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File No. 62043 234189

VIA E-FILING

Cynthia T. Brown, Chief
Section of Administration
Surface Transportation Board
395 E Street, S.W., Room 100
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings
May 8, 2013
Part of
Public Record

**Re: Opposition to California High-Speed Rail Authority Petition for Exemption;
Finance Docket No. 35724**

Dear Ms. Brown:

On behalf of Preserve Our Heritage (“POH”), I write to oppose the Petition for Exemption (“Petition”) filed by the California High-Speed Rail Authority (“Authority”). Through its Petition, the Authority seeks an exemption from the prior approval requirements of 49 U.S.C. § 10901 for construction of a rail line in Merced, Madera, and Fresno Counties (the “Project”). This letter supplements the letter filed by POH on April 10, 2013, in opposition to the Petition. For the reasons set forth below, the Surface Transportation Board (“Board”) should deny the Authority’s Petition and require the Authority to apply for a certificate as required by the Interstate Commerce Commission Termination Act of 1995 (“ICCTA”), 49 U.S.C. § 10901.¹

I. Background

POH is an organization comprised of farmers and other agricultural interests in the Madera and Merced area of California’s Central Valley. POH’s members have lived and farmed in this region for generations, and they pride themselves on being good stewards of the land. They are a key feature of the community, and their homes and farms are key components of this rural agricultural landscape.

Because of the California high-speed rail project’s potential for significant regional and local agricultural impacts, POH has been monitoring and participating in the Authority’s administrative procedures over the past several years, including its environmental analysis of rail line alternatives through the greater Madera and Merced region and elsewhere. Along with a group of

¹ We understand that the Board denied the Authority’s Motion to Dismiss the Petition on April 18, 2013. (See Surface Transportation Board Decision, Docket No. FD 35724 (Apr. 18, 2013).) According to the Board, “[t]herefore, replies to the Motion to Dismiss are unnecessary.” (*Id.* at p.2.) As such, this letter in opposition to the Authority’s Petition does not address or reply to the Authority’s Motion to Dismiss. POH looks forward to the Board’s subsequent decision on the merits in which it will set forth its reasons for denying the Motion to Dismiss.

other concerned parties, POH was co-plaintiff in state court litigation against the Authority. Plaintiffs in that case principally alleged that the Authority violated the California Environmental Quality Act (“CEQA”), which is similar to the National Environmental Policy Act (“NEPA”) and is California’s primary environmental review statute, and failed to properly disclose the Project’s environmental impacts.

POH is concerned that the Petition represents yet another attempt by the Authority to short-cut legal requirements and to give short-shrift to the statutorily-required evaluations and reviews set forth in applicable statutes such as NEPA and the ICCTA. POH is participating in this proceeding in an effort to ensure the Authority complies with the Board’s statutory requirements.

II. Continued Regulation by the Board Is Necessary to Carry Out the National Rail Transportation Policies.

Vice Chairman Begeman’s opinion concurring in part and dissenting in part in the Board’s April 18, 2013 Decision to deny the Authority’s Motion to Dismiss states:

[C]ontinued regulation by the Board is necessary . . . to carry out the rail transportation policy of 49 U.S.C. § 10101, and a project of this size and magnitude in terms of cost and miles – estimated at over \$68 billion and 800 miles of rail line – is not one of “limited scope.” We should direct the Authority to file an application so that the Board can fully review and analyze the proposal. The scope of the project and significant interest in public participation, which this decision itself recognizes, mandates it.

(Docket No. FD 35724 (April 18, 2013), p.3). We agree. As discussed in more detail below, the Board should deny the Authority’s petition and require the Authority to file an application for a certification pursuant to 49 U.S.C. § 10901 to enable the Board to fully review and analyze the Authority’s proposed construction of the new rail line.

A. The Proposed Construction Does Not Satisfy the Section 10502 Exemption Criteria for Line Construction Under Section 10901.

