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March 27, 2014
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March 27, 2013

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

Re: STB Finance Docket No. 35724 Sub No. 1, California High-Speed Rail Authority—Construction Exemption—In Fresno, Kings, Tulare, and Kern Counties, California

Dear Ms. Brown:

Enclosed for filing in the above-referenced docket, please find California High-Speed Rail Authority's (i) Motion for Leave to File a Reply to Public Comments and (ii) Reply to Public Comments.

Respectfully submitted,

A handwritten signature in cursive script that reads 'Linda J. Morgan'.

Linda J. Morgan
Attorney for California High-Speed Rail Authority

Enclosures
cc: Parties of Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35724 (SUB-NO. 1)

CALIFORNIA HIGH-SPEED RAIL AUTHORITY
— CONSTRUCTION EXEMPTION —
IN FRESNO, KINGS, TULARE, AND KERN COUNTIES, CALIFORNIA

MOTION FOR LEAVE TO FILE A REPLY TO PUBLIC COMMENTS

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Dated: March 27, 2014

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35724 (SUB-NO. 1)

CALIFORNIA HIGH-SPEED RAIL AUTHORITY
— CONSTRUCTION EXEMPTION —
IN FRESNO, KINGS, TULARE, AND KERN COUNTIES, CALIFORNIA

MOTION FOR LEAVE TO FILE A REPLY TO PUBLIC COMMENTS

California High-Speed Rail Authority (“Authority”) hereby files this Motion for Leave to File a Reply to the Public Comments filed in the above-referenced docket.

By petition filed on September 26, 2013, the Authority seeks an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10901 for authority to construct an approximately 114-mile high-speed passenger rail line between Fresno and Bakersfield, CA (the “Fresno to Bakersfield Section”).

In a decision served December 4, 2013, the Board instituted a proceeding and extended the deadline for replies to the Petition to December 24, 2013.¹ In a decision served February 4, 2014, the Board extended the reply deadline to March 7, 2014.²

Numerous Commenters express opposition to the California HST System for a variety of reasons. The Authority’s Reply to the opposition comments is attached hereto.

The Board’s rules prohibit a “reply to a reply.” 49 C.F.R. § 1104.13(c). However, the Board’s acceptance of the attached Reply to Public Comments will ensure that it has

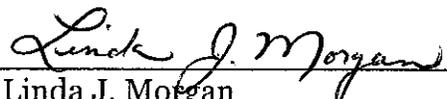
¹ *Cal. High-Speed Rail Auth. – Construction Exemption – In Fresno, Kings, Tulare, and Kern Counties, Cal.*, STB Finance Docket No. 35724 (Sub-No 1) (STB served December 4, 2013).

² *Cal. High-Speed Rail Auth. – Construction Exemption – In Fresno, Kings, Tulare, and Kern Counties, Cal.*, STB Finance Docket No. 35724 (Sub-No 1) (STB served February 4, 2014).

a complete record in this proceeding. *Cal. High-Speed Rail Auth. – Construction Exemption – In Merced, Madera and Fresno Counties, Cal.*, STB Finance Docket No. 35724 (STB served June 13, 2013); *Sierra Pacific Indus. - Abandonment Exemption in Amador County, CA*, STB Docket No. AB-512X (STB served February 25, 2005).

For the foregoing reasons, the Authority respectfully requests that the Board accept and consider the attached Reply to Public Comments.

Respectfully submitted,

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Dated: March 27, 2014

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REPLY TO PUBLIC COMMENTS

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CALIFORNIA HIGH-SPEED RAIL AUTHORITY
— CONSTRUCTION EXEMPTION —
IN FRESNO, KINGS, TULARE, AND KERN COUNTIES, CALIFORNIA

REPLY TO PUBLIC COMMENTS

By petition filed on September 26, 2013, California High-Speed Rail Authority (“Authority”)¹ seeks an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10901 for authority to construct an approximately 114-mile high-speed passenger rail line between Fresno and Bakersfield, CA (the “Fresno to Bakersfield Section”). The Fresno to Bakersfield Section is the second of nine sections of the planned California High-Speed Train System (“HST System”).²

In a decision served December 4, 2013, the Board instituted a proceeding and extended the deadline for replies to the petition to December 24, 2013.³ The Board said “[s]uch replies should address the *transportation merits of the petition.*” *Id.* at 3. (emphasis added). In a decision served February 4, 2014,⁴ the Board extended the reply

¹ The Authority is a state agency formed and organized under the laws of the State of California in 1996, and has responsibility for planning, designing, constructing, and operating the HST System.

