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E-FILING

January 20, 2015

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Office of Proceedings
January 20, 2015
Part of
Public Record

Re: STB Finance Docket No. FD 35861, California High-Speed Rail Authority—Petition for Declaratory Order

Dear Ms. Brown:

Enclosed for filing in the above proceeding is the California High-Speed Rail Authority's Reply in Opposition to Petitions for Reconsideration.

If you have any questions, please contact me.

Respectfully submitted,

Kevin M. Sheys
Attorney for California High-Speed Rail Authority

Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35861

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

REPLY IN OPPOSITION TO PETITIONS FOR RECONSIDERATION

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Dated: January 20, 2015

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SURFACE TRANSPORTATION BOARD**

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

REPLY TO OPPOSITION TO PETITIONS FOR RECONSIDERATION

The California High-Speed Rail Authority hereby replies in opposition to the Petitions for Reconsideration of the Board’s Decision dated December 12, 1014 (the “Decision”) filed by Jacqueline Ayer (“Ayer”) and County of Kings, Citizens for California High-Speed Rail Accountability, Kings County Farm Bureau, Dignity Health, First Free Will Baptist Church of Bakersfield, City of Shafter, County of Kern, Coffee-Brimhall LLC, Community Coalition On High-Speed Rail, Transportation Solutions Defense And Education Fund, and California Rail Foundations (“Group Petitioners”). Ayer and Group Petitioners sometimes are referred to herein collectively as “Petitioners.”

ARGUMENT

A. Introduction.

Under 49 U.S.C. § 722(c) and 49 C.F.R. § 1115.3(b), the Surface Transportation Board (“STB” or “Board”) will grant a petition for reconsideration only upon a showing that the prior action: (1) will be affected materially because of new evidence or changed circumstances; or (2) involves material error. *Total Petrochemicals & Refining USA, Inc. v. CSX Transportation.*, NOR 42141, slip op. at 3 (STB served Dec. 19, 2013) (citing

Alleghany Valley R.R. – Petition for Declaratory Order, FD 35239, slip op. at 3 (STB served July 16, 2013)).

Group Petitioners’ Petition should be rejected out of hand: they have failed to even *allege* that the Decision will be affected materially because of new evidence or changed circumstances *or* that it involves material error. The Ayer Petition likewise fails even to allege that the Decision will be affected materially because of new evidence or changed circumstances, and fails to show that the Decision involves material error. Accordingly, the Petitions for Reconsideration should be denied.

B. The Ayer Petition Fails To Demonstrate Material Error Because None Of Ayer’s Arguments Show Inconsistencies In The Decision.

The STB’s Decision as to the scope of preemption by § 10501(b) of the Interstate Commerce Commission Termination Act (“ICCTA”) over the California Environmental Quality Act (“CEQA”) is clear. The Decision describes the “core issue” of the Authority’s Petition as “whether CEQA as a whole” – *i.e.*, not just injunctive remedies, which were the subject of the Authority’s Petition for Declaratory Order – “is preempted with regard to the Line.” Decision at 10. With the issue framed as such, the STB proceeded to answer the question in the affirmative, stating that “the Board concludes that CEQA is categorically preempted by § 10501(b) in connection with the Line.” Decision at 10.

In spite of the clarity with which the Decision addresses the preemption of CEQA by § 10501(b), Ayer claims that the STB’s analysis of the scope of ICCTA’s preemptive effect is “internally inconsistent” and “contrary” because, according to Ayer, the STB (1) should have decided the question of what Proposition 1A may or may not require regarding CEQA, (2) incorrectly and indirectly concluded that ICCTA preemption of “CEQA as a whole” sweeps in any CEQA obligation allegedly imbedded in Proposition

1A, (3) was unclear regarding whether its preemption Decision pertained only to third-party enforcement suits or to all of CEQA and (4) failed to support its state sovereignty analysis with anything but “insubstantial vapor.” Ayer is wrong on all four claims, which are based almost entirely on fundamental misreading of the Decision.

