz – this is a carryover from Sierra Northern, an earlier operator. Progressive was quoted in the *Good Times* as being agreeable to removing this clause.

f. Bypassing the outcome of the Unified Corridor Investment Study – the RTC is working on storm damage from last year, but no upgrades to track will be made before a decision on the future of the track is made, subsequent to completion of the Unified Corridor Investment Study.

g. Continued concern about Prop 116 funding requirements – Yes, the RTC does take seriously the agreements made with the California Transportation Commission. See #4 above.

## **6. “Failure Likely But Success Could Be Worse”**

RTC Response:

- a. Progressive Rail has an impressive history of turning around failing branch lines into success stories (including one line that had deteriorated under Iowa Pacific).
- b. A fear of new businesses coming to the county, even if not wanted, based on federal preemptions is outright fear-mongering. A business needs land on which to operate – and thus will have to comply with any local land use and environmental permitting rules in place. Whether situated in Watsonville, the County or elsewhere, any new business will have to meet local zoning and building codes. Since Progressive Rail does not own the property, it is difficult to see where any preemption could even apply.
- c. The statement that “many, if not most, of Progressive Rail’s current locations transload hazardous commodities” is contradicted by the visit to three different rail lines owned and operated by them in March of 2018. RTC Commissioner Bottorff and Executive Director George Dondero walked through several transload facilities that handled milled hardwood, coiled aluminum, cardboard, utility poles, oyster shells, and yes – propane. Propane is most safely transported by rail, and the storage and transfer facilities are highly regulated for safety under state and federal laws. A local business owner who is not affiliated with Progressive Rail has been permitted and is building a propane facility in Watsonville, with access to the RTC’s rail line.