² The Board has determined that it has jurisdiction over the construction of the HST System and has authorized construction of the Merced to Fresno Section. *Cal. High-Speed Rail Auth.—Construction Exemption—In Merced, Madera and Fresno Counties, Cal.*, STB Finance Docket No. 35724 (STB served June 13, 2013) (“*Merced to Fresno Decision*”).

³ *Cal. High-Speed Rail Auth.—Construction Exemption—In Fresno, Kings, Tulare, and Kern Counties, Cal.*, STB Finance Docket No. 35724 (Sub-No 1) (STB served December 4, 2013).

⁴ *Cal. High-Speed Rail Auth.—Construction Exemption—In Fresno, Kings, Tulare, and Kern Counties, Cal.*, STB Finance Docket No. 35724 (Sub-No 1) (STB served February 4, 2014).

deadline, saying “[t]he deadline for comments on the *transportation merits of the proposed Fresno-to-Bakersfield Line construction* will be extended to March 7, 2014.” *Id.* at 2 (*emphasis added.*)

Numerous Commenters express opposition to the California HST System because there is no committed funding in place for the construction of the entire 800-mile system or segments of the system other than the Fresno to Bakersfield Section. Numerous Commenters raise environmental and land use issues. Several Commenters raise operating issues and a few express concerns about the impact of the HST System on current Amtrak riders.

A few Commenters raise the same arguments about improper segmentation that were made in the Merced to Fresno proceeding. Likewise, several Commenters argue that the Board should require the Authority to re-file this case as an application due to the size and magnitude of the planned HST System, the long-term funding prospects for the HST System, and the costs and funding issues for the Fresno to Bakersfield Section. These Commenters insist an application should be required because the Authority has not finalized all litigation related to the HST System (or to the Fresno to Bakersfield Section) or simply so that the Board can have more time and information with which to evaluate the proposed construction. A few Commenters question whether the Authority has met the section 10501 exemption criteria.

Under 49 U.S.C. § 10502(a), the Board “shall” exempt a transaction (including a proposed rail line construction) from a statutory provision if it finds that (1) application of the statutory provision (here 49 U.S.C. § 10901) is not necessary to carry out the rail transportation policy (“RTP”) of 49 U.S.C. § 10101; and (2) either (a) the transaction is of limited scope or (b) regulation is not necessary to protect shippers from the abuse of

market power.⁵ The Petition explained in detail why the Board's exemption of the construction of Fresno to Bakersfield Section would comply with the section 10502 exemption criteria and therefore should be granted. As explained below, none of the Commenters have provided any evidence which would justify denial of the Petition.

I. Many Commenters Address Issues Beyond The Transportation Merits Of The Fresno To Bakersfield Construction

Although the California HST System will provide intercity, high-speed passenger rail service on more than 800 miles of rail line throughout California,⁶ the Authority is not presently seeking authority to construct anything beyond the Fresno to Bakersfield Section. In addition, the Petition does not seek operating authority over the Fresno to Bakersfield Section because the Authority does not yet have an operating plan and therefore could not provide the Board with the information it would need to consider a petition for exemption with respect to operations. For these reasons, the Board has invited comments on the *transportation merits of the proposed Fresno to Bakersfield line construction*. Comments about construction other than on the Fresno to Bakersfield Section⁷ or comments about operating issues are beyond the scope of this

⁵ See, e.g., *Merced to Fresno Decision*, at 22.

⁶ As noted in the Petition, the Authority plans two phases for the HST System: Phase 1 (to be constructed in stages dependent on funding availability) will connect San Francisco to Los Angeles/Anaheim via Pacheco Pass and the Central Valley, through a combination of dedicated high-speed rail infrastructure blended with existing commuter rail systems on the northern-most segment (between San Jose and San Francisco) and the southern-most segment (between Los Angeles and Anaheim). Phase 2 will extend the system from Los Angeles to San Diego and from Merced to Sacramento. Petition at 2, 3-4.

