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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35106

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

**NORFOLK SOUTHERN CORPORATION'S
MOTION FOR LEAVE TO FILE RESPONSE**

Norfolk Southern Corporation (“Norfolk Southern”) respectfully moves for leave to respond to the Reply filed by the United States Department of Energy (“DOE”) on October 8, 2008.¹ This relief is appropriate because DOE’s Reply adopts an entirely new position that conflicts with DOE’s prior statements in its Application and elsewhere regarding the use of dedicated trains in serving the proposed Yucca Mountain repository. Norfolk Southern had no opportunity to address this new position before DOE revealed it in its Reply. Thus, fairness and due process require that Norfolk Southern be permitted to respond briefly, and to request clarification of DOE’s new position.

In its Application (at 15), DOE stated unequivocally that “[s]hipments of spent nuclear fuel and high-level radioactive waste [to Yucca Mountain] would be made by dedicated trains.” In its Reply, DOE fundamentally altered this position, stating that its prior commitment to the use of dedicated trains was intended to apply only to the portions of the relevant movements between Caliente, Nevada and Yucca Mountain, and *not* between the origins and Caliente

¹ *US Dep’t of Energy Reply to CSX Transportation, Inc.’s Motion for Leave to File Response to Reply of the US Dep’t of Energy to Comments on Its Application for a Certificate of Public Convenience and Necessity*, at 6 (filed October 8, 2008) (“Reply”).

Parties to STB proceedings generally may not adopt wholly new positions or arguments in reply or rebuttal.² The Board often allows supplemental filings when new positions or arguments are presented for the first time in a reply or rebuttal filing.³

In this case, DOE could have limited the scope of its representations regarding its use of dedicated train service in its opening filing, when interested parties could have responded. By fundamentally altering its position in its last evidentiary filing, DOE effectively precluded other parties from addressing that position.

In order to redress this unfairness, the Board should accept Norfolk Southern's brief response and request for clarification (filed herewith). No prejudice or harm to any party would result. Moreover, accepting Norfolk Southern's response for filing would provide a more complete evidentiary record, and would help to avoid the confusion that would otherwise result

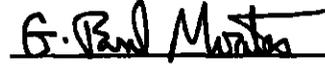
² See ICC Docket No. AB-167 (Sub-No. 970N), *Conrail Abandonment in Chicago, IL—In Re Offer of Fin Assistance*, 1987 WL 98398 at *4 (served May 5, 1987) (declining to consider argument first raised on rebuttal); STB Docket No. AB-55 (Sub-No. 618), *CSX Transp — Discontinuance—At Memphis, in Shelby Cty, TN* (served Oct. 28, 2002) (refusing to consider additional cost evidence submitted in rebuttal)

³ See, e.g., STB Docket No. 42083, *Granite State Concrete Co., Inc. and Milford-Bennington R Co. v. Boston and Maine Corp. and Springfield Terminal R Co.* (served September 15, 2003) (allowing surreply in response to new evidence and argument); STB Fin. Docket No. 33407, *Dakota, Minnesota & E R R Corp — Constr into the Powder River Basin*, slip op at 1 (served Nov 3, 1998) (supplemental evidence allowed in response to new evidence presented in reply filing); STB Fin. Docket No. 33995, *SF&L Ry. Inc — Acquisition & Operation Exemption— Toledo, Peoria & W Ry Corp Between La Harpe & Peoria, IL*, (served Feb. 1, 2002) (granting leave to file surrebuttal statement to respond to "new arguments" in reply statement); see STB Fin. Docket No. 34335, *Keokuk Junction Ry Co.—Feeder Line Acquisition—Line of Toledo, Peoria & W Ry Corp Between La Harpe & Hollis, IL*, slip op at 5 (served Feb. 7, 2005)

from DOE's contradictory submissions. For these reasons, Norfolk Southern respectfully requests leave to file the accompanying response.

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Respectfully submitted,



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Dated. October 10, 2008

CERTIFICATE OF SERVICE

I hereby certify on this 10th day of October, 2008, that I caused the foregoing Norfolk Southern Corporation's Motion For Leave To File Response to be served by first-class mail, postage prepaid, and/or overnight delivery, on all parties of record.


G. Paul Moates

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