

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33824

GREAT SALT LAKE AND SOUTHERN RAILROAD, L.L.C.—CONSTRUCTION  
AND OPERATION—IN TOOELE COUNTY, UT

Decided: December 13, 2000

On January 5, 2000, Great Salt Lake and Southern Railroad Company, L.L.C. (GSLS or applicant), a noncarrier, filed an application under 49 U.S.C. 10901 for authority to construct and operate one of two rail projects. The first is a 32-mile rail line between Low, UT, and a storage facility to be built in Skull Valley, UT. The second is a “run-around” track<sup>1</sup> and sidings to be built approximately 1.8 miles west of Timpie, UT. Applicant’s parent, Private Fuel Storage L.L.C. (PFS),<sup>2</sup> proposes to construct a facility for the interim storage of spent nuclear fuel (SNF) in the south-central portion of Skull Valley, UT. The run-around track, if built, would be constructed as part of an intermodal transfer complex to be built west of Timpie. There, GSLS would transfer SNF shipping casks from arriving rail cars to heavy haul trucks for carriage by road to the storage facility.<sup>3</sup>

GSLS states that PFS has applied to the Nuclear Regulatory Commission (NRC) for authority to construct and operate the storage facility. Construction of the proposed rail projects

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<sup>1</sup> A run-around track is a configuration that allows a locomotive to reverse its position with respect to a trailing or leading car or locomotive by running around it.

<sup>2</sup> PFS, formed in 1995, is owned in equal shares by eight electric utilities: Consolidated Edison Company of New York; Genoa Fuel Tech, Inc. (owned by Dairyland Power Cooperative); GPU Nuclear, Inc.; Illinois Power Company; Indiana Michigan Power Company; Northern States Power Company; Southern California Edison Company; and Southern Nuclear Operating Company, Inc.

<sup>3</sup> Because this second alternative would allow GSLS to serve a new market, it is an extension into new territory and is subject to our regulation under 49 U.S.C. 10901. See Detroit/Wayne County Port Authority v. ICC, 59 F.3d 1314, 1316 (D.C. Cir. 1995); Brotherhood of Locomotive Engineers v. United States, 101 F.3d 718, 728 (D.C. Cir. 1996), citing Texas & Pacific Ry. v. Gulf Colorado & Santa Fe Ry., 270 U.S. 266 (1926). Also, because the track construction would constitute GSLS’s entire line, we would not treat it as a spur exempt from our section 10901 jurisdiction under 49 U.S.C. 10906. See UTU v. STB, 183 F.3d 606 (7th Cir. 1999)

would not begin until the NRC issues a license approving the PFS facility.<sup>4</sup> Although it says that it has not yet finally determined which of the two proposed rail projects it would pursue to access the proposed storage facility, GSLS states that it prefers the direct rail option because it would permit efficiencies associated with rail-only movements.

Applicant indicates that substantially all of the traffic moving to the storage facility would be SNF originating at various commercial nuclear power electric generating plants throughout the United States.<sup>5</sup> The SNF would be transported to either Low or Timpie via the Union Pacific Railroad Company (UP) rail line west of Salt Lake City, UT.<sup>6</sup> GSLS projects construction costs of between \$20 million and \$35 million for the direct rail option and construction costs of \$6 million for the intermodal transfer option.

GSLS states that the proposed PFS storage facility is urgently needed. Many reactor sites lack sufficient storage capacity for SNF. Applicant says that the canister-based storage system that would be used at the facility would facilitate the subsequent transportation of SNF from the facility to a permanent repository to be developed by the Department of Energy (DOE).<sup>7</sup>

Applicant claims that the public benefits flowing from construction and operation of the PFS facility would not be realized if an efficient and safe means of providing transportation to the facility cannot be implemented. GSLS points to other potential public benefits from the construction and operation of the rail projects. These include lease payments to the Skull Valley Band of Goshute Indians (the owners of the land where the storage facility would be located), jobs for local residents, and local procurement of building materials and supplies.

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<sup>4</sup> Applicant applied for an NRC license in June 1997. That application remains pending. GSLS estimates that the NRC license will be issued in early 2002.