⁷ Without limiting the generality of the foregoing, the request of the Kings County Water District and Citizens for California High-Speed Rail Accountability ("KCWD/CCHSRA") that the Board rescind the exemption granted in *Merced to Fresno Decision* does not meet the statutory criteria for a Petition to Revoke. 49 U.S.C § 10502(d).

proceeding.⁸

Thus, for example, the Comments of William H. Warren, advocating full funding of the entire HST System before approval of the Petition and redeployment of available funding to commuter rail projects in California, are beyond the scope of this proceeding.⁹ Similarly, the Comments of William Grindley, arguing that the HST System will not be able to operate without a subsidy, are exclusively about operations and beyond the scope of this proceeding.¹⁰

Many other comments pertain to environmental and land use issues. Those issues will be addressed as part of the environmental review under NEPA.

II. Commenters' Arguments That The Fresno To Bakersfield Section Lacks Independent Utility Are Unpersuasive

When the Authority sought an exemption for the construction of the 65-mile Merced to Fresno Section, project opponents asserted that the Board's evaluation of this section in isolation was an improper segmentation and that the Board should evaluate the transportation merits of the entire HST System. *Merced to Fresno Decision*, at 15. In response to these arguments, the Board said that in determining whether a segment was appropriate for Board review, it would look at whether the proposed segment has logical termini and whether the proposed segment would have transportation benefits even if subsequent phases were never constructed. "If [the Board] find[s] that it does have independent utility, the segment will be suitable for the agency's consideration,

⁸ The Authority will address the substance of these Comments if they are repeated in connection with subsequent, relevant construction or operating authority exemption petitions.

⁹ Comment of William H. Warren at 1.

¹⁰ Comment of William Grindley at 1. For the same reason, the arguments made in the Opp'n of Community Coalition on High Speed Rail ("CC-HSR") at 19-24 is beyond the scope of this proceeding.

even though it may ultimately be part of a larger planned project that is not currently before the Board.”¹¹

As applied in the *Merced to Fresno Decision*, the Board looked at the Final EIR/EIS, noting that the Authority and the Federal Railroad Administration (“FRA”) have divided the HST System into logical sections that would support operation of high speed service on constructed segments while additional segments were in construction or development. The Board concluded that the Merced to Fresno Section would provide transportation benefits even if additional sections of the HST System were never built. The Board noted that the Final EIR/EIS concluded that California’s intercity transportation system is insufficient to meet existing and future demand; that making improvements to the existing system would benefit current passenger service; and that interim use of the Merced to Fresno Section by Amtrak was expected to result in improved and faster service on the San Joaquin route, which would in turn contribute to increased mobility throughout the rapidly growing Central Valley. *Id.* at 16-17.

As noted in the Petition, the Fresno to Bakersfield Section will have independent utility, even without the construction of additional facilities. The Fresno to Bakersfield Section will be available for use for improved and faster service on Amtrak’s San Joaquin intercity passenger rail service prior to initiation of HST Service on the line in 2022, thus providing for independent utility of the constructed segment.¹² Thus, the Fresno to Bakersfield Segment is appropriate for Board review.

KCWD/CCHSRA raise again the arguments about improper segmentation that

¹¹ *Merced to Fresno Decision*, at 16 (citing Ninth Circuit precedent utilizing a similar concept with respect to highway construction projects).

¹² Revised Draft EIR/Supplemental Draft EIS at 2-108.

they made in the Merced to Fresno proceeding. *Compare* KCWD/CCHSRA Pet. in Opp'n at 13-17 to CCHSRA Pet. in Opp'n in the lead docket at 4 and KCWD/Riverdale Public Utility District ("RPUD") Pet. in Opp'n in lead docket at 5. These assertions are unpersuasive here for the same reasons that they were unpersuasive in the Merced to Fresno proceeding.