1. Declining To Address An Issue Not Relevant To The Proceeding (Interpretation of Proposition 1A) Is Neither An “Oversight” Nor An Internal Inconsistency.

The Decision addressed the question whether the ICCTA preempts one state statute – CEQA – as a matter of interpreting the scope of the federal law. The Authority did not pose the question to the Board of whether Proposition 1A (a 2008 state bond measure that has provided some planning funding for the project and that may in the future provide partial capital funding for the project) even implicated CEQA, and if so how that would affect the preemption analysis. Consistent with this request, the Decision states that the STB “will not attempt to interpret the requirements of Proposition 1A, as that is for the state court to decide” Decision at 13. In keeping with this statement, the Decision does not delve into the question of whether using Proposition 1A funds for construction requires CEQA compliance.¹

Ayer considers the absence of analysis on this subject to be an “oversight” in the Decision, and demands the STB review state appellate court decisions in order to “affirm” the findings contained therein on Proposition 1A’s requirements. Ayer Petition

¹ While not relevant to the Board’s Decision about the federal law question of ICCTA preemption and the market participant doctrine, Group Petitioners misstate that Proposition 1A is “the ballot measure authorizing the planned high-speed rail system” Group Petition for Reconsideration at 4. System authorization began with the 1996 passage of the California High-Speed Rail Act. Cal. Pub. Util. Code § 185000 *et seq.* As relates to construction, Proposition 1A merely provides one optional funding source for only a small portion of the total system protected capital cost. Cal. Sts. & High. Code § 2704.07 (requires the Authority to “pursue and obtain other private and public funds, including, but not limited to, federal funds, funds from revenue bonds, and local funds”). Ayer recognizes that Proposition 1A is only a partial and optional capital funding source. Ayer Petition for Reconsideration at 5-6.

for Reconsideration at 4. But it is not a contradiction to conclude that an issue is not relevant to this proceeding and then decline to address it. There is no improper oversight or internal inconsistency, and Ayer’s objection fails to show material error in the Decision on this basis.²

2. There Is No Internal Inconsistency In How The Decision Addresses “CEQA as a whole” Because It Does Not Sweep In Proposition 1A.

Ayer argues that the Decision sets forth two contradictory directives by “exclud[ing] Proposition 1A” from its § 10501(b) analysis, while simultaneously “expanding ICCTA preemption” to include “CEQA as a whole”, and that this apparent inconsistency amounts to a material error in the Decision. Ayer Petition for Reconsideration at 4. Ayer’s claim is based on a fundamental misreading of the Decision’s phrase “CEQA as a whole”, which Ayer believes applies to any CEQA requirement that may be part of Proposition 1A. *Id.* However, the Decision unambiguously states that by “CEQA as a whole” the Board means all of CEQA and not just “its...injunctive remedies....” Decision at 10. The Decision also unambiguously states that the Board “will not attempt to interpret the requirements of Proposition 1A, as that is for the state court to decide” Decision at 13. That Ayer misreads clear statements in the Decision is not material error by the Board in the Decision.

² Ayer also says “it appears that the Decision specifically prevents CHSRA from making any sort of agreement (either voluntary, implied, intentional, or contractual) to comply with CEQA even if CHSRA wishes to do so in exchange for receiving taxpayer funds under Proposition 1A.” Ayer Petition for Reconsideration at 6-7. The Board’s discussion of the difference between enforceable voluntary agreements to comply with preempted state laws and agreements that go too far and are not enforceable (Decision at 10-12) is a restatement of existing law. Ayer’s conclusion does not follow from that case law and, in any event is not relevant to the Decision so therefore does not show material error in the Decision.

3. There Is No Internal Inconsistency Between The Decision’s Analysis Of “CEQA as a whole” And CEQA Enforcement Lawsuits.

