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May 19, 2016
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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36025

**TEXAS CENTRAL RAILROAD AND INFRASTRUCTURE, INC. & TEXAS CENTRAL
RAILROAD, LLC – AUTHORITY TO CONSTRUCT AND OPERATE – PETITION
FOR EXEMPTION FROM 49 U.S.C. § 10901 AND SUBTITLE IV – PASSENGER RAIL
LINE BETWEEN DALLAS, TX AND HOUSTON, TX**

REPLY IN OPPOSITION TO PETITION FOR CLARIFICATION

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Pursuant to 49 C.F.R. § 1104.13(a), Delta Troy Interests, Ltd. (“Delta Troy”) hereby replies in opposition to the Petition for Clarification (“Petition”) filed by Texas Central Railroad and Infrastructure, Inc. and Texas Central Railroad, LLC (collectively, “TCR”) on April 19, 2016.¹ In the Petition, TCR seeks permission to begin eminent domain proceedings against certain landowners in Texas in support of its proposed high-speed passenger rail project that would involve construction and operation of an approximately 240-mile rail line between Dallas and Houston, Texas (the “Project”). TCR brazenly seeks authority to jump-start the eminent domain proceedings for a Project that does not yet have an approved alignment, has not received regulatory authorization from this agency for either construction or operation, and has not completed the mandatory environmental review process. TCR also asserts this wholly intrastate Project falls within the Board’s jurisdiction but fails to present a clear and convincing case that the Project is part of the interstate rail network.

¹ The due date for responsive pleadings was extended to May 19, 2016 in a decision served by the Board on May 5, 2016.

The Surface Transportation Board (“Board” or “STB”) should deny TCR’s Petition based on a lack of jurisdiction over the Project. However, even if the Board were to find that it has jurisdiction, the Petition should be denied because the requested relief is contrary to law, inequitable to landowners and others affected by the Project, and improper because it requires the Board to interpret Texas law. In support hereof, Delta Troy states as follows:

I. The Petition Must Be Denied Because the Board Has No Jurisdiction Over the Project.

In its Petition for Exemption, TCR asserts that the Board has jurisdiction over the Project, but this assertion is undermined by both the facts and the law. The Board has jurisdiction over rail transportation between points in the same state only when such transportation is performed “as part of the interstate rail network.”² However, TCR’s Petition for Exemption falls far short of establishing that its Project satisfies this statutory standard.

TCR’s proposed rail line would operate wholly intrastate, providing passenger train service only between Dallas and Houston. The rail line would **not** connect physically with any other rail line that is part of the national rail system, and it would not use the same stations as any other passenger rail service provider.³ TCR asserts that the proposed rail line “will create a connection between the Amtrak routes serving Dallas and Houston,”⁴ but this is demonstrably false. The proposed station location in the Houston area would be in the northwestern part of the city, approximately seven miles from the Houston Amtrak Station.⁵ The proposed Dallas station would be approximately one-half mile from the Amtrak Station.⁶ No matter how many times

² 49 U.S.C. § 10501(a)(2)(A).

³ Petition for Exemption at 18. See also Texas Central High-Speed Railway: Last Mile Analysis Report at p. 65 (Mar. 27, 2015), available at: <http://www.texascentral.com/project/>.

⁴ See Petition for Exemption at 17.

⁵ See <http://www.texascentral.com/facts/> (answer to question “Where will the stations be?”).

⁶ See Petition for Exemption at 19, Figure 2.

TCR uses variations of the word “connect” in its Petition for Exemption, no such connection would exist.

TCR relies upon the Board’s recent decisions in California High-Speed Rail to buttress its assertion of jurisdiction, but this comparison only highlights the differences between the two projects.⁷ In California High-Speed Rail, the Petitioner proposed using the **same** stations as Amtrak in key project cities, such as Los Angeles, Sacramento, and San Jose.⁸ The Petitioner also planned a “blended” system whereby its tracks would connect to existing rail lines of other railroads, its trains would operate on these existing rail lines, and Amtrak trains would operate on its proposed new tracks.⁹ Thus, the California project will establish a true connection with Amtrak, thereby making the project “part of” the interstate rail network.

