



## Department of Energy

Washington, DC 20585

October 8, 2008

Via E-filing

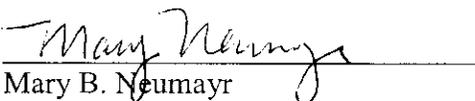
The Honorable Anne K. Quinlan  
Acting Secretary  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423-0001

Re: STB Finance Docket No. 35106  
United States Department of Energy --  
Rail Construction and Operation --  
Caliente Rail Line in Lincoln, Nye, and  
Esmeralda Counties, Nevada

Dear Acting Secretary Quinlan:

Enclosed for filing in the above referenced proceeding is the United States Department of Energy's Reply to CSX Transportation, Inc.'s Motion for Leave to File Response to Reply of the United States Department of Energy to Comments on its Application for a Certificate of Public Convenience and Necessity.

Sincerely,

  
Mary B. Neumayr  
Deputy General Counsel  
for Environment & Nuclear Programs



UNITED STATES OF AMERICA

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 35106

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UNITED STATES DEPARTMENT OF ENERGY  
--RAIL CONSTRUCTION AND OPERATION--  
CALIENTE RAIL LINE IN LINCOLN, NYE,  
AND ESMERALDA COUNTIES, NEVADA

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UNITED STATES DEPARTMENT OF ENERGY'S REPLY TO  
CSX TRANSPORTATION, INC.'S MOTION FOR LEAVE TO FILE RESPONSE TO  
REPLY OF THE UNITED STATES DEPARTMENT OF ENERGY TO COMMENTS  
ON ITS APPLICATION FOR A CERTIFICATE OF  
PUBLIC CONVENIENCE AND NECESSITY

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For the reasons stated below, the United States Department of Energy (“DOE”) respectfully requests that the Surface Transportation Board (“Board” or “STB”) deny CSX Transportation, Inc.’s (“CSXT”) Motion for Leave to File Response to Reply of the United States Department of Energy to Comments on its Application for a Certificate of Public Convenience and Necessity, dated September 18, 2008 (“Motion for Leave”).<sup>1</sup>

#### BACKGROUND

On March 17, 2008, DOE filed its Application for a Certificate of Public Convenience and Necessity (“Application”) to construct and operate an approximately 300-mile rail line, to be known as the Caliente Rail Line, in Nevada. On April 16, 2008, the Board published a *Federal Register* notice announcing DOE’s Application. In the notice, the Board also adopted a procedural schedule (“Schedule Decision”) that provided a comment period more expansive than that prescribed in the Board’s regulations. In particular, the Board allowed a 120-day period for interested parties to submit comments in support of or in opposition to the Application, instead of the 35-day period set forth in the Board’s regulations. *See* 73 Fed. Reg. 20748 (April 16, 2008).

CSXT submitted comments on July 15, 2008 (“CSXT Comments”). CSXT took no position in its comments on the merits of the Application. CSXT Comments at 1. CSXT also did not seek any conditions concerning the construction and operation of DOE’s proposed Caliente Rail Line in Nevada. Rather, CSXT requested that the STB

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<sup>1</sup> Accompanying the Motion for Leave is CSXT’s Proposed Response to Reply of the United States Department of Energy to Comments on its Application for a Certificate of Public Convenience and Necessity (“Proposed Reply”). If the Board were to grant CSXT’s Motion for Leave, DOE requests an opportunity to reply on the merits to the legal argument made in CSXT’s Proposed Reply.

require DOE to use dedicated trains for all shipments of spent nuclear fuel on the CSXT rail system that are in transit to the Yucca Mountain repository as their ultimate destination. CSXT Comments at 1-2.

CSXT attached to its comments a DOE policy statement from 2005 entitled Department of Energy Policy Statement for Use of Dedicated Trains for Waste Shipments to Yucca Mountain (“DOE Policy Statement”). That document states that DOE “will use dedicated train service (DTS) for its *usual* rail transport of spent nuclear fuel (SNF) and high-level radioactive waste.” DOE Policy Statement at 1 (emphasis added).

CSXT referred to the Policy Statement’s use of the qualifier “usual” and similar statements in the Nevada Rail Corridor SEIS,<sup>2</sup> and argued in its comments that DOE’s intention “should be made clear.” Specifically, CSXT asked DOE to state whether it intends that all shipments of spent nuclear fuel would arrive at the Interchange Yard for the Caliente Rail Line on dedicated trains or whether such shipments “from the East” could occur as part of general manifest trains. CSXT Comments at 6.

DOE filed its reply to comments on the Application (“DOE Reply to Comments”) on August 29, 2008. DOE stated in that filing that the Board should reject CSXT’s requested condition because it does not concern the construction and operation of the Caliente Rail Line and is outside the scope of the action requested in the Application. DOE Reply to Comments at 40. DOE also addressed CSXT’s request concerning the use of dedicated trains even though that topic is outside the scope of this proceeding. DOE

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<sup>2</sup> The name of the final Nevada Rail Corridor SEIS, which was issued in July, 2008, is the *Final Supplemental Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada--Nevada Rail Transportation Corridor* (DOE/EIS-0250F-S2).

reiterated in that regard what its Policy Statement states--namely, that DOE intends that its usual mode of rail transport will be by dedicated trains. DOE Reply to Comments at 40. DOE attached as Appendix E to its Reply to Comments a July 6, 2005 memorandum relating to the DOE Policy Statement.

