



Department of Energy

Washington, DC 20585

April 27, 2009

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 the State of Nevada's Motion to Suspend Further Proceedings, or in the alternative, to Reopen the Procedural Schedule and Record Previously Established for Public Comment on Public Convenience and Necessity (PCN) Issues Related to the Application Filed by the United States Department of Energy Under 49 U.S.C. 10901.

Sincerely,

A handwritten signature in black ink, appearing to read "Christina C. Pak", written over a horizontal line.

Christina C. Pak
Attorney Advisor



UNITED STATES OF AMERICA

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

UNITED STATES DEPARTMENT OF ENERGY'S REPLY TO
STATE OF NEVADA'S MOTION TO SUSPEND FURTHER PROCEEDINGS,
OR IN THE ALTERNATIVE, TO REOPEN THE PROCEDURAL SCHEDULE
AND RECORD PREVIOUSLY ESTABLISHED FOR PUBLIC COMMENT ON PUBLIC
CONVENIENCE AND NECESSITY (PCN) ISSUES RELATED TO THE APPLICATION
FILED BY THE UNITED STATES DEPARTMENT OF ENERGY UNDER 49 U.S.C. 10901

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The United States Department of Energy (DOE) opposes the State of Nevada's Motion to Suspend Further Proceedings, or in the alternative, to Reopen the Procedural Schedule and Record Previously Established for Public Comment on Public Convenience and Necessity (PCN) Issues Related to the Application Filed by the United States Department of Energy Under 49 U.S.C. 10901 (Motion). DOE opposes the Motion for two basic reasons. First, Nevada and all other interested persons have had ample opportunities -- well beyond those prescribed by the regulations of the Surface Transportation Board (STB) -- to comment on DOE's application, and there is, as a result, an ample record. Second, the substantive arguments Nevada seeks to raise have all been raised before and either rejected already or taken under advisement for resolution in the STB's final decision, or are simply beyond the scope of this proceeding.

DOE filed its Application for a Certificate of Public Convenience and Necessity for an approximately 300-mile rail line to be known as the Caliente Rail Line (Application) on March 17, 2008. In a *sua sponte* Decision and Procedural Schedule, served April 11, 2008 and published April 16, 2008 in the Federal Register (73 FR 20748), the STB promptly provided Nevada and other interested persons until July 15, 2008 to submit comments in support of or in opposition to DOE's Application. That allowed a four-month comment period, which was nearly four times as long as the 35-day comment period provided under the STB's rules of practice. *See* 49 C.F.R. § 1150.10(g) and (h) (providing only a 35-day comment period).

Early in the comment period, Nevada filed a motion to reject DOE's Application and, after DOE filed its response thereto, an amended motion. *See* State of Nevada's First Amended Motion to Reject DOE's Application, or Alternatively To Require Responsive Comments Only After Application Has Been Fully Completed By Proper Supplement, served May 2, 2008 (Motion to Reject). The Motion to Reject challenged the STB's jurisdiction and, alternatively,

sought to delay the comment period until DOE provided additional details regarding the Caliente Rail Line. In a June 26, 2008 Decision, served June 27, 2008 (June 26, 2008 STB Decision), the STB denied the Motion to Reject.

Following that Order, Nevada and twenty-one other persons filed comments on the Application. *See* State of Nevada's Comments in Opposition to the Application Filed March 17, 2008 by the United States Department of Energy Under 49 U.S.C. 10901, served July 15, 2008 (Nevada Comments). Altogether, those comments comprise several hundred pages of information and supporting documentation.

The STB thereafter held a public hearing -- not required under its regulations -- on DOE's Application on December 4, 2008 at which it allowed Nevada and other interested persons to comment further on the Application and to file additional written statements. *See* Notice of Public Hearing, served October 31, 2008 and published in the Federal Register on November 5, 2008 (73 FR 65922). Nevada participated in the December 4, 2008 hearing through both its Office of the Attorney General and the Nevada Agency for Nuclear Projects, both of which had representatives speak in opposition to the Application and submit written statements. *See* Statement of Robert Halstead, Transportation Advisor, Nevada Agency for Nuclear Projects, filed December 4, 2008 (Halstead Statement); Statement on behalf of Nevada Attorney General in Opposition, filed December 4, 2008. Twenty-seven other persons -- including representatives of other States, counties and other localities, and Tribes -- also participated in the December 4 hearing.

The record developed through the foregoing process was in addition to the extensive information the STB, through its Section of Environmental Analysis (SEA), had already obtained as a cooperating agency on the environmental impact statements DOE prepared addressing the

potential rail corridor and alternative rail alignments. As the STB explained at the December 4, 2008 hearing, the STB “has participated as a cooperating agency from the early stages of the environmental process.” Transcript at 7. As a cooperating agency, the STB participated in 13 scoping meetings and 8 public hearings; it reviewed several thousand comments from the public (including Nevada) and other agencies; it conducted site visits to both the Caliente and Mina corridors; and it reviewed DOE’s draft environmental impact statements related to the Caliente Rail Lines. *Id.* at 7-8.