In contrast, TCR is proposing an entirely insular system – “a totally dedicated, grade separated, secure corridor”¹⁰ – with no physical connection to Amtrak or any other rail carrier. TCR makes a thinly-veiled attempt to establish connectivity to Amtrak based on the suggestion that pedestrian travelers could potentially walk (via “pedestrian walkways”) or use buses to reach Amtrak Stations from the TCR stations.¹¹ However, based on the estimated seven-mile distance between Amtrak and the proposed TCR station in Houston, use of a pedestrian walkway is completely unrealistic and impractical. Furthermore, a need to rely on buses unequivocally proves that the Project is **not** “part of” the interstate rail network. Board approval of buses as a means to establish that a rail line is part of the interstate rail network would be plainly

⁷ Petition for Exemption at 14, 18, and 20, citing California High-Speed Rail Authority – Construction Exemption – In Merced, Madera and Fresno Counties, Cal., STB Docket No. 35724 (served June 13, 2013) (“CHSR I”).

⁸ CHSR I, slip op. at 13-14.

⁹ Id., slip op. at 11-15.

¹⁰ Petition for Exemption at 2.

¹¹ Id. at 17-18.

problematic as precedent because it would permit “connections” between intrastate and interstate rail lines that are tens or even hundreds of miles apart, thereby opening the door to untold future petitioners. If the statutory phrase “part of the interstate rail network” is to have any meaning whatsoever, the Board should find that the Project is not within its jurisdiction.

TCR suggests that connections to other future high-speed rail lines (that may or may not be built by unknown third parties at some future date) may be possible,¹² but such pure conjecture based on uncertain future events that may or may not occur should not and cannot be a basis for Board jurisdiction. Lastly, TCR points to its “willingness” to consider nebulous and unspecified “efforts” with other passenger rail providers.¹³ Again, it is not even clear what TCR is arguing here; more importantly, this is simply inadequate to establish that the Project would be “part of” the interstate rail network. Indeed, TCR’s CEO himself stated that “[i]t is too early in the project to define the precise nature and scope of such potential arrangements.”¹⁴ The Board should reject TCR’s reliance on speculation as the foundation for invoking Board jurisdiction.

Given the lack of Board jurisdiction over the Project, the Board should deny the Petition for Clarification.

II. TCR Seeks to Place Its Self Interest Above the Public Interest.

The remainder of this Reply consists of Delta Troy’s response on the merits of the clarification request. At various points in this Reply, Delta Troy states that condemnation cannot proceed without Board authorization of the relevant rail project. In these statements, Delta Troy is obviously referring to rail projects within Board jurisdiction. Similarly, to argue the merits of the clarification request, Delta Troy must occasionally in this Reply assume that TCR’s proposal

¹² Petition for Exemption at 19-20.

¹³ Id. at 20.

¹⁴ Id.

is within Board jurisdiction. This assumption is made solely for the sake of argument, and does not function as a waiver of Delta Troy's position on jurisdiction.

Pursuant to long-standing and carefully-devised Board procedures, proposed rail construction projects must be evaluated pursuant to the "public convenience and necessity" standard before the project can begin. See 49 U.S.C. § 10901(c). Specifically, if the Board finds no inconsistency with the public convenience and necessity ("PCN"), the Board must approve the project.¹⁵ The PCN standard is significant because it requires the Board to determine whether the given rail construction proposal "is in the public interest."¹⁶ Without a positive finding on the PCN issue, a proposed project remains just one party's private desire, not a project that serves the much broader interest of the public at large.

Even when the Board considers a request for an exemption regarding a rail construction project pursuant to 49 U.S.C. § 10502(a), the Board must still assess whether § 10901 should apply in order to carry out the rail transportation policy of § 10101.¹⁷ Such an assessment necessarily involves evaluation of the public interest, which is "explicit" in the national rail transportation policy.¹⁸ Hence, whether an application or exemption is used for the Project, the public interest must be considered.¹⁹

The Board's public interest evaluation is critical because it is precisely the Board's authorization of a rail construction project that justifies use of eminent domain in the first place.