Section 10901 of the ICCTA provides that a party may construct an additional railroad line or provide transportation over or by means of an additional railroad line, so long as that party files an application subject to public notice and obtains a certificate authorizing that action. The Board is authorized to issue the certificate unless, after evaluating the party’s application, it finds that the action is inconsistent with “public convenience and necessity.” (49 U.S.C. § 10901(a), (b), (c).) The Board may consider a “variety of circumstances” and factors to evaluate whether a proposal satisfies the “public convenience and necessity” requirement. These factors may include consideration of the applicant’s financial fitness, the public need and demand for the service, and the potential harm to competitors. (*See N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1092 (9th Cir. 2011).) However, this process of review and analysis by the Board can occur

only after the party files a formal application to start the “proceeding to grant authority.” (49 U.S.C. § 10901(b).)

The Board may exempt that party from complying with these review requirements only if the Board finds that such an application:

- (1) is not necessary to carry out the transportation policy of section 10101 . . . ; and
- (2) either (a) the transaction or service is of limited scope; or (b) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.

(49 U.S.C. § 10502(a).) The Authority’s Petition fails to satisfy these criteria, and thus the Board should not exempt the Authority from complying with the review requirements of Section 10901.

First, continued regulation by the Board and an application for a certificate pursuant to 49 U.S.C. § 10901 are necessary to carry out the rail transportation policy expressed in Section 10101. An application from the Authority regarding the Project is necessary for the Board to evaluate, among other things:

- whether the Project will allow competition and the demand for services to establish reasonable rates for transportation by rail (*id.* § 10101(1));
- whether the Project will promote a safe and efficient rail transportation system by allowing the rail carrier to earn adequate revenues, as determined by the Board (*id.* § 10101(3));
- whether the Project will maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail systems and to attract capital (*id.* § 10101(6));
- whether the Project will result in the operation of transportation facilities and equipment without detriment to the public health and safety (*id.* § 10101(8));
- whether the Project will encourage honest and efficient management of railroads (*id.* § 10101(9));
- whether the Project will rely on individual rate increases, and limit the use of increases of general applicability (*id.* § 10101(10));
- whether the Project will ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing

and maintaining the capability of providing such information (*id.* § 10101(13));
and

- whether the Project will encourage and promote energy conservation (*id.* § 10101(14)).

As the many letters in opposition to the Authority's Petition and the rest of the record demonstrate, the answers to these questions and other issues related to the funding, construction, and operation of the Project remain unresolved. The City of Bakersfield's opposition to the Petition, entered by the Board's Office of Proceedings on April 15, 2013, provides a series of good examples:

[the Project] is inconsistent with [the] transportation policy because it fails to provide passenger train service that is more convenient, more competitive, and relatively more affordable than Amtrak service and other modes of travel and it lacks the revenue to complete the Project, sustain its operations, and attract capital.

(Letter from City of Bakersfield to Surface Transportation Board (Apr. 12, 2013), p.2.)

POH agrees. The size and magnitude of the Project, and the public controversies concerning the Authority's financial plan, engineering, and environmental impacts, alone justify further analysis by this Board as to whether the Project satisfies the rail transportation policies identified in 49 U.S.C. § 10101.

In addition, POH has recently become aware of a letter between the BNSF Railway and the Authority's Project Management Team, dated April 16, 2013. (See attached.) That letter concerns the "modeling and review of various proposed passenger rail blended service plans." The letter states:

With respect to truly high speed passenger rail service, **elements of the options under consideration appear to be inconsistent with materials or plans that the Authority has submitted in descriptions to the Surface Transportation Board for exemption, and what the Authority has submitted for environmental review.** Thus, there appears to be too much ambiguity at this time for a productive review of these plans.

(Letter from BNSF Railway to Project Management Team for the Authority (Apr. 16, 2013), p.1 (emphasis added).)