The STB has thus developed a “robust record” on DOE’s Application as a result of those measures. *Id.* at 10. That “robust record” is complete and fully enables the STB to fulfill its statutory obligations to decide whether DOE is entitled under existing law to a Certificate of Public Convenience and Necessity for the Caliente Line.

What Nevada’s current Motion characterizes as DOE’s “cumulative filings to date” do not warrant reopening that record and deferring the STB’s statutory obligations. All but two of those “filings” are pleadings and other documents that either pre-date the December 4, 2008 hearing or, in one instance, was submitted at that hearing. Nevada could have, and should have, addressed them either before or at the December 4 hearing, before the record closed. *See* 49 C.F.R. § 1104.13(a) (requiring motion addressed to any pleading to be made within 20 days after the pleading is filed).

The other two “filings” -- DOE’s Project Decision Schedule and DOE’s National Transportation Plan -- are documents that were not filed with the STB but that were issued in January 2009. The comments on these documents in the Motion come well outside the 20-day period contemplated under § 1104.13(a). More significant, Nevada has not identified any

information in either document that is material to DOE's Application or different from the existing record before the STB.

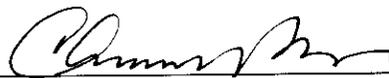
Equally important, the topics on which Nevada wishes supplemental submission are matters that Nevada and others already have raised in the existing record. For example:

- Nevada questions the sufficiency of DOE's decision regarding common carrier service. Nevada, however, has already raised this issue, *see* Motion to Reject at 6-11, and the STB has already rejected Nevada's challenge, holding that Nevada's concerns "do not warrant rejection of DOE's application." June 26, 2008 STB Decision at 3. The STB held that it would lack jurisdiction "only if DOE would definitely decide that it does not wish to have common carrier service" on the Caliente Rail Line. *Id.* Nevada's current Motion does not contend that DOE has made a definite decision not to have such common carrier service.
- Nevada complains that DOE's Application does not provide all the information required by 49 C.F.R. Part 1150. Nevada has previously raised this issue as well. *E.g.*, Motion to Reject at 12-19; Nevada Comments at 34-54. The STB, in response, has already held that "DOE has included sufficient operational information to warrant continuing processing its application under [its] rules." June 26, 2008 STB Decision at 4.
- Nevada seeks to introduce information concerning national transportation matters that it asserts is relevant to the STB's environmental analysis. Nevada, however, has already raised such matters. *E.g.*, Nevada Comments at 53-61; Halstead Statement at 4-8. The STB has reiterated in response to Nevada's existing filings that its SEA "will thoroughly review" DOE's NEPA documentation and "determine whether it provides an adequate analysis." The STB said it "will seek and obtain whatever assistance from the applicant we need to fulfill our obligation under NEPA." June 26, 2008 STB Decision at 5.

- Nevada seeks to address the effect of potential Congressional appropriations. This too is a matter Nevada already has raised in the existing record. *E.g.*, Nevada Comments at 49. DOE always has recognized that construction of the Caliente Rail Line is dependent on Congressional appropriations. Application at 31; *see also* Reply of the United States Department of Energy to Comments on its Application for a Certificate of Public Convenience and Necessity, filed August 29, 2008, at 18. And as the STB has recognized, its grant of authority under § 10901 “is permissive, not mandatory.” June 26, 2008 STB Decision at 3. The permissive nature of its grant “recognizes that the decision to go forward with a project is in the hands of the applicant and not this agency.” *Id.* This ground too, therefore, provides no basis to suspend or reopen the proceeding.

In sum, Nevada presents no grounds for suspending the proceeding or reopening the record. Nevada seeks to raise matters that either previously have been rejected or are irrelevant to the STB’s public convenience and necessity determination. The STB should deny Nevada’s Motion.¹

Respectfully submitted,



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¹ DOE reserves the right to respond to each of the matters Nevada seeks to add to record in the event the STB were to grant Nevada’s Motion.

CERTIFICATE OF SERVICE

I, Christina C. Pak, hereby certify that I caused to be served a true and correct copy of the United States Department of Energy's Reply to the State of Nevada's Motion to Suspend Further Proceedings, or in the alternative, to Reopen the Procedural Schedule and Record Previously Established for Public Comment on Public Convenience and Necessity (PCN) Issues Related to the Application Filed by the United States Department of Energy Under 49 U.S.C. 10901 on each party of record on the attached list by first-class mail or more expedient service on the 27th day of April 2009.



Christina C. Pak
Attorney Advisor

UNITED STATES OF AMERICA
BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35106

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