¹⁵ 49 U.S.C. § 10901(c).

¹⁶ Tongue River Railroad Company, Inc. – Construction and Operation – Western Alignment, STB Docket No. 30186 (Sub-No. 3), slip op. at 13 (served Oct. 9, 2007).

¹⁷ See, e.g., CHSR I, slip op. at 22 ("under § 10502(a), we must exempt a proposed rail line construction without regard to the scope of the project when we find that application of the provisions of § 10901 is not necessary to carry out the rail transportation policy of § 10101 (RTP) and there is no danger of market power abuse").

¹⁸ Chesapeake and Ohio Railway Co. v. United States, 704 F.2d 373, 375-376 (7th Cir. 1983).

¹⁹ Delta Troy believes that an application should be required for TCR's Project. Delta Troy will address this issue in its response to the Petition for Exemption.

Without Board authorization, the justification for eminent domain evaporates because there is no public use finding attached to the project. This remains true regardless of whether the putative condemnor (here, TCR) only proceeds part-way through the applicable eminent domain process, as TCR proposes to do.²⁰ This also remains true regardless of whether the concept of “construction” in 49 U.S.C. § 10901 includes eminent domain. Therefore, TCR’s reliance upon the self-serving promise that it will stop after “phase one” of the Texas eminent domain process until the Board rules on its Petition for Exemption is of no consequence, because any part of eminent domain first requires that a project have a public purpose.²¹

When the power to forcibly seize others’ land is given to private entities, such as railroads, the underlying rationale is that the private entity is engaged in an activity that has a public purpose and furthers the public interest.²² Prior to the Board’s authorization of a proposed rail project within its jurisdiction, no such public purpose or public interest can be assumed and, thus, eminent domain should not be utilized. Consideration of whether a public use exists is a legal question,²³ properly within the Board’s expertise due to its exclusive jurisdiction over rail construction projects, and TCR should not be permitted to shortcut this necessary initial finding due to its self-imposed Project schedule. In short, TCR seeks to reverse and upend the careful balancing of interests that exists between Board authorization under federal law and use of eminent domain under state law.

²⁰ See, e.g., Petition at 8.

²¹ TCR’s reliance on a dictionary definition of “construct” is not probative. Petition at 6-7. The Board, citing Supreme Court precedent, has cautioned parties about using dictionary definitions to interpret words in the Interstate Commerce Act. DesertXpress Enterprises, LLC – Petition for Declaratory Order, STB Docket No. 34914, slip op. at 15 (served May 7, 2010).

²² See, e.g., Thompson v. Consolidated Gas Utilities Corporation, 300 U.S. 55, 80 (1937) (“one person’s property may not be taken for the benefit of another private person without a justifying public purpose”) (citations omitted).

²³ See, e.g., Harrison v. Danville & Western Railway Company, 208 U.S. 598, 606 (1908).

TCR also provides no support for its remarkable proposal that eminent domain can be utilized even when the alignment of a project is unknown. This unprecedented proposal – where a putative condemnor would acquire parcels in multiple alternate corridors prior to both project approval and alignment selection – would subject private property owners to a dramatic and sweeping restriction of their rights. If all that is needed for a private party to commence eminent domain is to submit a rail construction proposal to the relevant government agency, then no one’s land is safe and the entire concept of private property is undermined. TCR has provided no precedent from Texas or, indeed, any jurisdiction that eminent domain has **ever** previously been utilized in this manner.

Moreover, the relief requested in the Petition would subject private landowners to eminent domain proceedings even before the putative condemnor has been found to have the support of the public interest. Even TCR concedes that it would be “inexplicabl[e]” for a railroad to “proceed[] with condemnation” when there is no public use finding.²⁴ It is not enough that TCR simply “wants” to start the condemnation process due to its self-imposed schedule. Eminent domain cannot and should not move forward before the Board has authorized the Project and found that it serves the public interest. The Board should not permit its long-standing regulatory framework to be reversed.