Ayer claims that the STB’s statement – that “the relevant regulatory actions for purposes of our preemption analysis here are the third-party CEQA enforcement suits” (Decision at 14) – is contrary to the Decision’s holding that “CEQA is categorically preempted by § 10501(b) in connection with the line...” Decision at 10. Ayer Petition for Reconsideration at 9. However, the STB does not, as Ayer claims, “adopt both of these contradictory edicts” The Decision draws only the latter, broader conclusion. Decision at 10. The former was a statement along the analytical route to get to the broader conclusion and simply recognized the context of this particular proceeding – third party lawsuits to enforce CEQA. Decision at 14 and n.24. Discussions of the specific circumstances that brought the question before STB – here, the imminent threat of injunctive remedies to delay or obstruct the construction of the STB- approved Line – does not limit the broader holding.

4. There Is No Internal Inconsistency Or Lack Of Support In The Decision’s State Sovereignty Analysis.

Ayer calls the Decision’s analysis and conclusions about the state sovereignty issue “a complete non-sequitur” and “insubstantial vapor” (Ayer at 9-10) based entirely on the Decision’s statement and distinction that the present issue does not involve CEQA enforcement actions “brought by the state” but rather by third parties “against a state agency under the guise of state law.” Ayer at 9-10; Decision at 14. Again, Ayer misreads the language in the Decision. The Decision simply distinguishes CEQA lawsuits brought by third parties *against* the state (the present situation) from

hypothetical lawsuits brought by the state, which may or may not implicate state sovereignty considerations, but which are not the present situation. Decision at 14.

Despite Ayer's insistence, the STB was not required to address a hypothetical situation, and it very appropriately declined to do so.

C. The Ayer Petition Fails To Demonstrate Material Error Because The Decision Is Solidly Grounded In Existing Precedent.

The Ayer Petition fails to demonstrate material error because the Decision is solidly grounded on existing precedent and neither expands nor modifies that precedent. See Decision at 10. When reviewing decisions of the STB, the Courts of Appeal first review “whether Congress has addressed directly the issue before the court, and if so, ‘the agency ‘must give effect to the unambiguously expressed intent of Congress.’” *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1082 (9th Cir. 2013) (quoting *Chevron, U.S.A. Inc. v. Nat. Res. Defense Council*, 467 U.S. 837, 842-43 (1984)). With respect to environmental preclearance requirements, “congressional intent to preempt ... state and local regulation of rail lines is explicit in the plain language of the ICCTA and the statutory framework surrounding it,”³ and the Board has given effect to the unambiguous language.⁴

That Ayer favors a different interpretation of the statute is readily apparent. However, preferring one construction of a statute is not enough to show material error when the Board has applied the plain language of the ICCTA.

³ *City of Auburn v. United States*, 154 F.3d 1025, 1031 (9th Cir. 1998).

⁴ Even if the statute were ambiguous, the Board's construction of the statute is a permissible one. *Association of American Railroads v. Surface Transp. Bd.*, 161 F. 3d 58, 63 (D.C. Cir. 1998) (citations omitted). For this same reason, the Group Petitioners' argument regarding the legislative history of the ICCTA (see Group Petition for Reconsideration at 9-12) cannot support granting the Group Petition for Reconsideration.

D. Group Petitioners Fail To Demonstrate Material Error Because The Board Was Not Obligated To Defer To *Atherton's* Interpretation of Federal Law.

While not addressing the requisite grounds for reconsideration, Group Petitioners argue that the STB is obligated by law to follow *Atherton* and was “precluded from reaching the opposite conclusion in the Decision.” Group Petition for Reconsideration at 4. To support this argument, Group Petitioners assert that “[f]ederal courts, and by extension federal agencies such as [the STB], must follow a state’s intermediate appellate courts absent convincing evidence that the state’s highest court would rule differently.” *Id.* Assuming that the STB’s obligation is the same as that of a federal court, the case relied upon by the Group Petitioners, *Cal. Pro-Life Council v. Getman*, 328 F. 3d 1088 (9th Cir. 2003) (“*Cal. Pro-Life Council*”), would require the STB to defer to the California Court of Appeal’s interpretation of a *state* law. The *Cal. Pro-Life Council* case involved a federal court’s deference to a California appellate court’s interpretation of the California Political Reform Act of 1974, Cal. Gov. Code § 81000 *et seq.*, a state law. In *Atherton*, in contrast, the Court of Appeal was interpreting a *federal* law (the ICCTA) and a *federal* doctrine (the market participant doctrine),⁵ not state law. Thus, *Cal. Pro-Life Council* provides no support for the argument of the Group