KCWD/CCHSRA make much of the fact that responsibility for the Amtrak San Joaquin Service will transition from the California Department of Transportation ("Caltrans") to the San Joaquin Joint Powers Authority ("San Joaquin JPA"). KCWD/CCHSRA at 15. KCWD/CCHSRA say the Authority "misled the Board by suggesting" that Caltrans would have authority to make decisions about changes in Amtrak San Joaquin service. *Id.* at 15. This is a false and grossly unfair assertion.¹³ The Authority referred only to "Amtrak's San Joaquin intercity passenger rail line" and "Amtrak San Joaquin operations." Petition at 8. Moreover, nothing in the cases that the Board relied upon in establishing its test for "independent utility" suggests that the identity of every involved agency or specific implementation of the alternative service needs to be detailed and finalized in order for an agency to evaluate proper segmentation of a transportation project. In fact, to require this level of detail in advance of making a finding of independent utility would require that the alternative use be cleared through the NEPA process, which would defeat the very purpose of

¹³ In addition to this allegation, the KCWD/CCHSRA Opposition Statement is filled with objectionable matter and unsubstantiated statements regarding the integrity of the Authority. Among others, KCWD/CCHSRA say: the Petition "was secretly filed on September 26, 2013" (*Id.* at 1); the Authority "did not disclose to the Board the enactment of AB 1779" (*Id.* at 15); "The Authority's proclivities continue to display ... less than forthrightness, the same institutional personality traits expressed in the Petition." (*Id.* at 25-26); and the Authority's "false representations that 'construction' had to start in Summer 2013" (*Id.* at 26).

proper segmentation. *See Lange v. Brinegar*, 625 F.2d 812, 816-817 (9th Cir. 1975).

For all of these reasons, the Board should conclude that the Authority's proposed construction of the Fresno to Bakersfield Section has independent utility and can be considered by the Board at this time.

III. Commenters' Arguments That An Application Is Necessary Are Not Persuasive

Many Commenters have argued that the Board should require the Authority to re-file this case as an application due to the size and magnitude of the planned HST System, long-term funding prospects for the HST System, the costs and funding issues for the Fresno to Bakersfield Section, because the Authority has not finalized all litigation related to the HST System or the Fresno to Bakersfield Section, or simply so that the Board can have more time and information with which to evaluate the proposed construction. These arguments were made and rejected in the *Merced to Fresno Decision* and are equally unpersuasive here.

As noted above, to the extent these Commenters address construction, funding or other issues associated with the planned HST System and not the Fresno to Bakersfield Section, they are beyond the scope of this proceeding. The mere fact that the Fresno to Bakersfield Section is a large, complicated and controversial project does not justify the application procedures of section 10901.¹⁴ Congress directed the Board to exempt rail construction projects from the section 10901 application process, even if the projects

¹⁴ As noted in the *Merced to Fresno Decision*, "[t]he Board has exempted rail construction proposals under § 10502 even where, as here, the project was complex and controversial. *Id.* at 18. Thus, CC-HSR's contention that "exemption proceedings would be ill-advised in a controversial mega-project of this significance" (*see* CC-HSR Pet. in Opp'n at 8 and generally at 7-9) is no basis upon which to require an application under section 10901.

have a significant scope, so long as an application is not necessary to carry out the RTP and there is no danger of market power abuse.¹⁵

Likewise, the fact that the Fresno to Bakersfield Section is being built with public funds does not justify use of the section 10901 application procedure. CC-HSR and other Commenters revive their Merced to Fresno proceeding argument, urging the Board to require an application in this case because the public cannot rely upon the scrutiny of private-sector investors to determine financial viability. See CC-HSR Pet. in Opp'n at 9-14. Board precedent does not distinguish between privately funded and publicly funded construction projects. There is case law supporting the proposition that the Board typically does not undertake a profitability analysis in private-sector construction projects. See, e.g., *Mid States Coal. for Progress v. STB* 345 F.3d 520, 552 (8th Cir. 2003). It does not follow that the Board *will* undertake a profitability analysis in publicly-funded construction cases. The Board has not established such a rule or practice, nor should it. Although Commissioner Mulvey expressed the view that the “presumption in favor of approving construction projects was targeted at private rail operators that expend mostly private funds”¹⁶, that view was not adopted by the Board in the case where he expressed it and Commissioner Mulvey did not restate that view in the *Merced to Fresno Decision*.