If TCR commences eminent domain proceedings while Board evaluation of the proposed Project is still ongoing, the Texas state courts will be faced with a non-carrier private entity, TCR, that does not have a Board-authorized project. As such, the Texas courts may be forced to undertake an independent analysis of whether TCR is a common carrier railroad before allowing

²⁴ See Petition at 8-9 (n. 31) (referring to Tampa Phosphate, 418 F.2d 387).

“phase one” of the eminent domain process to move forward,²⁵ yet this state court evaluation of common carrier status would be occurring at the same time as the Board’s evaluation of the Project. The potential for the duplicative exercise of jurisdiction over common carrier operations would be convoluted at best. The Board thus should deny the Petition.

III. TCR Is Improperly Asking the Board to Direct State Legal Processes.

Although styled as a petition for “clarification,” what TCR really seeks is a power akin to preemption. TCR wants the Board to condone its plan to start the condemnation process under Texas law even before final alignment is selected for the rail line and before the Board has authorized the Project or licensed TCR as a rail carrier. TCR seeks a Board ruling that it can use to improperly jump start condemnation proceedings in Texas state court, based on anticipated opposition to such proceedings by certain landowners. Specifically, TCR is concerned about “arguments...[that may] be raised in Texas state court within the next three-to-four months” and TCR wants a “clear statement” from the Board that can be used in response.²⁶

TCR wants the Board to direct the Texas state courts to allow eminent domain proceedings to move forward, thereby superseding the Texas courts’ consideration of any objections that are raised to such proceedings, but such direction is only proper for a Board-authorized project.²⁷ The Project is not Board-authorized; therefore, TCR, like any private

²⁵ Cf. Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC, 363 S.W.3d 192, 202 (Tex. 2012) (“once a landowner challenges” the common carrier status of a pipeline owner, “the burden falls upon the pipeline company to establish its common-carrier bona fides if it wishes to exercise the power of eminent domain”).

²⁶ Petition at 9-10.

²⁷ Dakota, Minnesota & Eastern Railroad Corp. v. South Dakota, 236 F.Supp.2d 989, 1006-1009 (D.S.D. 2002), *aff’d on other grounds*, 362 F.3d 512 (8th Cir. 2004) (“Dakota, Minnesota & Eastern”). See also Draft Environmental Impact Statement, p. 4-65, Southwest Gulf Railroad Company – Construction and Operation Exemption – In Medina County, TX, STB Docket No. 34284 (issued Nov. 5, 2004) (“states cannot apply their eminent domain statutes in such a way as

party, is subject to the Texas state courts' full consideration of any objections that are raised. Acquiescence in TCR's request for a premature, preemption-like ruling would disrupt the careful separation of responsibilities that exists between states and the Board.

TCR seeks a Board statement that would permit early commencement of the condemnation process based on TCR's alleged need to meet certain opaque construction and financing milestones. TCR's desire to change settled law is based on its self-serving promise not to take possession of any properties that are the subject of the state proceedings.²⁸ The Board must reject TCR's requested clarification; this issue has already been conclusively decided by the courts and the Board's predecessor.

The U.S. Court of Appeals for the Fifth Circuit determined long ago that:

There appears to be no serious question that an attempt to condemn lands for the purpose of constructing new trackage thereon without first acquiring a certificate from the Interstate Commerce Commission constitutes "construction" within the meaning of this statute.

Tampa Phosphate Railroad Company v. Seaboard Coast Line Railroad Company, 418 F.2d 387, 393 (5th Cir. 1969) (citations omitted), *cert. denied*, 397 U.S. 910 (1970). TCR contends that it is "in a completely different position" than the railroad in Tampa Phosphate because that railroad was "inexplicably proceeding" with condemnation without a public use finding from the Interstate Commerce Commission ("ICC"). This distinction fails miserably. With its requested clarification, TCR is attempting to do the exact same thing as the railroad in Tampa Phosphate, i.e., commence eminent domain without an affirmative public use finding, and it should suffer the same fate. The Board has not yet determined that the Project satisfies the public interest and

to present an 'insurmountable barrier' for a **Board-approved railroad construction project**") (emphasis added).