This letter indicates that the materials currently before the Board and related to the Authority's Petition may be "inconsistent" with other materials or plans the Authority has prepared or distributed. In light of this letter, the Board cannot now in good conscience issue the Authority an exemption from review, based on the possible existence of any incorrect, inconsistent, and

insufficient data regarding the Project. A further analysis of this material or a request for additional clarifying material is warranted. An application for a certificate pursuant to 49 U.S.C. § 10901 from the Authority should provide the Board the correct information it needs, and such an application is necessary for the Board's determination as to how and whether the Project will carry out the rail transportation policies.

Second, the Project – including the Project's proposed service, size, and costs – is not "limited in scope" under 49 U.S.C. § 10502(a)(2).² The Authority bills the high-speed rail project as one of the largest public infrastructure projects the State of California has ever seen. The Project at issue in the Petition (i.e., the Merced to Fresno portion of the overall project) itself is no small development. It will leave in its wake crippling economic impacts to the local agricultural community and significant effects on the environment.

Notably, the Project is part of the larger high-speed rail project, and its scope should not be submerged or concealed by the fact that it is one piece of a larger overall effort. To 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. See *Bozung v. Local Agency Formation Comm'n*, 13 Cal.3d 263 (1975); *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985).

Either by itself or as part of the larger high-speed rail network, the Project is clearly not "limited in scope" pursuant to 49 U.S.C. § 10502(a)(2). The Board should not grant the Petition and should require the Authority to submit an application for a certificate in light of this requirement, as well.

III. Conclusion

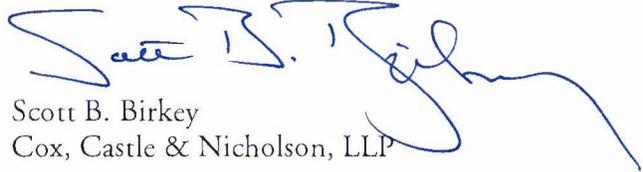
The Board should require the Authority to file an application for a certificate pursuant to Section 10901 of the ICCTA for construction of the Project. The Authority has failed to demonstrate it has met the exemption criteria under 49 U.S.C. § 10502(a). An application is necessary to carry out the national rail transportation policies, and the Project (including the Project

² Because the Project is not "of limited scope," we need not establish whether an application is needed "to protect shippers from the abuse of market power." (49 U.S.C. § 10502(a)(2).) We note that the Authority alleges in its Petition that "the line will not be used for service to shippers," and thus "regulation of the Project's construction as a safeguard against the potential for market power abuse is unwarranted." (Petition at p.13.) This proposition should not be taken at face value. An application for a certificate will give the Board the opportunity to probe this statement and determine whether shippers need protection from the abuse of market power as a result of the Project.

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as part of the overall high-speed rail project) is not limited in scope. Thus, POH respectfully requests that the Board **deny** the Authority's Petition and require an application for a certificate.

Sincerely,



Scott B. Birkey
Cox, Castle & Nicholson, LLP

Attachment

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CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2013, I served the foregoing OPPOSITION TO CALIFORNIA HIGH-SPEED RAIL AUTHORITY PETITION FOR EXEMPTION upon the following parties of record in this proceeding:

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April 16, 2013

Mr. Joseph J. Metzler
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Project Management Team for CAHSRA
On the behalf of the NCRPWG
Parsons Brinckerhoff
303 Second Street
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RE: PB-BNSF-3146--California High Speed Rail Authority-Rail Service Concepts for 2018-2025 BNSF Network Capacity Models

Dear Mr. Metzler:

This is in reference to your letter and the request you forwarded in February on behalf of the California High Speed Rail Authority for modeling and review of various proposed passenger rail blended service plans

We have generally reviewed and looked over these plans, but we are at a point in our understanding of intercity passenger rail planning in the San Joaquin Valley that we are at present unable to proceed to more specific planning or review of these materials. This is in light of frankly a great deal of ambiguity and contradictions in the different materials that have been forwarded, in the public statements being made and in the absence of any kind of understanding or agreement with the public agency sponsors of these programs. It is unclear what plans are ready to be progressed on behalf of the Authority and under what terms we should consider them.

