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SUBMITTED BY ELECTRONIC FILING

237088

November 19, 2014

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street SW
Washington, DC 20423

ENTERED
Office of Proceedings
November 20, 2014
Part of
Public Record

RE: STB Finance Docket No. 35861, California High-Speed Rail Authority –
Petition for Declaratory Order.

Dear Ms. Brown:

Please find attached hereto for filing in the above-referenced docket the Opposition to Motion for Leave to Reply or, in the Alternative, Motion for Leave to File Surreply, and Certificate of Service submitted by Interveners Community Coalition on High-Speed Rail, Transportation Solutions Defense and Education Fund, and California Rail Foundation.

If you have any questions about this submission, please contact me.

Most sincerely,



Stuart M. Flashman
Attorney for Interveners Community
Coalition on High-Speed Rail,
Transportation Solutions Defense and
Education Fund, and California Rail
Foundation

**SURFACE TRANSPORTATION BOARD
FINANCE DOCKET NO. 35861**

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35861

**CALIFORNIA HIGH-SPEED RAIL AUTHORITY
PETITION FOR DECLARATORY ORDER**

**OPPOSITION OF COMMUNITY COALITION ON HIGH-SPEED RAIL,
TRANSPORTATION SOLUTIONS DEFENSE AND EDUCATION FUND,
AND CALIFORNIA RAIL FOUNDATION TO MOTION OF CALIFORNIA
HIGH-SPEED RAIL AUTHORITY FOR LEAVE TO REPLY OR, IN THE
ALTERNATIVE, MOTION FOR LEAVE TO FILE SURREPLY ON NEWLY
RAISED ISSUES**

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Counsel for Interveners Community
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Transportation Solutions Defense and
Education Fund, and California Rail
Foundation

Dated: November 19, 2014

**SURFACE TRANSPORTATION BOARD
FINANCE DOCKET NO. 35861**

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35861

**CALIFORNIA HIGH-SPEED RAIL AUTHORITY
PETITION FOR DECLARATORY ORDER**

I. OPPOSITION TO MOTION FOR LEAVE TO REPLY

Community Coalition on High-Speed Rail (“CC-HSR”), Transportation Solutions Defense and Education Fund (“TRANSDEF”), and California Rail Foundations (“CRF”, and the foregoing, collectively, “Intervenors”) submit this Opposition to the Motion for Leave to Reply filed by the California High-Speed Rail Authority (“CHSRA”) on October 18, 2014.

A. LEAVE TO REPLY SHOULD BE DENIED BECAUSE CHSRA’S SURREPLY WILL PREJUDICE INTERVENERS.

In its motion for leave to file reply, CHSRA specifically asserts that granting leave will not prejudice any party. (CHSRA Motion for Leave to Reply and Reply [“Surreply”]¹ at p. 3.) This is false. As CHSRA notes, STB regulations prohibit a “reply to a reply,” citing 49 C.F.R. §1104.13(c). (CHSRA Motion at p.3.) This is for good reason. Allowing a petitioner to file a surreply allows it to raise new issues without an opportunity for opposing parties to respond. Further, it allows a petitioner to reiterate and expand on previously-raised points and essentially get a “second bite at the apple.”

¹ While CHSRA denominates its submission a “reply” it is more accurately designated as a surreply.

**SURFACE TRANSPORTATION BOARD
FINANCE DOCKET NO. 35861**

CHSRA's motion and the accompanying proposed surreply show the wisdom of prohibiting such surreplies.

*1. CHSRA'S SURREPLY RAISES NEW ISSUES THAT INTERVENERS
HAVE NOT BEEN ALLOWED TO RESPOND TO.*

Rather than just respond to the oppositions filed against its petition, CHSRA uses its proposed Surreply to raise new issues not previously addressed in its petition. Thus, the Surreply claims that CHSRA's petition is ripe for determination because CHSRA has made formal written offers to owners of 89 out of 536 parcels required in the Fresno to Bakersfield segment. (Surreply at p.6.) Interveners (and others opposing the petition) deserve the opportunity to comment on the significance (or lack thereof) of this newly submitted fact in terms of indicating whether construction is likely to begin shortly, making a motion for preliminary injunction plausible, or not.