²⁸ Petition at 9-10.

there is no guarantee that the Project will obtain Board approval. Just as the Fifth Circuit did, the Board should reject TCR's request as wholly improper.

The ICC has also clearly addressed this issue. In 1982, the ICC unambiguously stated that:

We agree with the court in *Tampa Phosphate* that the condemnation of right-of-way to construct a railroad line is "construction" which triggers the approval requirements of 49 U.S.C. 10901.

Nicholson v. Missouri Pacific Railroad Company, 366 ICC 69, 71 (1982). TCR attempts to distinguish Nicholson by arguing that, unlike the condemnor in that case, TCR will not take physical possession of any property or engage in any "real" construction until after the Board authorizes the proposed Project.²⁹ This distinction is irrelevant because it is the Board's authorization that enables eminent domain in the first place. Furthermore, even the simple "phase one" of the Texas eminent domain process will place an undue burden on private property owners. See Section V.

The premature ruling that TCR seeks is not markedly different from the ruling the California High-Speed Rail Authority sought and the Board wisely denied just a few years ago. In that case, the CHSR Authority had sought a final determination on the transportation merits of a project before the required environmental review was complete. The Board declined to grant such a request, referring to its "independent statutory obligation to review" transactions brought before it and also the possibility that "the Board could deny the petition for exemption notwithstanding a prior conditional grant."³⁰

²⁹ See, e.g. Petition at 8.

³⁰ California High-Speed Rail Authority – Construction Exemption – In Merced, Madera and Fresno Counties, Cal., STB Docket No. 35724 (Sub-No. 1), slip op. at 2 (served Dec. 4, 2013) ("CHSR II").

If the Board were to grant TCR's requested clarification, such a ruling would improperly impute "railroad status" to TCR before the Board has made such a determination. Thus, in any future dispute under Texas law regarding whether TCR can properly invoke eminent domain as a "railroad" despite having no Board authority, TCR would likely rely upon the Board clarification decision to support its alleged railroad status. In other words, TCR is not a Board-authorized carrier, yet it seeks the power of one through its requested "clarification." The relief requested in the Petition should be denied.

IV. The Board Cannot Grant the Petition Because It Requires Interpretation of Texas Law.

TCR seeks an order from the Board that would instruct the state courts in Texas as to when eminent domain may or may not be used with respect to rail construction projects in Texas. TCR's Petition is largely premised on the specific construct and workings of the Texas eminent domain statute and processes.³¹ Even though the Board could not be expected to be familiar with such state law, TCR only complicates the matter further by promising not to exercise the right of possession for properties whose values are determined in the eminent domain proceeding, even though such right exists under Texas law.³² Thus, TCR's Petition improperly asks the Board to determine the proper application of the Texas eminent domain statute, even though such matters are beyond the Board's jurisdiction. See, e.g., Tongue River Railroad Company, Inc. – Rail Construction and Operation – In Custer, Powder River and Rosebud Counties, Mont., STB Docket No. 30186, slip op. at 13 (served Mar. 22, 2013) ("The Board plays no role in any eminent domain proceedings and does not approve or disapprove any condemnation of private

³¹ Petition at 5-6 and 8-10.

³² Texas Prop. Code § 21.021.

property under state law.”). Simply put, the Board does not get involved in interpretation of state law.³³

Moreover, the Board can only direct state courts regarding application of state eminent domain law when the courts are considering actions that would thwart a **Board-authorized** railroad or rail project.³⁴ TCR is **not** a Board-authorized railroad, and its proposed Project has **not** been approved by the Board. Consequently, the Board cannot dictate application of state law or otherwise tell the Texas state courts how to adjudicate an eminent domain dispute.

