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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35724

CALIFORNIA HIGH-SPEED RAIL AUTHORITY
— CONSTRUCTION EXEMPTION —
IN MERCED, MADERA AND FRESNO COUNTIES, CALIFORNIA

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RESPONSE TO PUBLIC COMMENTS AND REPLIES

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Dated: May 17, 2013

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RESPONSE TO PUBLIC COMMENTS AND REPLIES

Pursuant to a Motion for Leave filed simultaneously in this proceeding, California High-Speed Rail Authority (“Authority”) hereby submits this Response to public comments and replies addressing the Authority’s petition for an exemption (“Petition”) pursuant to 49 U.S.C. § 10502 from the formal application requirements of 49 U.S.C. § 10901 for the construction by the Authority of a dedicated high-speed passenger rail line between Merced, CA and Fresno, CA, a distance of approximately 65 miles (the “Project” or the “Merced to Fresno HST Section”).

As discussed below, many commenters have strayed from the essential inquiry in this proceeding – whether the Authority’s Project meets the § 10502 exemption criteria. More specifically, no commenters have established that the Surface Transportation Board (“Board”) must require the Authority to follow the formal application procedures of § 10901 for line construction in order for the Board to carry out the rail transportation policy of 49 U.S.C. § 10101 (“RTP”). In fact, the volume and breadth of public comment, in addition to the ample public record created by the Authority, indicates that the Board can carry out the RTP through this § 10502 exemption proceeding. Under the clear and well-developed standards for exemption set forth in § 10502, the Board should grant the Petition.

I. Application of the Exemption Standard

As set forth in the Petition, under 49 U.S.C. § 10502(a), the Board must exempt¹ the Authority's proposed rail line construction from the formal application procedures of 49 U.S.C. § 10901 if the Board finds that (1) the § 10901 procedures are not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101, and (2) either (a) the construction is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power. Because the second prong of that standard is clearly satisfied, *see* Petition at 13, the Board's inquiry boils down to whether requiring the Authority to file an application under § 10901 is necessary to carry out the RTP. None of the commenters who advocate denying the Petition correctly construe the § 10502 exemption standard.² No commenter has shown that the § 10901 application

¹ Through use of the operative word "shall," § 10502 does not confer permissive authority on the Board to grant exemptions, but rather **requires** the Board to grant an exemption when a petitioner meets the standards set forth therein. *See DesertXpress Enterprises, LLC and DesertXpress HSR Corp.—Construction and Operation Exemption—In Victorville, Cal. and Las Vegas, Nev.*, STB Finance Docket No. 35544, slip op. at 3 (STB served Oct. 25, 2011) ("Under § 10502(a), we **must** exempt a proposed rail line construction from the detailed application procedures of § 10901 when we find that [the § 10502 standards are met]" (emphasis added)).

² For example, Citizens for California High-Speed Rail Accountability ("CCHSRA"), Kings County Water District ("KCWD") and Riverdale Public Utility District ("RPUD") assert that any of the fifteen RTP elements "can give the Board justification to become involved in order to ensure that these policy elements will be promoted and protected." CCHSRA at 8, KCWD-RPUD at 10. Community Coalition on High-Speed Rail ("CC-HSR") contends that "prudence dictates that the Board take the time necessary to conduct a full and fair review of this project to make sure that it is not inconsistent with federal rail policy in any material respect, and that the public interest is adequately protected." CC-HSR at 6. William Descary, Jeff Taylor and the City of Bakersfield allege that "[w]ithout demonstrating how the Authority's high speed rail project will provide passenger service that is more convenient, more competitive, and relatively more affordable than Amtrak service and other modes of travel and demonstrating how the Project will provide revenue to sustain its operations and attract capital, the Authority does not satisfy several components of the RTP," and further that "when the Authority requests that the Board abdicate its responsibility to ensure that the Project satisfies the RTP . . . the Board must deny that Petition and conduct a more detailed evaluation of the Project." Descary Apr. 12 at 2, Taylor Apr. 16 at 2, Bakersfield at 3. Each of these comments misinterprets the legal standard at issue in this proceeding. By

procedures for line construction are necessary to carry out the RTP, and the totality of the comments and the Authority's Petition demonstrates that this § 10502 exemption proceeding has provided ample process through which the Board can carry out the RTP.