In the *Merced to Fresno Decision*, Commenters argued that the Board should undertake a detailed review of the financial fitness of the project because the Authority

¹⁵ See *Id.* at 18-21, citing *Alaska Survival v. STB*, 705 F.3d 1073, 1082-83 (9th Cir. 2013); *Vill. of Palestine*, 936 F.2d at 1337, 1340 (D.C. Cir. 1991).

¹⁶ See *Alaska Railroad Corporation – Construction and Operation Exemption – Rail Line Between North Pole and Delta Junction, AK*, STB Finance Docket 34658 (STB served January 6, 2010) (Mulvey dissent).

was using federal and state funds. The Board declined to do so, noting:

Here, however, funding decisions have already been made by bodies directly empowered to make those decisions, including FRA and the voters of California. Neither our statute nor a Board or court precedent suggest that we must use the full application process of §10901 to revisit or override those decisions, particularly given the significant amount of public information and participation regarding the funding decisions available in this case.

Id. at 20.¹⁷ Here, as in the Merced to Fresno proceeding, a sister federal agency and a sovereign state have made public funding decisions about construction of a passenger rail line and the Board should not “override” those decisions by requiring a section 10901 application.

In the Merced to Fresno proceeding, several Commenters argued that the Board should use the application process because the Authority had not resolved all outstanding issues related to the proposed construction (including agreements with freight railroad), because of alleged FRA grant agreement compliance issues and due to pending state court litigation about the project or the state’s bond funding process. The Board observed that “just as with private construction projects, which are not always ready for immediate implementation upon authorization, because the Board’s construction authority is permissive, a public agency may seek an exemption prior to resolving these types of issues.” *Id.* at 20, n.104. The Board noted that the controversy

¹⁷ For the same reasons, in the *Merced to Fresno Decision*, the Board distinguished the HST System from the construction proposed by the Ozark Mountain Railroad. *Id.* at 19, n. 101. CC-HSR argues that “*Ozark Mountain Railroad* precedent no longer appears to be factually distinguishable” based upon developments in the state court litigation. CC-HSR Pet. in Opp’n at 8-9. However, the state court Prop 1A litigation was pending at the time the Board issued the *Merced to Fresno Decision* and the Board concluded there that the controversy regarding state bond funding was “a matter to be resolved under the laws of California, and not by this agency.” *Id.* at 20. Thus, *Ozark Mountain Railroad* remains inapposite.

regarding state bond funding was “a matter to be resolved under the laws of California, and not by this agency.” *Id.* at 20.

Many Commenters have made the same or very similar arguments in the present proceeding.¹⁸ For the same reasons the Board declined to require an application in the Merced to Fresno proceeding, the Board should decline to require an application in the present case. The Authority has not yet resolved all outstanding issues related to the construction of Fresno to Bakersfield; it has not yet received final decisions or other dispositions in all litigation pertaining to the Fresno to Bakersfield construction or state bond funding. The Board’s construction authority, whether sought by a corporation or a sovereign state, is permissive and a public authority may seek an exemption prior to resolving these types of issues. *Id.*

Finally, the application procedures of section 10901 are not justified in order to give the Board more time and information with which to review the Fresno to Bakersfield Section construction. The same argument was made in the Merced to Fresno proceeding and the Board found that it had sufficient time and information for review, particularly in light of the fact that numerous federal, state and local officials had extensively scrutinized the Merced to Fresno Section and the Board had extended the comment period to allow ample public comment.

The Board should draw the same conclusion here for the same reasons. The Petition was filed on September 26, 2013; the deadline for comments on the Petition

¹⁸ For example, KCWD/CCHSRA include a lengthy summary updating the status of the same litigation discussed in their Pets. in Opp’n filed in the lead docket. *Compare* KCWD/CCHSRA at 4-13 to CCHSRA Pet. in Opp’n in the lead docket at 19-21 and KCWD/RPUD Pet. in Opp’n in the lead docket at 24-26; *compare* CC-HSR Pet. in Opp’n at 2-7 to CC-HSR Pet. in Opp’n in the lead docket at 1-6. The same can be said for the KCWD/CCHSRA rehearsed argument regarding the freight railroad agreements. *See* KCWD/CCHSRA Pet. in Opp’n at 19-23.

ultimately was extended to March 7, 2014, which means that the public had more than five months to comment on the transportation merits of the project.¹⁹ In addition, the Authority and the FRA issued a joint Draft EIR/EIS in August of 2011 and a revised Draft EIR/Supplemental Draft EIS in July of 2012, so the public has had ample opportunity to comment on the environmental and land use issues related to the Fresno to Bakersfield Section construction.