CSXT subsequently filed its Motion for Leave and Proposed Reply. CSXT's Proposed Reply seeks to submit additional comments and argument on two matters: (i) DOE's policy regarding the use of dedicated trains; and (ii) the Board's authority to impose CSXT's requested condition and the scope of the Board's environmental review.

#### ARGUMENT

CSXT's Motion for Leave requests permission to file an impermissible reply to a reply in violation of the Board's regulations. In addition, the motion is premised on an inaccurate allegation by CSXT that DOE's Reply to Comments changes DOE's position regarding the use of dedicated trains. There has been no change in DOE's position. DOE has and continues to have a policy in favor of the use of dedicated trains for its usual mode of rail transport of spent nuclear fuel and high-level radioactive waste to Yucca Mountain. Further, CSXT's allegation that DOE has changed its policy position in no way justifies the second part of CSXT's Proposed Reply which does not concern DOE's policy, but rather seeks to rebut legal arguments regarding the Board's authority to impose the requested condition.

##### 1. CSXT Seeks To File An Impermissible Reply To A Reply

The Board's procedural regulations, in 49 C.F.R. § 1104.13, prescribe two basic filings with respect to an application for public convenience and necessity. Specifically, they contemplate "a reply or a motion addressed to any pleading . . . ." 49 C.F.R.

§ 1104.13(a). Those regulations expressly provide further: “A reply to a reply is not permitted.” 49 C.F.R. § 1104.13(c).

Consistent with those regulations, the Board’s Schedule Decision provided for two filings with respect to DOE’s Application. It provided for comments on the Application by interested parties and then a reply to those comments by DOE. The Schedule Decision contains no provision for replies to DOE’s reply.

That CSXT has labeled its proposed filing a “response” rather than a “reply” is immaterial. The substance of CSXT’s proposed filing is indisputably a reply to DOE’s Reply to Comments. The Board should not allow CSXT to circumvent its regulations through the artifice of the title CSXT gives its documents.

Also immaterial is the Board’s earlier decision granting the State of Nevada’s motion for leave to amend its motion to reject the Application. Contrary to CSXT’s suggestion, that motion presented a distinctly different situation. There, Nevada sought to amend a pending motion to assert supposed additional grounds for rejecting the Application. A motion is a permitted filing under 49 C.F.R. § 1104.13(a), and that regulation does not expressly prohibit amendments to motions.<sup>3</sup>

In contrast, CSXT seeks to file a reply expressly prohibited by the Board’s regulations, and the extended period for comments on the Application has passed. Re-opening the record to receive CSXT’s additional comments and arguments--and, to prevent prejudice, to allow DOE time to reply to CSXT’s arguments--would delay the

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<sup>3</sup> Further, Nevada could have raised the asserted additional grounds in its later comments on the Application, and thus the Board would have had to address those arguments in any event. Against that backdrop, the Board concluded that the proposed amendment would not “unduly delay the proceeding or prejudice any party.” June 26, 2008 STB Decision, slip op. at 2, served June 27, 2008.

proceedings and set an inappropriate precedent. If CSXT's motion were granted, interested parties in future proceedings would be encouraged to seek leave to file sur-replies as a matter of course. The purpose served by the Board's prohibition on replies to replies would be negated.

2. DOE Has Not Changed Its Position On Dedicated Trains

In addition to the procedural irregularity of CSXT's Proposed Reply, the asserted factual predicate for CSXT's request is erroneous. CSXT notes that the July 2005 memorandum attached to DOE's Reply to Comments does not "unequivocally favor the use of dedicated train service . . . ." CSXT Motion for Leave at 3. CSXT further observes in that regard that the July 2005 memorandum states that DOE "must be able to use general freight service and truck as needed" and that DOE "retains the option to modify its policy as appropriate." *Id.* According to CSXT, these statements contradict DOE's purported representations about the use of dedicated trains.

Notwithstanding CSXT's assertions, there is no conflict between the Policy Statement and the July 2005 memorandum. As noted above, the Policy Statement announces DOE's intent to use dedicated train service for its "usual" rail transport of spent nuclear fuel and high-level radioactive waste to the Yucca Mountain repository. The July 2005 memorandum says the same thing. It recommends to the Principal Deputy Director of the Office of Civilian Radioactive Waste Management (OCRWM) at DOE that OCRWM adopt a policy favoring the use of dedicated train service for the "usual" method of rail transport. July 2005 Memorandum at 4. Neither the Policy Statement nor the memorandum "unequivocally" favors the use of dedicated train service.