In that regard, six intercity rail service options have been forwarded which may be internally inconsistent with respect to the extent to which they would involve BNSF right of way, trackage, or the construction of new railroad sometimes adjacent to and sometimes over BNSF right of way. It is also unclear the extent to which these options would use conventional FRA compliant rolling stock at speeds below 90 MPH or other alternatives.

With respect to truly high speed passenger rail service, elements of the options under consideration appear to be inconsistent with materials or plans that the Authority has submitted in descriptions to the Surface Transportation Board for exemption, and what the Authority has submitted for environmental review. Thus, there appears to be too much ambiguity at this time for a productive review of these plans.

In order to progress this effectively, we ask that the Authority provide us with a draft engineering agreement that contains a scope of work and budget that can be reviewed and for the Authority to specify the corridor alignment that is the realistic plan they might be advancing. As we have emphasized since our first discussions with prior officers of the Authority, it will also be essential



to address the safety implications, risk mitigation strategy and liability associated with any construction near or adjacent to our track as well as for future operations. We would then be in a better position to have meaningful discussions on how this could progress. BNSF has not agreed to or acquiesced in any proposed or potential alignment or change in service in the San Joaquin Valley involving our railroad, whether on, near, or adjacent to, our current right-of-way, or which could affect current or future rail service on our line, or could affect access to our line by present or future freight customers. In order for BNSF to progress any particular segment we will need to understand how these issues are addressed as to the entire proposed line through the San Joaquin Valley.

By the same token, we are not clear with whom we are actually negotiating or what agency would be the responsible entity progressing these plans, whether they are for truly high speed service or for what is being called Blended Service. For that reason I am copying Frank Vacca of CAHSRA and Bill Bronte of Caltrans to help us understand how all of this is to progress, and please feel free to forward this letter to the various parties copied on your initial letter to us as appropriate. With respect to the Authority's two Blended Service options and Caltrans' three service options A, B, and C, we believe it is necessary for the appropriate public agency intercity passenger rail sponsors to make some key decisions:

- Determine which one of the five conventional train speed options should be used as the foundation for any additional service agreement negotiations;
- Confirm that the service option selected consists of Amtrak service as part of its existing network and normal operations, whether operating on BNSF track or facilities constructed by the Authority;
- Identify a lead agency with which BNSF would negotiate;
- Provide BNSF with a projected timeline for the implementation of the proposed additional service; and,
- Confirm, as discussed in recent meetings, that Design-Build will not be used as a project delivery method where CHSRA construction will impact BNSF property or customers.

The different options and scenarios of your various alternative plans, some of which are very aggressive levels of passenger train service, could require significantly different capital infrastructure requirements to permit service and analysis of impacts on future freight service capacity and even access to our own line as a result of potential parallel structures along the right-of-way. In a similar vein, if the agencies envision something along the lines of the Amtrak metrics and standards to apply to this service for measurement of on-time performance, that will also involve significantly increased infrastructure and capital investment to ensure future intercity passenger rail service compatible with the preservation of freight capacity and mobility.

While we appreciate the work Parsons Brinckerhoff has been doing on this project, it is now essential that we have direct contact with whatever authority we would be negotiating definitive agreements if these projects are to be progressed. Therefore, as indicated earlier, we are copying Messrs. Vacca and Bronte for their determination of which agency we should be working with



on which agreement for which service. When we are advised with whom at the appropriate agency we should discuss how best to progress this, we can plan a follow-up call or meeting to include myself and Rick Weicher as we coordinate these efforts for BNSF, consistent with our previous direct meetings with prior representatives for and officers of the California High Speed Rail Authority.

Sincerely,

A handwritten signature in black ink, appearing to read "DJ Mitchell II".

DJ Mitchell II
Passenger Operations

cc: Frank Vacca, Chief Program Manager, California High-Speed Rail Authority
Bill Bronte, Division Chief, Division of Rail, Caltrans
Karen Greene Ross, Assistant Chief Counsel, California High-Speed Rail Authority
Gil Mallery, Parsons Brinkerhoff
Rick Weicher, BNSF Railway
Walt Smith, BNSF Railway