IV. The Authority Has Met The Section 10502 Exemption Criteria

Under 49 U.S.C. § 10502(a), the Board “shall” exempt a transaction (including a proposed rail line construction) from a statutory provision if it finds that (1) application of the statutory provision (here § 10901) is not necessary to carry out the rail transportation policy (“RTP”) of 49 U.S.C. § 10101; and (2) either (a) the transaction is of limited scope or (b) regulation is not necessary to protect shippers from the abuse of market power.²⁰ The Petition explained in detail that the proposed Fresno to Bakersfield Section complies with the § 10502 exemption criteria and therefore should be exempted from § 10901’s detailed application procedures. None of the Commenters have presented any evidence that regulation of the Fresno to Bakersfield Section is necessary to carry out the RTP or to protect shippers (or by analogy, passengers) from

¹⁹ In fact, by the Authority’s reckoning, every person or entity who filed comments between March 5th and 10th had filed a notice of intent at least 32 days earlier.

²⁰ See, e.g., *Merced to Fresno Decision*, at 22.

the abuse of market power.

A. An Exemption Will Promote Rail Transportation Policy

It is the rail transportation policy of the United States, as set forth in 49 U.S.C. § 10101, to promote safe and efficient transportation by rail and to minimize the need for federal regulatory control over the rail transportation system, among other goals. As the Authority detailed in its Petition, the Board's approval of a § 10502 exemption for construction of the Fresno to Bakersfield Section advances, rather than undermines, the policy goals set forth in the RTP, because the rail line would: (a) "provide and enhance intermodal competition and increase capacity, as well as promote the development of a sound rail transportation system to meet the needs of the traveling public"²¹ by connecting two of the Central Valley's largest cities, consistent with 49 U.S.C. §§ 10101(4) and (5); (b) promote the RTP's emphasis on energy conservation, energy savings and reduced congestion and air pollution by diverting automobile traffic to the electrified rail, consistent with the goal of 49 U.S.C. § 10101(14);²² and (c) "minimize the need for Federal regulation and reduce regulatory barriers to entry,"²³ consistent with 49 U.S.C §§ 10101(2) and (7), by minimizing the time and administrative expense associated with construction.

Commenters KCWD/CCHSRA mischaracterize both the Authority's burden and the Board's duty under 49 U.S.C. § 10502, by suggesting that all fifteen of the RTP's objectives must be met in order for the Board to grant a § 10502 exemption. KCWD/CCHSRA decry the Authority's showing, which includes a detailed description of

²¹ *Id.* at 23.

²² *Id.*

²³ *Id.*

how an exemption for the Fresno to Bakersfield Section would advance at least five of the RTP's objectives, as wholly inadequate by pointing to certain RTP objectives the Authority did not specifically address. In fact, the Authority was not required to demonstrate having met "all of the policies set forth in 49 U.S.C. § 10101,"²⁴ and KCWD/CCHSRA provide no authority in their Opposition Statement for such a proposition. To the contrary, courts addressing this question have found that no such obligation exists.

In *Alaska Survival v. STB*, the Ninth Circuit Court of Appeals considered a challenge to a Board decision exempting the subject railroad from 49 U.S.C. § 10901 upon consideration of four of the fifteen RTP criteria. In denying the petition, the Court rejected the contention that the Board was obligated to consider additional RTP policy objectives. The Court stated that requiring the Board to consider all fifteen factors would thrust upon the Board the "impossible task of reconciling a variety of different objectives of the [Rail] Transportation Policy."²⁵ The Court further found that to require the Board to make findings about each aspect of the rail transportation policy "possibly affected" by the grant of an exemption would "make the exemption process 'broader and possibly more onerous than the proceeding from which exemption was sought.'"²⁶

In addition to trying to hold the Authority and the Board to an erroneous legal standard, KCWD/CCHSRA ignore the Authority's demonstration of how an exemption for the Fresno to Bakersfield Section would advance the RTP. KCWD/CCHSRA indicate that the Authority "mentioned the language" of certain subsections of § 10101, as though

²⁴ KCWD/Citizens at 17.