All substantive materials that the Authority would otherwise include in a § 10901 application are either publicly available on the Authority's website or already provided by the Authority through its Petition. The Authority is a California state agency that holds public board meetings, and the Project has completed an extensive state and federal environmental review, allowing broad public access to and disclosure of the Project plans and details through environmental analysis documents and other materials available on the Authority's website.³ See Petition at 5-9. The Board has extended the deadline for replies to the Petition for an additional 22 days beyond the standard 20-day period for replies, and has received a number of comments.⁴

Denying the Authority's Petition and requiring the Authority to file a separate application under § 10901 is not only not necessary to carry out the RTP, but would also run directly counter to the RTP directives to minimize regulatory control (§ 10101(2)), reduce regulatory barriers to entry (§ 10101(7)), and expedite proceedings (§ 10101(15)). Requiring the Authority to engage in a needlessly duplicative § 10901 application

contrast, the joint reply filed by various rail unions on May 8 in this proceeding correctly notes that granting the Petition would "not be contrary" to the [RTP] and that, in fact, granting the exemption is consistent with the RTP. See Union Reply at 9-11.

³ The Authority, as a cost-saving measure, plans to improve and modernize its website on May 18, 2013. The website will preserve and contain all the same documents and records as before. Because the website has a new URL, all of the internal links will change. The new website address will be www.hsr.ca.gov. The Final EIR/EIS for the Merced to Fresno HST Section at issue in this proceeding can be found at "Programs" / "Environmental Planning" / "Final EIR/EIS: Merced to Fresno."

⁴ This 42 day commenting period on the Petition is longer than the 35 day commenting period provided by the Board's rules for an application submitted under § 10901. See 49 C.F.R. § 1150.10(g).

process would harm the Authority and the Project by delaying the scheduled start of Project construction of this spring or summer by at least a few months.

A. Policy Element No. 1: Competition and Reasonable Rates

Policy element no. 1 provides that, in regulating the railroad industry, it is the policy of the U.S. Government “to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail.” 49 U.S.C. § 10101(1). CCHSRA, KCWD and RPUD allege that, “[w]ith respect to policy element (1) [], we need to know how future operations on the new line might affect the reasonability of rates or fares charged both on Amtrak and the Authority’s rail road.” CCHSRA at 10, KCWD-RPUD at 11. These factors are not relevant to the instant inquiry. Instead, the Board must determine whether the § 10901 application procedures for line construction are necessary for the Board to carry out the policy to allow for competition and demand for services.

The Board would not gain access to any additional relevant materials relating to competition and demand by requiring the Authority to file a § 10901 application, particularly because the scope of the exemption is limited to construction of a 65-mile rail line upon which no operations can commence until other portions of the Authority’s HST System are completed. As discussed in the Petition at 5 and its Motion at 8, the Authority does not seek operating authority over the Merced to Fresno HST Section at this time because the Authority has not yet developed firm operating plans that are ripe for the Board’s consideration. The Authority will seek operating authority from the Board once its operating plans have progressed further. There are no Board requirements that the Authority seek construction and operating authority concurrently.

B. Policy Elements No. 4 and 5: Competition to Meet Public Needs, Intermodal Coordination

Policy elements no. 4 and 5 provide that, in regulating the railroad industry, it is the policy of the U.S. Government “to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;” and “to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes.” 49 U.S.C. § 10101(4), (5).

CCHSRA, KCWD and RPUD state that “[w]ith respect to policy element (4) [], we also need to know whether the operation of the new rail line will ‘meet the needs of the public.’” CCHSRA at 10, KCWD-RPUD at 11. CC-HSR states that “the Board is charged with examining whether, and to what extent, CHSRA’s proposed rail line and its competitors (including “other modes”) will meet the needs of the public in a way that will foster sound economic conditions in transportation.” CC-HSR at 6. CC-HSR further states that self-driving car technology “will make it extremely difficult for California high-speed rail, as planned, to compete effectively in the critical competition for inter-regional California passengers, predictably resulting in the antithesis of an economically sound rail transportation system based on high-speed rail.” *Id.* at 7.