Innumerable state law questions inevitably accompany TCR’s requested clarification, such as:

1. Is TCR even authorized to use eminent domain under Texas state law, given that TCR has not been licensed by the Board? In other words, can TCR properly be considered a “railroad” under Texas eminent domain law?
2. Did TCR accurately and correctly characterize the Texas eminent domain procedure in its Petition for Clarification, including the substance of the two phases?
3. What rights would TCR obtain via completion of the “first phase” of the Texas eminent domain process, and can those rights be properly considered so limited that they are not part of rail line construction?
4. How would the Board enforce TCR’s self-imposed plan to not proceed to “phase two” of the Texas eminent domain process?

³³ See, e.g., Minnesota Department of Transportation – Petition for Declaratory Order – Operations of Rochester Limousine Service, Inc., ICC No. MCC-C-30225, 1995 MCC Lexis 16 at *9 (served Mar. 24, 1995) (“interpret[ing] State law” is “beyond our jurisdiction”). Cf. MVC Transportation, LLC – Petition for Declaratory Order, STB Docket No. 34462 (Sub-No. 1), slip op. at 6 (served Oct. 20, 2004) (“The questions here involve local property law, contract law, and mortgages, which are for a court to answer, not the Board.”); 14500 Limited LLC – Petition for Declaratory Order, STB Docket No. 35788, slip op. at 6 (served June 5, 2014) (“a state or federal court is the proper forum to decide state common law property claims”).

³⁴ Dakota, Minnesota & Eastern, 236 F.Supp.2d 989, 1006-1009. Cf. Denver & Rio Grande Railway Historical Foundation – Petition for Declaratory Order, STB Docket No. 35496, slip op. at 9 (served Aug. 18, 2014) (if an entity’s use of land is “not in furtherance of transportation over which the Board has jurisdiction,” then a local government’s law regarding that land “would not be preempted”).

The first question is especially noteworthy. Under Texas law, railroads have the power of eminent domain, but the Texas Transportation Code does not appear to have a conclusive definition of “railroad.”³⁵ TCR is not authorized by the Board; it is simply a recently-established limited liability company that calls itself a railroad. Is this sufficient to commence eminent domain proceedings, thereby invoking one of the most severe powers held by a government – the ability to forcibly seize others’ land? Obviously, the answer is no.³⁶ If and when TCR’s proposed Project is authorized by the Board, then the state eminent domain law must operate without creating an insurmountable barrier for the Project.³⁷ Before that time, though, it is for the Texas courts to decide if a non-railroad entity like TCR can engage in any part of the state eminent domain process.

If and when TCR receives Board authorization for its proposed Project, the extent to which Texas eminent domain law may be “delay[ing]”, “slow[ing] down”, or “threatening the viability of” the Project can be reevaluated.³⁸ At the present moment, however, it is far too soon. Federal preemption only “shields railroad operations that are subject to the Board’s jurisdiction.”³⁹ The requested order from the Board regarding the application of Texas eminent

³⁵ One section of the code comes close to defining “railroad” but the definition itself uses the word “railroad” and, therefore, is not ultimately helpful. Texas Trans. Code § 81.001.

³⁶ Texas law is clear that eminent domain can only be utilized for a public purpose. Texas Rice Land v. Denbury Green Pipeline, 363 S.W.3d at 194.

³⁷ Dakota, Minnesota & Eastern, 236 F.Supp.2d 989, 1006-1009.

³⁸ Petition at 9-10.

³⁹ Tri-State Brick and Stone of New York, Inc. and Tri-State Transportation, Inc. – Petition for Declaratory Order, STB Docket No. 34824, slip op. at 3 (served Aug. 11, 2006). See also Texas Central Business Lines Corp. v. Midlothian, 669 F.3d 525, 530 (5th Cir. 2012); SEA-3, Inc. – Petition for Declaratory Order, STB Docket No. 35853, slip op. at 5 (served Mar. 17, 2015) (for preemption to apply, “the activities at issue must be...performed by...a ‘rail carrier’”).

domain law to the Project cannot be given because TCR has not “obtained Board authority to act as a rail carrier.”⁴⁰

It is for the courts in Texas to decide when eminent domain can, and cannot, be utilized. The Board should decline TCR’s request that the Board inject itself into this complex analysis of state property law. The Board should only become involved **if** the proposed Project is authorized by the Board **and if** Texas courts apply the state’s condemnation laws in a way that would create an insurmountable barrier to the Project.