²⁵ *Alaska Survival v. STB*, 705 F.3d 1073, 1083 (9th Cir. 2013) (citing *Oregon Public Utility Com'n. v. ICC*, 979 F.2d 778, 781 (9th Cir. 1992)).

²⁶ *Id.*, at 1083 (citing *Vill. of Palestine v. ICC*, 936 F.2d 1335, 1339)

the Authority simply regurgitated the text of the statute without providing further support. To the contrary, the Authority's Petition sets forth, in detail, substantial evidence bolstering the Authority's assertion that the application procedures are not necessary to promote the RTP and that, instead, the public policy goals of the RTP are advanced by an exemption for the Fresno to Bakersfield Section.

Just as in the Merced to Fresno proceeding, there is no "good reason for full regulation"²⁷ with respect to the Fresno to Bakersfield Section. Section 10901's "unneeded regulatory burdens"²⁸ are not required to carry out the RTP and should be removed in order to *promote* the RTP. Commenters KCWD/CCHSRA misrepresent the Authority's threshold burden to justify the exemption and fail to show that regulation under § 10901 is appropriate.

B. Regulation is Not Needed to Protect Shippers from the Abuse of Market Power

Board regulation of construction of the Fresno to Bakersfield Section is not needed to protect shippers or the traveling public from abuse of market power.²⁹ Just as in the Merced to Fresno proceeding, the Fresno to Bakersfield Section will be "essentially neutral with regard to market power in the freight rail industry," because the Fresno to Bakersfield Section will not be used to provide freight rail transportation and no shippers will lose access as a result of the Fresno to Bakersfield Section.³⁰

²⁷ *Merced to Fresno Decision*, at 23.

²⁸ *Id.*

²⁹ The second component of the test for exemption is stated in the alternative — either the proposed construction project must be of limited scope or the Board must find that regulation of the transaction is not needed to protect shippers from the abuse of market power. If the Board concludes that regulation of the transaction is not needed to protect against abuse of market power, the Board "need not determine whether the transaction is limited in scope" *Id.* at 25, n. 118.

³⁰ *Id.* at 24.

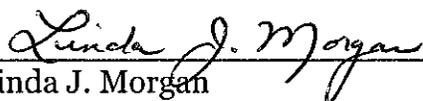
In the *Merced to Fresno Decision*, the Board extended the statutory market power “abuse” test from freight rail shippers to rail passengers and concluded that exemption would not result in an abuse of market power detrimental to the traveling public. *Id.* at 25. Several Commenters have raised concerns regarding the impact of construction of the Fresno to Bakersfield segment on Amtrak service.³¹ The Board faced the same issue in the *Merced to Fresno Decision*. The Board concluded that construction of the Merced to Fresno Section could result in the termination of certain Amtrak services, and that some passengers might prefer existing Amtrak service over service that will be created by the HST System, but that new and more efficient service would become available for many more passengers. The Board also concluded that the ready availability of buses and private automobiles provided an alternative means for moving passengers. Overall, the Board concluded that the public using passenger rail service would benefit from more passenger service as a result of the HST System and, accordingly, it found no threat to an abuse of market power. *Merced to Fresno Decision* at 24-25. For the same reasons, the Board should conclude here that regulation of construction of the Fresno to Bakersfield Section will not result in abuse of market power detrimental to the traveling public.

³¹ See, e.g., Comments of Joyce Coty, at 1; Comments of Karen Stout at 2.

CONCLUSION

For the foregoing reasons, the Authority respectfully requests that the Board grant the requested exemption in a decision effective by July 12, 2014.

Respectfully submitted,

By: 
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Dated: March 27, 2014

CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2014, I served the California High-Speed Rail Authority's (i) Motion for Leave to File a Reply to Public Comments and (ii) Reply to Public Comments, by email in the instances where an email is listed below and otherwise by first-class mail, postage prepaid, upon the following Parties of Record in this proceeding:

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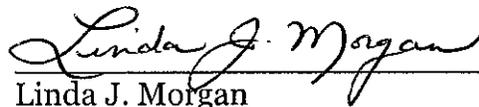
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