These commenters incorrectly apply the § 10502 exemption standard at issue here. The Board must determine whether the § 10901 application procedures for line construction authority are necessary for the Board to carry out policy elements no. 4 and 5. The § 10901 application procedures would not provide the Board with any additional relevant information on this issue that is not already in the record of this proceeding or publicly available. The Project would meet the needs of the public, *see* Petition at 10-13,

and the Board has found that new line construction is presumptively in the public interest, *see* Petition at 9-10. Nevertheless, the Authority need not specifically establish in this exemption proceeding any public need for the Project.⁵ Furthermore, the Authority will return to the Board to seek operating authority once the Authority has developed firm operating plans that are ripe for the Board’s consideration, and the Board will consider operational issues at that time.

C. Policy Element No. 8: Public Health & Safety

Policy element no. 8 provides that, in regulating the railroad industry, it is the policy of the U.S. Government “to operate transportation facilities and equipment without detriment to the public health and safety.” 49 U.S.C. § 10101(8). CCHSRA, KCWD and RPUD note that, “[w]ith respect to policy element (8) . . . Corcoran recently closed its only hospital. A person in Corcoran who has no car can presently board Amtrak in Corcoran and . . . get off the station in Hanford only a few hundred yards from the hospital. With the new line by-passing stations in these two towns, how will it affect such persons?” CCHSRA at 10, KCWD-RPUD at 11. CC-HSR argues that the application of policy element no. 8 “to high-speed rail operations must be re-evaluated in light of . . . the terrorist bomb plot against the Canadian train that runs between Toronto and New York, and [] the Boston Marathon terrorist bombing that resulted in

⁵ In *Ill. Central R.R. Co.—Construction and Operation Exemption—In East Baton Rouge Parish, La.*, STB Finance Docket No. 33877 (STB served May 25, 2011), a rail carrier sought a § 10502 exemption from the application requirements of § 10901 for rail line construction. An opponent made a number of informational requests of the petitioner, “based on a belief that [the petitioner] bears a burden of proving a ‘public need’ for its proposed construction . . .” *Id.*, slip op. at 2. The Board correctly held that such requests “are irrelevant to [its] review” because “neither under the exemption criteria of section 10502 nor under the prior approval requirements of section 10901 is there a requirement of a showing of public need for the facilities proposed to be constructed.” *Id.* Similarly here, the Authority need not establish any facts beyond those required to meet the exemption criteria of § 10502.

the shutdown of all Amtrak trains entering or leaving Boston.” CC-HSR at 16. These commenters incorrectly apply the § 10502 exemption standard. The § 10901 application procedures for line construction are not necessary to carry out policy element no. 8, because the Authority and FRA fully analyzed public health and safety issues in their environmental review of this Project, and the Authority does not currently seek operating authority. The Board would not gain any additional relevant materials on this topic by requiring the Authority to undertake a needlessly duplicative § 10901 application for line construction.

D. Policy Element No. 14: Energy Conservation

Policy element no. 14 provides that, in regulating the railroad industry, it is the policy of the U.S. Government “to encourage and promote energy conservation.” 49 U.S.C. § 10101(14). CC-HSR correctly notes that “no one has evaluated the likely energy consumption of California’s high-speed rail system compared to an autonomous self-driving car system.” CC-HSR at 13. However, CC-HSR alleges that “[i]f the comparative advantage favors the self-driving car system, then it would be inconsistent with national rail policy to grant the exemption.” *Id.* at 16. Again, CC-HSR incorrectly applies the § 10502 exemption standard. The § 10901 application procedures are not necessary to carry out the policy to encourage and promote energy conservation because the Authority and FRA fully analyzed this issue in their environmental review of the Project. The Board would not gain any additional relevant materials on this topic by requiring the Authority to submit a § 10901 application for line construction.