<sup>5</sup> The PFS storage facility will also be used by reactors that have reached the end of their operating lives and require off-site storage of SNF to complete their decommissioning process.

<sup>6</sup> Applicant states that it might contract with UP for UP to operate trains over the GSLS line. If this occurs, GSLS indicates that it will seek appropriate authority from the Board.

<sup>7</sup> The total design capacity of the PFS facility would be 4,000 canisters of SNF. GSLS notes that DOE has a statutory responsibility to develop a geologic repository program for SNF, and was directed to begin to dispose of SNF generated by the nation's commercial nuclear power plants by January 31, 1998. GSLS states, however, that DOE is not likely to actually implement such a program for another decade. Applicant maintains that the nuclear power industry thus has no alternative but to build and operate its own interim storage facility, where SNF could be stored for up to 40 years.

By notice served on January 19, 2000, and published in the Federal Register on the same day (65 FR 3005-06), we announced the filing of GSLS's application. We requested public comments by February 9, 2000. We received comments in support of the application from United States Senator Rod Grams; the Tooele County Commission; the Skull Valley Band of Goshute Indians; Consolidated Edison Company of New York Inc.; Dairyland Power Cooperative; GPU Nuclear, Inc.; Illinois Power Company; Northern States Power Company; Southern California Edison Company; and Southern Nuclear Operating Company, Inc.<sup>8</sup> We received comments opposing the application from Cargill Incorporated Salt Division (Cargill) and from the State of Utah Department of Transportation (Utah).

Cargill owns and operates a salt processing plant at Timpie Point, UT, near applicant's proposed rail construction project. Cargill opposes the construction application because of concerns that GSLS's transportation and storage of hazardous commodities could stigmatize the quality of Cargill's salt products and could also harm Cargill's ability to attract and retain employees. Cargill also contends that a derailment or spill of SNF would endanger the safety of its employees and affect recreational and commercial use of the Great Salt Lake.

Utah expresses serious environmental and safety concerns with applicant's proposal to transport and store hazardous SNF within the State. Utah argues that the Board should not consider GSLS's rail construction application until the environmental review process is completed. In supplemental comments filed February 29, 2000, the Utah Office of Attorney General notes that the State is challenging the financial qualifications of applicant's parent (PFS) in proceedings before the NRC.<sup>9</sup> Utah maintains that, because GSLS has no assets and is relying on PFS to provide its financial backing, GSLS has failed to satisfy the public interest standard of section 10901(c).

In reply, GSLS notes that the only two parties opposing the application, Utah and Cargill, do not raise transportation-related issues. GSLS submits that the concerns raised by these parties regarding environmental and safety issues can be fully addressed in the ongoing environmental review of the proposal. In response to Utah's financial fitness claims, applicant argues that the

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<sup>8</sup> As previously indicated, the listed electric utility companies are owners in equal shares of GSLS's parent, PFS. They state that they strongly support GSLS's application because of their urgent need to transport and store SNF in a safe and efficient manner.

<sup>9</sup> In reply to Utah's supplemental comments, GSLS maintains that these comments should be stricken because they are out of time (comments were due on or before February 9, 2000) or, alternatively, because they are an impermissible reply to a reply. We will accept Utah's supplemental comments in the interest of developing a full record. GSLS will not be prejudiced by this because it responded to Utah's supplemental comments, and we have considered this response.

purpose of the financial fitness test in section 10901 is not to protect the applicant carrier or its investors, but rather to protect existing shippers from loss or diminution of service from improvident expenditures. GSLS maintains that the test has little, if any, application to a new railroad without existing shippers, such as itself.

GSLS asks that we follow a practice established in recent rail construction cases. There, we have typically issued preliminary decisions addressing the issue of whether the rail construction application satisfies the transportation-related requirements of 49 U.S.C. 10901. Subsequently, we have issued decisions encompassing all aspects of the rail project after completion of the environmental review process. GSLS emphasizes that no construction could begin until our final decision has been issued and has become effective.