Similarly, on the legal side, CHSRA uses its Surreply to raise, for the first time, the argument that any commitment to CEQA review made in Proposition 1A was not a voluntary commitment, but an attempt to apply state regulation to the high-speed rail project in violation of the ICCTA's preemption clause. (Surreply at p. 23.) Again, accepting the Surreply would deprive Interveners and other opponents of the Petition of the opportunity to respond to this newly-raised issue, as, for example, by pointing out that under the standards set for application of the market participant exception, application of a specific requirement to a single

**SURFACE TRANSPORTATION BOARD
FINANCE DOCKET NO. 35861**

specific project of the state itself does not constitute an attempt to assert state regulation of the interstate rail network.

2. *CHSRA'S SURREPLY IMPERMISSIBLY REARGUES POINTS
MADE IN ITS PETITION.*

It is worth noting that CHSRA's Petition was seventeen pages in length, including an introduction and two pages of background information. CHSRA's Surreply is twenty-six pages, more than fifty percent longer. Much of the CHSRA's Surreply is spent in rearguing and expanding upon points it had already presented in its Petition. As 49 C.F.R. §1104.13(c) makes clear, this is not a court proceeding where a petitioner is entitled to file a reply brief to respond to opposition and expand on its initial argument. The Board's procedural rules are meant, in the interest of achieving a prompt resolution, to encourage those involved to present their argument fully in their initial filing. Such flouting of the Board's explicit regulations should not be countenanced, especially when CHSRA itself has emphasized the urgency of a quick decision.

**B. CHSRA'S MOTION SHOULD BE DENIED BECAUSE THE
SURREPLY WILL DELAY THE BOARD'S DETERMINATION OF
CHSRA'S PETITION.**

Accepting CHSRA's Surreply must, in the interest of fairness, allow the opportunity for other parties to this proceeding to submit their comments on the newly-raised factual and legal issues. This will delay the Board being able to reach its determination. CHSRA cannot have it both ways. Either time is of the

**SURFACE TRANSPORTATION BOARD
FINANCE DOCKET NO. 35861**

essence, in which case the Surreply should not have been submitted and should be rejected, or an additional period to provide responses must be provided.

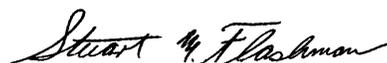
II. MOTION FOR LEAVE TO FILE SURREPLY

As explained above, acceptance of CHSRA's Surreply will prejudice Interveners, and other parties opposing CHSRA's Petition, by depriving them of the opportunity to respond to the new factual and legal issues that CHSRA raises in its Surreply. . (See, e.g., *Ballard Terminal Railroad Company, L.L.C. – Acquisition and Operation Exemption – Woodinville Subdivision* (FD 35731) decision service date January 15, 2014 at p.3 [reply of Ballard terminal Railroad Company constituted a supplement to its petitions, justifying the filing of surreply by opponents of the petition].)

Consequently, if the Board is inclined to accept CHSRA's Surreply, Interveners respectfully request that, in the interest of fairness and of having a complete record before it when it makes its determination, the Board also grant Interveners, and other participants in this proceeding, ten days in which to file a Surreply responding specifically to the new issues raised in CHSRA's Surreply.

Dated: November 19, 2014

Respectfully submitted,



Stuart M Flashman
Attorney for Interveners Community Coalition
on High-Speed Rail, Transportation Solutions
Defense and Education Fund, and California
Rail Foundation

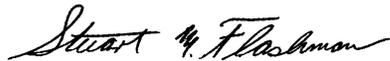
**SURFACE TRANSPORTATION BOARD
FINANCE DOCKET NO. 35861**

VERIFICATION

I, Stuart M. Flashman, verify under penalty of perjury that the factual statements made in the foregoing Petition for Leave to Intervene are true and correct, to the best of my knowledge, information, and belief.

Further, I certify that I am qualified and authorized to file this verification.

Executed on November 19, 2014

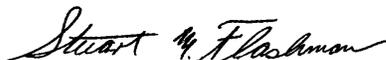
A handwritten signature in cursive script that reads "Stuart M. Flashman".

Stuart M. Flashman
Attorney for Intervenors Community
Coalition on High-Speed Rail, Transportation
Solutions Defense and Education Fund, and
California Rail Foundation

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Opposition to Motion for Leave to Reply and Motion for Leave to File Surreply was served on the 19th day of November by e-mail or first class mail, postage prepaid, (as noted) on the following parties:

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Stuart M. Flashman