E. Private Capital

A number of commenters note the fact that the Authority plans to use public funds, and not private capital, to construct the initial 29-mile segment of the Merced to

Fresno HST Section, and attempt to tie this fact to the § 10502 exemption standard.⁶ However, nothing in the § 10502 exemption statute or the Board’s precedent suggests that the lack of private capital for the construction of a segment of the Merced to Fresno HST Section adds any additional layer of scrutiny to the well-established § 10502 exemption standards. Furthermore, the FRA evaluated the Authority’s proposed HST System through its merit-based, competitive grant program, and awarded more than \$3 billion in federal funds to the Authority – nearly one-third of all funds awarded through this grant program. The Board need only consider whether requiring the Authority to file a § 10901 application is necessary to carry out the RTP.

CC-HSR alleges that without private capital “the underlying premise for the deregulation of rail construction is missing in action.” CC-HSR at 2, citing Vice Chairman Mulvey’s dissent in *Alaska R.R. Corp—Construction and Operation Exemption—Rail Line Between North Pole and Delta Junction, AK*, STB Finance Docket No. 34658, slip op. at 15 (STB served Jan. 6, 2010) (“*Alaska Railroad*”). In *Alaska Railroad*, the Board granted the petitioner an exemption from the § 10901 application requirements, and Vice Chairman Mulvey dissented “in light of opposition from EPA, the [Alaska state environmental agency], and the lack of an adequate, documented purpose and need in support of the project.” *Alaska Railroad*, slip op. at 15.

⁶ For example, Descary and Taylor contend that “the Board is obligated to ensure that [federal] funds are utilized in a way that strengthens California’s transportation plan in accordance with Section 10101.” Descary Apr. 12 at 3, Taylor Apr. 16 at 3. Carol Bender writes that “Because this project is so different from the privately funded projects typically reviewed by the Board, the STB needs to undertake a thorough evaluation of the proposed project, to make sure that it will, in fact, conform to the national policies set out in Subsections (4) and (5) of Section 10101.” Bender at 1.

The *Alaska Railroad* project is distinguishable from the Authority's Project. In *Alaska Railroad*, the project had not undergone environmental review prior to the railroad petitioning the Board for an exemption of the § 10901 application procedures, and the opposing agencies cited by Vice Chairman Mulvey raised issues with the final environmental analysis. Here, the Authority and FRA have already completed an extensive environmental review for the Project, and the Board's Office of Environmental Analysis has recommended that the Board adopt this review. In addition, construction of the Merced to Fresno HST Section would further the RTP and is consistent with the public interest. *See* Petition at 10-13. The rail line will "link California's population centers without expanding airports and highways, improve mobility, help the environment, reduce energy dependency, and create hundreds of thousands of jobs." Gov. Brown Letter, May 7 at 1; *see also* Sen. Boxer and Sen. Feinstein Letter, May 15 ("This project . . . has the potential to transform California's transportation system, enhance urban and rural community development, spur economic growth, and foster job creation throughout the state.").

II. Geographic Scope and Segmentation

A number of commenters have raised questions about the geographic scope of the Petition.⁷ In its Petition, the Authority clearly described the scope of its planned 800-mile HST System, the segmenting of the HST System into nine distinct HST Sections for environmental review purposes, the extent of the 65-mile Merced to Fresno HST Section that is the subject of this proceeding, and the Authority's plans for the construction of an

initial 29-mile segment of the Merced to Fresno HST Section. Petition at 3-4. However, for the avoidance of any possible doubt, the Authority affirms here that it seeks construction authority for the Merced to Fresno HST Section, as studied and approved in the Final EIR/EIS and the Federal Railroad Administration’s (“FRA”) Record of Decision for the Project (attached as Exhibit B to the Petition).

Certain commenters make unsupported allegations that the Authority improperly segmented its HST System for the purposes of obtaining Board authority. Protect Our Heritage (“Heritage”) alleges that “[t]o view the Project in isolation would be akin to the concept of improper ‘project chopping’ or ‘segmentation’ of the overall project – CEQA and NEPA terminology for the improper, and illegal, piecemealing of environmental review in order to conceal a project’s true environmental impacts.” Heritage at 5.⁸

Heritage cites no Board authority for this proposition and concedes that point by using the phrase “akin to” in an attempt to analogize environmental laws to the Board’s authority over rail line construction. In fact, the Board has no rules prohibiting the segmenting of rail projects for construction or operation authority, nor even suggesting anything improper about the Authority’s approach to segmenting its HST System for Board authority purposes. To the contrary, the Authority correctly and prudently limits the scope of the rail line at issue in this proceeding to that portion of the HST System that has been environmentally analyzed and approved.