The Board, through its Section of Environmental Analysis (SEA), is currently participating as a cooperating agency<sup>10</sup> in an environmental review of GSLS's application. The NRC is the lead agency—primarily responsible for environmental review—because it must rule on PFS's application to construct and operate the SNF storage facility. A Draft Environmental Impact Statement (DEIS) evaluating the environmental effects of the PFS proposal, including the construction and operation of the GSLS rail projects, was issued in June 2000. SEA participated in the preparation of the DEIS and will be involved in the preparation of a Final Environmental Impact Statement reflecting the comments on the DEIS. The Board will then review the entire environmental record in making its final decision regarding the proposed rail construction projects.

## DISCUSSION AND CONCLUSIONS

This construction and operation application<sup>11</sup> is governed by 49 U.S.C. 10901(c), which specifies that:

(c) The Board shall issue a certificate authorizing activities for which such authority is requested in an application filed under subsection (b) unless the Board finds that such activities are inconsistent with the public convenience and necessity . . . .

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<sup>10</sup> The Bureau of Land Management (BLM) and the Bureau of Indian Affairs of the United States Department of Interior are also participating in the environmental review as cooperating agencies. The former is focusing on PFS's applications for use of certain BLM-managed land for transportation purposes. The latter is examining the leasing of certain land on the Skull Valley Indian Reservation.

<sup>11</sup> Our discussion here is applicable to both of the alternative rail construction proposals.

As we recently noted in Dakota, Minnesota & Eastern R.R. Construction into the Powder River Basin, STB Finance Docket No. 33407 (STB served Dec. 10, 1998), slip op. at 17 (DM&E), in enacting the ICC Termination Act of 1995, Congress intended to facilitate rail construction. Congress did so by changing the statutory standard from requiring approval if the agency finds that a project is consistent with the public convenience and necessity (PC&N) to requiring approval unless the agency finds that the project is inconsistent with the PC&N. Under this new standard, “proposed rail construction projects are to be given the benefit of the doubt.” Id. In reviewing construction proposals, we examine whether: (1) the applicant is financially fit to undertake the construction and provide service; (2) there is a public demand or need for the proposed service; and (3) the construction project is in the public interest and will not unduly harm existing services. Id. at 15-16; Tongue River RR Co.—Const. & Oper.—Ashland-Decker, MT, 1 S.T.B. 809, 826 (1996) (Tongue River).

Preliminary Decision. Utah argues that we should not issue a preliminary decision considering whether GSLS’s application satisfies the transportation-related aspects of 49 U.S.C. 10901 until the environmental review process is completed. As GSLS notes, however, we have consistently handled construction applications and exemptions by first considering the transportation issues, and later addressing environmental issues.<sup>12</sup> This approach does not diminish our capacity to consider environmental matters when we issue a final decision following the completion of environmental review and, if warranted, make our grant of rail construction authority effective at that time. See Illinois Commerce Com’n v. ICC, 848 F.2d 1246, 1259 (D.C. Cir. 1988), cert. denied, 488 U.S. 1004 (1989); Missouri Mining Inc. v. ICC, 33 F.3d 980 (8th Cir. 1994). Because no construction may begin until our final decision has been issued and has become effective, all environmental matters raised in this proceeding will be fully considered.<sup>13</sup> In these circumstances, Utah has failed to demonstrate that we should not make a finding at this point, based on the information available to date, as to whether GSLS’s rail construction projects satisfy the transportation aspects of section 10901.

Cargill opposes the application based primarily on safety concerns, both for its products and for its employees. These concerns, to the extent appropriate, will be dealt with as part of the environmental review process. See DM&E, at 46, n. 102 and 103. Accordingly, there is no reason for us to delay issuance of this decision. We now turn to our evaluation of the evidence presented to date on the transportation merits of this rail construction proceeding.

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<sup>12</sup> See, e.g., DM&E; Southern Electric R.R.—Construction & Operation Exemption—West Jefferson, AL, STB Finance Docket No. 33387 (STB served July 16, 1997, and Nov. 3, 1997).

<sup>13</sup> Moreover, we note that in this case no construction of either rail project would begin until the NRC issues a license approving the PFS storage facility.

Financial Fitness. In assessing the financial viability of the proposal to construct and operate a rail line, we consider both the resources that would be required to build the line and those needed to then maintain and operate the line. We will address each here.