V. Significant Public Harm Would Result From This Premature Use of Eminent Domain.

A final alignment for the proposed rail line does not exist, environmental review is still ongoing, and the Board has not authorized the Project. At this juncture, eminent domain is markedly premature. All aspects of condemnation, including “phase one” as proposed by TCR, must wait until the final route is selected, environmental review is complete, and Board approval exists. Before all three of these elements exist, serious harms would befall landowners subject to eminent domain proceedings, even just “phase one” of condemnation.

The balance of equities favor denial of the requested clarification. The potential burdens imposed on the landowners far outweigh TCR’s desire to adhere to its self-imposed business plan, especially because the alignment of the Project is not yet known. Landowners could be required to incur substantial legal and other costs and be forced to engage in a formal eminent domain process even though (1) TCR might never obtain regulatory approval for the Project, and/or (2) their land may not even be in the final alignment. Indeed, TCR itself remarkably states that: “Texas Central recognizes that it may acquire property rights in locations not ultimately identified as the final alignment. Texas Central is willing to accept this risk because

⁴⁰ Tri-State, slip op. at 4.

its construction schedule is central to its business model.”⁴¹ TCR’s cavalier attitude toward the potential costs and burdens that it seeks to impose on landowners, even when such landowners’ property may not be included in the final alignment, should not be condoned by the Board.

Under Texas eminent domain law, a taking occurs via “constructive possession” at the end of the administrative valuation process (“phase one”) whenever a condemnor pays the special commissioners’ award into the court registry.⁴² TCR promises not to take “physical” possession of property at the end of the administrative process, but TCR could pay the special commissioners’ award, thus triggering constructive possession and, under Texas law, a taking. For any affected landowner that may have previously leased all or part of its property, the lessee has a right to compensation when a taking occurs.⁴³ This creates the risk that TCR payment of the special commissioners’ award could result in Texas landowners being faced with claims from their lessees for compensation even though TCR has not taken “physical” possession.

Permitting eminent domain to commence when the final alignment is unknown and there is no authorization for the Project would subject landowners to legal fees and other costs and burdens, and a veritable “regulatory limbo” for an unspecified amount of time. When eminent domain is commenced in Texas, a *lis pendens* notice is filed with the county land records for the property sought by the putative condemnor, thereby warning the public of the pending litigation regarding real property rights.⁴⁴ Such a notice prevents disposition of the affected land. If the Board were to grant the requested clarification, thereby allowing TCR to commence eminent domain proceedings, it would adversely affect landowners’ ability to develop, sell, lease, and otherwise use their land due to a looming cloud of uncertainty for more than a year as the Board

⁴¹ Petition at 4 (n. 13), citing Keith V.S. ¶ 6.

⁴² Weingarten Realty Investors v. Albertson’s, Inc., 66 F.Supp.2d 825, 843 (S.D. Tex. 1999).

⁴³ Texas Pig Stands, Inc. v. Krueger, 441 S.W.2d 940, 944 (Tex. Civ. App. 1969).

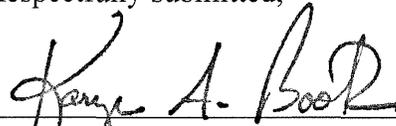
⁴⁴ Texas Prop. Code § 12.007.

and FRA evaluations move forward. For a project that has not yet been imbued with a public purpose, this is a bridge too far.

VI. Conclusion.

For all the reasons described herein, Delta Troy respectfully requests that the Board dismiss the Petition because the Board lacks jurisdiction over the Project. However, should the Board determine that it maintains jurisdiction, then the Petition should be denied on its merits.

Respectfully submitted,



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May 19, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of May 2016, I served a copy of the foregoing upon all parties of record via U.S. first-class mail, postage prepaid.



David E. Benz