There is also no conflict between the Application and the July 2005 memorandum. CSXT argues that “DOE made a clear representation to the Board that ‘[s]hipments of spent nuclear fuel and high-level radioactive waste would be made by dedicated trains.’” CSXT Motion for Leave at 1, quoting Application at 15. CSXT takes that quote out of context, however. That statement concerns the operation of the proposed Caliente Rail Line. It does *not* concern the mode of transporting spent nuclear fuel to the Caliente Rail Line. In fact, CSXT acknowledged in its original Comments that the Application leaves open the possibility that shipments of spent nuclear fuel might arrive at the Caliente Rail Line on general manifest trains. CSXT Comments at 6.

That DOE did not “unequivocally commit” to use dedicated trains on the CSXT system in response to CSXT’s request, therefore, does not introduce any new or different evidence or argument into the proceeding, or otherwise deviate from DOE’s Policy Statement. DOE merely reiterated what CSXT understood when it filed its original Comments--namely, that DOE’s present policy is to use dedicated trains as the *usual* mode of rail service for shipment of spent nuclear fuel and high-level radioactive waste to the Yucca Mountain repository.

In sum, DOE’s Reply to Comments does not set forth a “new found position on the use of dedicated trains,” as CSXT contends. CSXT Motion for Leave at 5.

3. CSXT’s Legal Arguments Are Unrelated To The July 2005 Memorandum

Fully half of CSXT’s Proposed Reply concerns an issue unrelated to the July 2005 memorandum. In particular, the second half of CSXT’s Proposed Reply (Proposed Reply at 6-10) concerns whether the Board has authority to impose the requested

condition and discusses the scope of the Board's environmental review under the National Environmental Policy Act.

That part of CSXT's Proposed Reply does not purport to rebut anything allegedly put in issue by the July 2005 memorandum. CSXT does not contend that DOE's Reply to Comments introduced new or different information on the Board's authority to impose safety conditions or the scope of the Board's environmental review. Yet, CSXT seeks to use its Proposed Reply to bootstrap additional argument on those topics. Such an effort is a further improper attempt to circumvent the regulatory prohibition on replies to replies.<sup>4</sup>

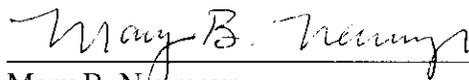
#### CONCLUSION

For the reasons stated above, DOE respectfully requests that the Board (1) deny CSXT's Motion for Leave; (2) not accept CSXT's Proposed Reply; and (3) decide the Application on the existing record. In the event that the Board grants CSXT leave to file its Proposed Reply, DOE respectfully requests an opportunity to reply on the merits to that pleading. DOE also respectfully requests that DOE's reply time run from the date of notification of any such decision granting leave.

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<sup>4</sup> In effect, CSXT is attempting to challenge long settled issues well outside the limited scope of this proceeding. In particular, past carrier attempts to impose mandatory special train restrictions on spent fuel shipments have been rejected. *See Trainload Rates on Radioactive Materials, Eastern Railroads*, 362 I.C.C. 756 (1980), 364 I.C.C. 981 (1981) (finding special train transportation unnecessary and wasteful transportation), *aff'd sub nom. Consolidated Rail Corp. v. I.C.C.*, 646 F.2d 642 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 1047 (1981). *Accord, Radioactive Materials, Special Train Service, Nationwide*, 359 I.C.C. 70 (1978) (cancelling a proposed special train requirement as neither just nor reasonable). *See also U.S. Department of Energy v. Baltimore & Ohio R.R. Co.*, 364 I.C.C. 951 (1981) (finding mandatory special trains an unreasonable practice), *appeal dismissed sub nom. Consolidated Rail Corp. v. I.C.C.*, 685 F.2d 687 (D.C. Cir. 1982), civil action to enforce the I.C.C. order in *United States v. Union Pacific R.R. Co.*, C.A. Nos. 92-0282 and 92-1117, U.S. District Court, D.C., resolved by payment by the railroads pursuant to a Joint Stipulation and Settlement Agreement filed May 28, 1993.

Respectfully submitted,

A handwritten signature in cursive script that reads "Mary B. Neimayr". The signature is written in black ink and is positioned above a horizontal line.

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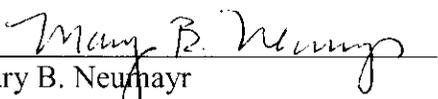
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**CERTIFICATE OF SERVICE**

I, Mary B. Neumayr, hereby certify that I caused to be served a true and correct copy of the United States Department of Energy's Reply to CSX Transportation, Inc.'s Motion for Leave to File Response to Reply of the United States Department of Energy to Comments on its Application for a Certificate of Public Convenience and Necessity on each party of record on the attached list by first-class mail or more expedient service on this 8th day of October 2008.

  
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Mary B. Neumayr  
Deputy General Counsel  
for Environment & Nuclear Programs

October 8, 2008

UNITED STATES OF AMERICA  
BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 35106

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UNITED STATES DEPARTMENT OF ENERGY  
--RAIL CONSTRUCTION AND OPERATION--  
CALIENTE RAIL LINE IN LINCOLN, NYE,  
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