⁵ *Atherton's* statements about Proposition 1A and other state law matters were as factual support for its market participant doctrine analysis. *Town of Atherton v. California High-Speed Rail Authority*, 228 Cal.App.4th 314, 337-341 (2014). What those *Atherton* statements (and *Tos* as well [*California High-Speed Rail Authority v. Superior Court*, 228 Cal. App.4th 676 (2014)]) – items pointed out by Ayer (Ayer Petition for Reconsideration at 4, fn 3.) – may or may not mean as *dicta* as relates to state law questions not before the Board are irrelevant to the federal ICCTA question the Decision addresses. As shown in the foregoing response to Ayer’s contentions, the Decision expressly and correctly declined to address any such questions.

Petitioners.⁶

E. The Other Group Petitioners' Arguments Are Addressed To The STB's Discretion And Thus Cannot Support Granting The Petition For Reconsideration.

The Group Petitioners acknowledge that issuance of the Decision (a declaratory order) was in the STB's discretion.⁷ All of the arguments Group Petitioners make on pages 5-8 are addressed to the Board's discretion and cannot form the basis for granting the Group Petition for Reconsideration. For the same reason, the speculative policy argument Group Petitioners espouse regarding the decline of state sponsored railroads (See Group Petition for Reconsideration at 13) does not provide a basis for granting the Petition for Reconsideration. In the end, most of the Group Petitioners' arguments are obvious attempts to reargue issues the Board definitively addressed in the Decision and in prior determinations: (1) whether the STB has jurisdiction over the Line (Group Petition for Reconsideration at 5-6) or (2) whether CEQA is preempted by ICCTA in this case (Group Petition for Reconsideration at 6-12).

⁶ Group Petitioners also claim the Board improperly cited to *Friends of Eel River v. North Coast Railroad Authority*, 178 Cal. Rptr. 3d 752 (Ct. App. 2014) ("*Eel River*") as precedent. Group Petition for Reconsideration at 5. In fact, the Board did not use *Eel River* for purposes of controlling authority, but rather, noted and agreed with the case's reasoning to explain its conclusion regarding the applicability of the market participant doctrine. Decision at 12-14. That is not surprising, given that *Eel River* was cited and discussed in the briefing leading to the Decision, which was issued just before the California Supreme Court decided to accept review of that case. Most importantly, the STB recognized in the Decision that the California Supreme Court in its review would consider the issues raised in *Eel River* and the *Atherton* decision. Finally, the Board's citation to *Eel River* in note 24 (regarding the absence of any relevant distinction between state and private rail agencies) is only one of four cases cited. *Id.* at 14.

⁷ Group Petition for Reconsideration at 3 ("we request . . . that you instead use your discretion to decline to issue a Declaratory Order."); *id.* at 13 ("by using its discretion to refrain from issuing an advisory opinion, the Board would best promote comity")

CONCLUSION

The Petitioners have not demonstrated that the Decision involves material error and the Authority respectfully submits that the Petitions should be denied.

Respectfully submitted,



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January 20, 2015

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply in Opposition to Petitions for Reconsideration was served on the 20th day of January 2015, by electronic mail (where indicated) or by U.S. mail, postage prepaid, on the following parties:

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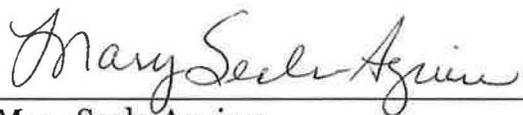
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