⁷ See CCHSRA at 3, KCWD-RPUD at 3-4 (“Authority’s construction of the ICS will not begin in Merced and it will carry on no construction whatsoever in Merced County”); CCHSRA at 7, KCWD-RPUD at 8 (“The Authority misdescribes the Project throughout as the ‘Merced to Fresno’ segment”); CCHSRA at 18-19, KCWD-RPUD at 24 (discussing the environmental review status of other sections of the HST System that are not the subject of this Petition).

⁸ See also CCHSRA at 4, KCWD-RPUD at 5 (“The Petition . . . is an improper segmentation or piecemealing of Board oversight over the entire HSR system that the Authority purports to plan to build. It is as if the Authority is seeking to escape Board review and oversight.”).

Certain commenters also criticize the Authority for not seeking operating authority over the Merced to Fresno HST Section through its Petition.⁹ As discussed in the Petition at 5 and its Motion at 8, the Authority does not seek operating authority over the Merced to Fresno HST Section at this time because the Authority has not yet developed firm operating plans that are ripe for the Board’s consideration. If the Authority had sought operating authority based upon what it knows today about its possible operating plan, the same parties very likely would argue that it was insufficient information upon which to grant operation authority. The Authority will seek operating authority from the Board once its operating plans have progressed further. There are no Board requirements that the Authority seek construction and operating authority concurrently.

In a separate expression to the April 18 Board decision in this proceeding, Vice Chairman Begeman stated that “it is unfortunate that the Authority didn’t come to the Board in a more timely manner than it did.” The Authority acknowledges this concern, and respectfully suggests that the Project is now ripe for the Board’s review given that environmental review is complete and the alignment decisions have been made. Additionally, as set forth in the Petition at 5 and the Authority’s Motion to Dismiss at 8, the Authority will return to the Board to obtain construction authority for the additional Sections of the HST System when the Authority has finalized alignment and completed the environmental review process for those Sections. The issue now before the Board is whether requiring the Authority to file an application under § 10901 in connection with

⁹ See CCHSRA at 11, KCWD-RPUD at 12 (“[the Authority’s explanation for not seeking operating authority] is an astonishing declaration, and it is difficult to know what to make of it.”).

construction of the Project is necessary to carry out the RTP. The Authority believes that such a filing is not necessary.

III. Unresolved but Unrelated Issues

Certain commenters correctly note that the Authority has not resolved all outstanding issues related to the construction and operation of its HST System. These issues range from compliance with FRA grant agreement terms to pending state court litigation. *See* CCHSRA at 11-17 & 19-20, KCWD-RPUD at 12-19 & 24-26, Heritage at 4-5. Because the Board's construction authority is permissive, the Authority need not resolve all of these issues prior to seeking the Board's construction authority.

KCWD and RPUD also noted that the Authority's bid evaluation process evolved during its procurement for design-build services for the initial segment of the Merced to Fresno HST Section, but did not even attempt to tie this discussion to the § 10502 exemption standards at issue in this proceeding – likely because these facts are clearly irrelevant to determining whether a § 10901 application is necessary to carry out the RTP. *See* KCWD-RPUD at 19-23. Regardless, the Authority's procurement complies with all applicable state and federal laws.

IV. CONCLUSION

No commenters seeking denial of the Petition have shown any basis for denying the Petition, and the Authority and commenters supporting the Petition have provided sufficient support to satisfy the clear and well-developed standards for exemption set forth in § 10502. The Board should grant the Petition. The § 10901 application procedures are not necessary to carry out the RTP; in fact, granting the Petition would further the RTP.

Respectfully submitted,

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Dated: May 17, 2013

CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2013, I served the foregoing **Response to Public Comments and Replies** upon the following parties of record in this proceeding:

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