The purpose of the test of the financial ability of the applicant to construct the proposed rail line is not to protect the carrier or its investors. Rather, it is to “protect existing shippers from a carrier’s proposed actions that could have an adverse impact on the carrier’s ability to continue to serve those shippers without detriment to either service or rates.” DM&E, at 18. Accord Tongue River, 1 S.T.B. at 829 (with no current shippers to be adversely affected, we leave it to the “financial market itself” to “ultimately determine if the project is economically viable”). Thus, we agree with GSLS that because it is a new railroad without existing shippers, the financial fitness test has little, if any, bearing on the GSLS rail construction application.

GSLS has submitted the cost and financial information required by our rules, to demonstrate its financial fitness to maintain and operate the line once it is built.<sup>14</sup> The evidence shows the costs of the proposed alternative projects as well as their construction financing and projected financial performance. This evidence indicates that rail line operations would be financed by several mechanisms. These include equity contributions from the utility owners of PFS and also pre-shipment customer payments and annual storage fee payments pursuant to service agreements. The prior payments required by these service agreements, GSLS claims, provide appropriate assurance that funding for ongoing expenses will be obtained. GSLS states that the revenues it expects to receive from providing rail service would exceed the costs of the proposed alternative rail construction projects.<sup>15</sup> There is no evidence in the record directly challenging GSLS’s cost and financial information. We find, based on our experience with other rail construction projects, that the cost and the financial figures used by GSLS are reasonable.

In proceedings before the NRC, Utah has challenged the financial fitness of applicant’s parent, PFS, to build and operate the proposed storage facility. Because PFS will provide GSLS with financial backing, Utah argues that applicant has failed to satisfy the financial fitness standard in 49 U.S.C. 10901(c). As mentioned above, it is up to the NRC, and not the Board, to

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<sup>14</sup> Cf. Ozark Mountain Railroad—Construction Exemption, ICC Docket No. 32204 (ICC served Dec. 15, 1994) (revoking a conditional exemption for a \$300 million rail construction project where entity seeking authority to construct failed to submit the financial information required by the agency for applications to construct rail lines under 49 U.S.C. 10901); (ICC served Sept. 25, 1995) (denying petition to reopen).

<sup>15</sup> Even though our rules require net income to be projected only for the first 2 years following construction, GSLS submitted projections of operating income and expense for 4 years to provide a more detailed presentation of its expected financial performance. See Application, Vol. 2, V.S. Whitehurst.

determine whether or not the storage facility should be built and whether it would be cost-effective. If the storage facility is not approved by the NRC, or not built even if approved, the proposed rail line would not be built. Utah has not shown, based on the information available to date, that GSLS is not financially fit to build the line and to maintain and operate the line once it is built.

Public Demand or Need/Public Interest and No Harm To Existing Services. No one challenges the second or third part of the three-part test for public convenience and necessity. Moreover, as GSLS notes in its application, the nuclear power industry claims that there is an urgent need to build and operate its own transportation and storage facilities for the interim storage of SNF because it is unlikely that DOE will develop a permanent repository in the near future. GSLS has shown that the rail construction project before us is needed to access the proposed PFS facility. Other public benefits would result from the construction and operation of the proposed rail project, including payments to the Skull Valley Reservation, jobs for local residents, and local procurement of materials and supplies. Finally, because this is a new facility and service, the issue of whether the proposed operation would harm existing rail services is not applicable here.

#### CONCLUSION

We find, based on the present record, that the construction and operation of either of the lines of railroad described above satisfies the transportation aspects of 49 U.S.C. 10901. Following the conclusion of the ongoing environmental review process, we will issue a further decision assessing the potential environmental impacts of the proposal. This decision does not in any way prejudice our ultimate decision. Construction may not begin until our final decision in this proceeding has been issued and becomes effective.

As conditioned, this action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Subject to our further consideration of the anticipated environmental impacts of the proposals, GSLS's application to construct and operate either of the above-described lines is granted.
2. After completion of the environmental review, we will issue a further decision addressing those matters and making our grant of authority effective at that time, if appropriate.

3. This decision is effective on January 14, 2001.
4. Petitions to reopen must be filed by January 4, 2001.

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.

Vernon A. Williams  
Secretary